

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL NO. E087 OF 2024

ALI MAZRUI.....APPELLANT **AWADH**
VERSUS
GEOFFREY MWALIMU RUNYA RESPONDENT

JUDGMENT

1. The Appellant is aggrieved by the damages awarded to the Respondent in Kilifi CMCC No. E307 of 2023. The award was in respect of injuries sustained in a road traffic accident that occurred on 4.3.23 involving motorcycle registration number KMEP 195C in which the Respondent was riding and motor vehicle registration number KCZ 777W owned by the Appellant.

2. The trial court entered judgment on 24.6.24 as follows:

Liability against the Appellant	80%
Pain and suffering	Kshs. 1,500,000/=
Loss of earning capacity	Kshs. 450,000/=
Future medical expenses	Kshs. 180,000/=
Special damages	Kshs. 7,095/=
subtotal	Kshs. 2,137,095/=
Less 20% contribution	Kshs. 427,419/=
Total	Kshs. 1,709,676/=

Costs and interest at court rate from date of judgment.

3. In his Appeal in which he seeks the setting aside the judgment dated 24.6.24, the Appellant raised the following grounds:

- The Learned Magistrate erred in Law and in Fact by departing from the well-established principle that comparable injuries should as far as possible be compensated by comparable awards thus making an Award that was not only excessive but without any basis/justification as damages for pain and suffering;*
- The Learned Magistrate erred in Law and in Fact by ignoring the fact contained in the Medical Report of Dr. Udayan Sheth that the Respondent had fully healed from the fracture of medial malleolus with a permanent disability of 5% as such there was no justification/basis for arriving at a figure of Kshs. 450,000/= as loss of earning capacity.*

3. *The Learned Magistrate erred in Law and in Fact by making Award of Kshs. 450,000/= which was not supported by any evidence;*
4. *The Learned Magistrate erred in Law and in Fact in relying the Medical Report by Dr.Kiema in making an assessment Award for future Medical Report (sic) when the same had been ousted by consent of parties and the guiding medical report was be the one by Dr. Udayan Sheth.*

4. This being a first appeal, I have Court has reconsidered and re-evaluated the entire record and has made due allowance with respect to the fact that I have neither seen nor heard the witnesses. These principles were set out in **Selle and another –vs- Associated Motor Boat Company Ltd. & Others (1968) EA 123** by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect.

5. As I consider this appeal, I am mindful of the fact that assessment of damages is a matter of discretion of the trial court that should not be interfered with, unless the quantum of damages awarded is inordinately high or low. This was stated by the Court of Appeal in **Catholic Diocese of Kisumu v Tete [2004] eKLR** as follows:

*It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see *Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470*).*

6. In faulting the award of Kshs. 1,500,000/= for pain and suffering, the Appellant submitted that the trial Magistrate unjustifiably departed from the well-established principle in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**, that comparable injuries should as far as possible be compensated by comparable awards. The Appellant reiterated that the sum of Kshs. 600,000/= proposed in the trial court was sufficient

compensation. For the Respondent, it was submitted that he suffered fracture of the femur and of the right medial malleolus bone and that the award was fair in the circumstances.

7. In awarding the sum of Kshs. 1,500,000/= in its judgment, the trial court considered the nature of injuries sustained by the Respondent and the procedures he underwent during his 1 month hospitalization. The court further considered the authorities cited by the parties, as well as the effect of inflation.
8. This Court has considered the cases cited by the Appellant. In **Jitan, Nagra v Abidnego Nyandusi Oigo [2018] eKLR**, the court set aside an award of Kshs. 1,000,000/= and substituted therefor an award of Kshs. 450,000/=. The injuries included lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. In **David Mutembei vs. Maurice Ochieng Odoyo [2019] eKLR**, the court on appeal reduced an award of Kshs. 1,600,000/= to Kshs. 800,000/= where the Respondent had suffered a fracture of the right femur and a proximal fracture of the left tibia. And in **Joseph Mwangi Thuita vs. Joyce Mwole [2018] eKLR** the court awarded Kshs. 700,000/= as general damages where the plaintiff suffered a fractured right femur, compound fracture in right tibia and fibula, shortening right leg and episodic pain on the right thigh with inability to walk without support.
9. The Court has also considered the authorities cited by the Respondent. In **Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit vs N I A (Minor suing through her next friend I A I S) & 3 others (2018) (Consolidated)** an award of Kshs. 2,500,000/= was made and in **Isaac K. Chemjor and Another vs. Laban Kiptoo (2019) eKLR** where Kshs. 1,500,000/= was awarded. The injuries suffered by the plaintiffs therein however, included hip fractures which are more serious than those suffered by the Respondent herein. The Respondent also cited **Pestony Limited & another v Samuel Itonye Kagoko [2022] KEHC 1146 (KLR)**, where on appeal, an award of Kshs. 1,400,000/= was reduced to Kshs. 800,000/= for a fracture of the left femur (mid-shaft) and swollen left tender thigh.
10. In assessing damages, the general rule is that comparable injuries should as far as possible be compensated by comparable awards. It must however be recalled that no two cases will be

exactly similar. In Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, the Court of Appeal observed:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

