

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CIVIL DIVISION

CIVIL APPEAL CASE NO. E005 OF 2022

BETWEEN

GILBERT KIPKOSGEI

SAWE:.....1ST APPELLANT

STEPHEN

MELLY:.....2ND

APPELLANT

AND

BEATRICE

AKHWIVISA

KARAKACHA:.....RESPONDENT

[Being an appeal from the judgment and decree the Hon. B. W. Wachira, Resident Magistrate delivered on 28th January 2022 in Kapsabet SPMCC NO. 59 OF 2019: Beatrice Karakacha Vs. Gilbert Kipkosgei Sawe & Stephen Melly]

JUDGMENT

1. This appeal arises from the judgment of the Resident Magistrate in **Kapsabet SPMCC No. 59 of 2019**, in which the Appellants were the Defendants in the suit instituted against them by the Respondent for both general and special damages as well as loss of income arising from a road traffic

accident which occurred on the 14th July 2019 along the Kaptumo road involving the Appellant's **Motor Vehicle Registration No. KBU 642** in which the Respondent was travelling as a lawful passenger.

2. It was pleaded in the plaint that the Plaintiff/ Respondent was on the material date travelling aboard the said motor vehicle when it was negligently driven, controlled and/or managed by Second Defendant/ Appellant that it collided with another oncoming vehicle thereby causing the Plaintiff to suffer severe injuries.

It was the Plaintiff's contention that the accident was caused by the Appellant's negligence which resulted in the Plaintiff suffering bodily injuries.

3. The Plaintiff therefore prayed for general damages for pain and suffering, special damages in the sum of Kshs. 44,850/- and loss of past and/or future income together with costs of the suit and interest. The Defendant/ Appellants' denied the claim in its totality and contended that if the accident indeed occurred, then it was inevitable and due to factors beyond the control of the Appellants motor vehicle. that, the accident was solely, over whelming and substantially caused or contributed to by the Plaintiff [Respondent] and the owner and/or driver of the other **Motor Vehicle Registration No. KBU 719E.**

4. It was the Defendants/ Appellant's prayer that the Plaintiff/ Respondent's suit against be dismissed with costs.

After trial, judgment was entered in favour of the Plaintiff/Respondent against the Defendant/ Appellant at 100% liability for the sum of Kshs. 700,000/- general damages, Kshs. 718,488/- loss of earnings, Kshs. 44,850/- special damages together with costs.

5. Being dissatisfied with the decision the Appellant preferred the present appeal on the basis of the nine [9] grounds set out in the memorandum of appeal.

Whereas grounds one [1], two[2], four[4] and five[5] essentially addresses the issue of liability, the rest of the grounds [i.e. grounds 3,6,7,8 and 9] are on quantum of damages.

Indeed, the pleadings and the evidence indicated that the basic issue which presented itself for determination at the trial was whether the accident resulted from the Defendant's negligence in the manner of driving the ill-fated vehicle and if so, whether the Plaintiff was therefore entitled to damages from them and to what extent.

6. Simply put, the issue for determination was whether the Defendants/Appellant were liable in damages for the injuries and loss occasioned to the Plaintiff as a result of their

negligent acts and/or omissions which resulted in the accident.

The occurrence of the accident and the ownership of the ill-fated motor vehicle are factors which were not at all or substantially disputed by the Defendant. And so to, was the fact that the Plaintiff was a lawful passenger in the Appellant's vehicle at the material time of the accident.

7. In this appeal, the duty of this court was to reconsider the evidence availed at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. In that regard, the Plaintiff's evidence though the Plaintiff, **Batrice Akhwivisa Karakacha [PW2]**, a Police Officer **IP Kelvin Savoke [PW1]** and a medical professional **Dr. Washington Wokabi [PW3]**, was given due consideration by this court which thereby finds that it was largely uncontroverted and sufficient enough to establish that the Defendants directly and/or indirectly were to blame for the accident.

8. They [Defendants] did not avail any evidence in support of their defence that the Plaintiff [Respondent] and a third Party Motor Vehicle were to blame for the accident or contributed in any manner to its occurrence.

A party is bound by his/her pleadings which generally provide a basis for determination of any dispute. The

evidence tendered by a party must be in sync with his/her pleadings to be able to establish any allegation made against the opposite party.

9. In this case, the Defendant had no evidence to disprove the allegations of negligence made against themselves by the Plaintiff. They could not therefore be heard to claim that it was the Plaintiff and another who were culpable for the accident.

The particulars of negligence made against the Plaintiff by the Defendants remained unproved, thereby giving added strength and credible to the particulars of negligence made against them [Defendants] by the Plaintiff.

10. In any event, being a mere passenger in the Defendant's Motor Vehicle it was difficult to fathom how the Plaintiff/Respondent could have contributed to the accident. She was not in control of the vehicle. She said that the driver of the vehicle failed to properly negotiate a bend thereby encroaching into the path of an oncoming vehicle resulting in a head on collision of the two vehicles. She suffered injury to her right leg as a result.

11. The Traffic Police Officer **[PW1]** in his testimony more or less confirmed what the Plaintiff stated in relation to the Defendant's capability for the accident. He was not the

investigations officer, but his evidence was derived from the necessary police investigations report which was never disputed or discredited by any evidence from the Defendants.