11. I have considered the injuries sustained by the Respondent as indicated in the plaint as well as the authorities relied upon. The injuries include fracture of the right proximal femur bone with displacement, fracture of the right medial malleolus bone with subluxation of the right ankle joint, swollen right lower limb, surgical scar in the right thigh and hip area, stiffness in the right hip and right knee joint. I find that the authorities cited by the Appellant to be more relevant than those cited by the Respondent. Taking into account the cited decisions and the nature and extent of the injuries as well as inflation, I find the award of Kshs. 1,500,000/= to be rather high. An award of Kshs. 1,200,000/= is adequate.
12. The Appellant further assails the award of Kshs. 450,000/= for loss of earning capacity on ground that it was not justified. The Appellant contends that the Respondent admitted that his employment had not been terminated and that his employer asked him to return to work once healed. Further, that no evidence was adduced to demonstrate how the fractures diminished the Respondent's chances of ever working as an electrician. For the Respondent it was submitted that Dr. Udayan Sheth assessed his permanent disability at 5%.
13. In its judgment, the trial court noted that the Respondent had not resumed work over a year from the accident. Further that his chances of getting the same job as a casual labourer was not promising and there was no guarantee of securing an alternative job in the labour market with his impairments. In awarding the sum of Kshs. 450,000/= for loss of earning capacity, the trial court stated that it was satisfied that the claim had been proved. And that it was guided by the level of permanent disability and the Respondent's age of 47 years.
14. The record shows that in his testimony, the Respondent indicated that his employer told him to go back to work when he recovered. He stated that he could not go back to work as he could not walk. In his report dated 20.9.23 which parties agreed to rely on, Dr. Sheth indicated that ***"There is no tenderness in fracture sight. Movement of right hip was mildly restricted, movement of right knee is full and painless. There is no shortening of right lower limb. He is walking with a stick...Movement of right ankle is full and painless. Dr.***

Sheth indicated that the 5% permanent incapacity was due to mild stiffness of the right hip joint.” Although Dr. Sheth recommended x-ray of the right hip to rule out arthritis and then review, the Respondent stated that he did not go back for a review.

15. While an award for loss of earning capacity may be made in addition to general damages and where a plaintiff is employed or not, the correct principles must be applied and relevant factors taken into account. This was the holding in **Mumias Sugar Company Ltd v Wanalo (Civil Appeal 91 of 2003) [2007] KECA 485 (KLR) (31 July 2007) (Judgment)** where the Court of Appeal stated:

From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.

16. One of the principles to be applied is no doubt proof of the claim made. It is trite law that he who asserts must prove. Section 107 of The Evidence Act stipulates:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

17. In the instant case, the Respondent was required to lay a basis for the award for loss of earning capacity. However, the Respondent did not adduce any evidence to show that his employment was no longer available, nor did he state that he had been unable to secure alternative employment. The finding of the trial court was thus not supported by any

evidence. I accordingly find no justification for this award. In this regard, I associate with the finding in Ndereba & another v Mbae (Civil Appeal E029 of 2022) [2024] KEHC 4472 (KLR) (4 April 2024) (Judgment), where Gitari, J. set aside an award for loss of earning capacity and stated:

Furthermore, the Respondent also did not adduce any evidence to show that she will be unable to get another job or an equally good job as a result of the injuries she sustained in the accident.

18. The last award challenged by the Appellant is that of Kshs. 180,000/= for future medical expenses. It was submitted that based on the medical report by Dr. Udayan Sheth agreed to by both parties, the respondent had proposed the sum of Kshs. 10,000/=. The Respondent concurred and urged the Court to award Kshs. 10,000/= as per Dr. Sheth's medical report.
19. The Respondent required to have the k-nail and screws removed in the future. In spite of the parties' consent to go by Dr. Sheth's assessment of future medical expenses of Kshs. 10,000/=: the trial court chose to rely on Dr. Kiema's report and proceeded to award the sum of Kshs. 180,000/=. In light of the parties' consent, the trial court misdirected itself in making the award that it did. The same cannot therefore stand.
20. The upshot is that the Appeal partly succeeds. The awards for pain and suffering, loss of earning capacity and future medical costs are set aside. The Court makes the following awards:

Pain and suffering	Kshs. 1,200,000/=
Future medical costs	Kshs. 10,000/=
21. The other awards and liability ratio remain the same. The sums awarded shall attract interest from the date of judgment before the subordinate court. Each party to bear own costs.

DATED and DELIVERED in MALINDI this 27th day of February 2026

M. THANDE
JUDGE