12. On the question of liability, the claimants' evidence was credible and sufficient enough to establish and prove on a balance of probabilities that the Defendants were fully to blame for the accident, hence liable to the Plaintiff in damages as a consequence of their negligent acts and/or omissions.

The finding of the trial court that the Defendants were 100% liable for the accident was therefore sound and correct in as much as it was grounded on solid evidence from the Plaintiff against the Defendants.

13. Having found herein above that the Defendants were fully liable to the Plaintiff in damages, the next issue would be the extent of the damages that the Plaintiff would be entitled to i.e. the question of damages. In that regard, the Plaintiff claimed general damages for pain and suffering and special damages for expenses incurred as a result of the accident. In addition, the Plaintiff claimed loss of earnings.

14. On general damages, the medical report by **Dr. Wakabi [PW3]**, a consultant surgeon indicated that the Plaintiff

suffered fractures of the right tibia and fibula as well as blunt injuries to the chest and head, she was operated and the right tibia was fixed with a K-nail, but walked with aid of crutches.

The report dated 17th July 2018 [**P. Exhibit 13**] concluded that the Plaintiff's injuries would heal over time, but with a permanent disability of 8%.

15. A second medical report by **Dr. M.S. Malik** undated, but showing that the Plaintiff was examined on 3rd November 2020 did more or less agree with the first report of **Dr. Wakabi** on the nature and seriousness of the injuries suffered by the Plaintiff, however, it [second report] indicated that the Plaintiff would only suffer temporary incapacity for at least two [2] years rather than permanent incapacity.

16. Whereas, the Plaintiff proposed general damages in the sum of Kshs. 2.5 million, the Defendants proposed the sum of Kshs. 400,000/-. Both parties cited several authorities in support of their respective proposals.

The trial court considered the nature of the injuries suffered by the Plaintiff and the cited authorities and opined that a sum of Kshs. 700,000/- was reasonable compensation as general damages for pain, suffering and loss of amenities.

17. This court having also considered the Plaintiff's injuries and the authorities which were cited by both sides would have no reason to disagree with the findings of this trial court or general damages, but would have every reasons to disagree with the Appellant's contention that the award was excessive.

18. With regard to the award of special damages in the sum of Kshs. 44,850/-, the trial court found that the amount was specifically pleaded and proved, hence available to the Plaintiff. This court agrees and adds that the amount was actually not disputed by the Defendants in as much as it was established and proved by the documentary evidence presented at the trial by the Plaintiff.

19. With regard to loss of earning, the trial court awarded Kshs. 718,488/- on the basis that a letter from the Plaintiff's employer [**P. Exhibit 8**] showed that the Plaintiff was retired on medical grounds at a time she was earning Kshs. 12,000/- per month. Herein, the Plaintiff contended that the letter [**P. Exhibit 8**] was uncontroverted and provided proper basis for the award of Kshs. 718,488/- as loss of earnings.

20. The contention by the Defendant was that the award was unmerited and had no legal basis as the Plaintiff failed to prove that she was rendered incapable of discharging her

duties, hence her retirement on medical grounds and in any event, the retirement was not approved or sanctioned by a medical board.

21. The Defendants further contended that it is only a medical board that can certify that a person is incapable of work performance due to an existing medical conditions.

In relation to the claim for loss of earnings, this court notes that the pleading and evidence in support thereof renders the claim to be that of loss of future earning capacity rather than loss of future earnings.

22. The case cited by the Plaintiff/Respondent to support her claim of loss of earnings i.e. **Apharama Limited Vs. John Murigi Wairegi [2018] eKLR**, actually related more to loss of earnings rather than loss of future earning capacity. There is a difference between the two sets of damages. Loss of earning is different head of damages from loss of earning capacity which can readily be proved at the time of trial by necessary evidence.

Whereas, loss of earning capacity is classified as general damages, loss of earnings or lost earnings is classified as special damages.

23. Loss of earnings on aspect of special damages as opposed to loss of earning capacity which is an aspect of general damages.

In the **American Case of Connolly Vs. Pre Mixed Concrete Company [1957]49 Cal 2d 483**, it was held that: -

“Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of earnings or income either before or after the injury and damages in this respect are awarded for the loss of ability thereafter to earn money.”

24. It would therefore follow that to recover damages for loss of earnings, a claimant must prove the amount of earnings he/ she will be reasonably certain to lose in the future as a result of the injury. And, to recover damages for loss of capacity or ability to earn income as a result of the injury the claimant would be required to prove the reasonable value of the loss.

25. In this case, what the trial court compensation the Plaintiff was not the actual loss of earning pleaded as a prayer, but loss of earning capacity which was not prayed for.

Therefore, the award of Kshs. 718,488/- loss of earning was erroneous and not supported by any evidence.

Indeed, no basis was laid for awarding the Plaintiff damages for loss of earnings. The award is hereby set aside by this court.

26. In the end result, this appeal has disallowed in respect of general and special damages and allowed in respect of damages for loss of earnings.

The parties shall bear their own costs of the appeal.

Ordered accordingly.

Dated and delivered this 11th day of March 2026

**HON. J. R. KARANJAH,
JUDGE**