

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E394 OF 2024

CHRISTINA KIJALA MWAWAI.....
APPELLANT

VERSUS

1. JOHNSTONE OGUTU

2. ROBERT NAFTALI MUTURI.....

RESPONDENTS

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M.L. Nabibya, Senior Principal Magistrate dated 17/10/2024 arising from Mombasa CMCC No. 800 of 2021.
2. The Appeal is on quantum only. It is based substantially on the grounds in the Memorandum of Appeal dated 14/11/2024 that the trial court erred in the assessment of general damages and awarded amount which is low in view of the injuries sustained by the Appellant, failure to award Future Medical Expenses,

Loss of Earning Capacity and Diminished Earning Capacity. The Special Damages proved were also not awarded.

3. Through the Amended Plaintiff dated 23/03/2023, the Plaintiff/ Appellant claimed damages for an accident that occurred on 22/12/2019 involving the Defendant's/ Respondent Motor Vehicle Registration Number KBA 385T, where the Plaintiff was a lawful fare paying passenger. The vehicle was negligently driven and it lost control where it hit a wall where the Plaintiff suffered severe injuries.
4. The Plaintiff pleaded Special Damages as well as General Damages. The appeal is on general damages only. The injuries were pleaded as follows:
 - a. *Fracture of cervical spine no. 7 causing cord compression resulting in quadriplegia and sympathoplegia*
 - b. *Fracture of cervica spine no. 5*
 - c. *Displaced fracture of cervical spine no. 6*
 - d. *Loss of normal cervical spine curvature due to muscle spasms*
 - e. *Linear tractor of the left occipital bone and left mastoid associated with left hemotympanum*
 - f. *Multiple deed scalp and facial cut wounds*
 - g. *Acute kidney injury*
 - h. *Gastroparesis*
5. Special damages were pleaded as follows;

<i>Certificate of search</i>	<i>Kshs.</i>	<i>550.00</i>
<i>Medical Report</i>	<i>Kshs.</i>	<i>3,000.00</i>
<i>Police Abstract</i>	<i>Kshs.</i>	<i>200.00</i>
<u><i>Medical expenses</i></u>	<u><i>Kshs.</i></u>	<u><i>1,060,420.00</i></u>
<i>Total</i>	<i>Kshs.</i>	<i>1,064,170.00,</i>

6. The Respondent filed the Amended Statement of Defence denying the averments in the Plaint and in the alternative, blamed the Plaintiff for contributory negligence. The Defendants further denied that there was an accident and accused the Plaintiff of fraud for purporting to be in an accident when indeed she was never involved. It was parted that the suit be dismissed with costs.
7. The Trial Court heard the parties and proceeded to render judgement on 31/10/2023. In the Judgement, the Court entered judgment in favour of the Appellant against the Respondent as hereunder;
- a. Liability at 100% against the Defendant in favour of the Plaintiff.*
 - b. Kshs. 3,000,000/- in General Damages*
 - c. Kshs. 3,500/= as Special Damages*
 - d. Kshs. 217,236/= as Loss of Future Earning Capacity*
 - e. Costs of the suit and interest*

8. Aggrieved by the finding of the Trial Court, the Plaintiff/ Appellant lodged the Memorandum of Appeal hence this Appeal.
9. It was directed that the appeal be canvassed by way of written submissions. Both parties complied by filing their rival submissions.

Submissions

10. The Appellants submitted that Kshs. 3,000,000 awarded as General Damages was inordinately low and do not adequately compensate the injuries sustained. It was proposed that Kshs. 4,500,000 would be adequate compensation for the injuries suffered. Reliance was made in the case of *Christine Mwigina Akonya v Samuel Kairu Chege (2017) eKLR* where Kshs. 4,000,000 was awarded for fractures of the ribs and right femur.
11. For Loss of Earnings, it was submitted that the Plaintiff having been earning Kshs. 18,103 per month and she was dependent for 3 years and 10 months, Kshs. 832,728/= would be payable for loss of earning capacity, being $18,103 \times 46 = 832,728$. For loss of future earnings, it was submitted that the Plaintiff would have worked for 26 more years up to age 60, being the retirement age hence $18,103 \times 26 \times 12 = 5,648,136$.
12. The court was also faulted in failing to award future medical expenses of Kshs. 1,500,000/= and special damages of Kshs. 1,596,166/=, despite the same being

proved. The Appellant prayed that the appeal be allowed and a total of Kshs. 14,077,040/= be awarded.

13. The Respondent in their submissions dated 22/07/2025, submitted that the Kshs. 3,000,000/= awarded as general damages was proportionate to the injuries sustained and is adequate compensation. On special damages, it was submitted that the same was not strictly proved for reasons that there is no stamps on the receipts, the receipts have contradicting dates, an invoice does not amount to a receipt.
14. On loss of earnings, the Plaintiff is entitled to the amount awarded by the court of Kshs. 217,236/=. It was prayed that the appeal be dismissed with costs to the Respondent.

Analysis

15. This being a first Appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a Trial Court, unlike the Appellate Court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
16. In the cases of *Peters vs Sunday Post Limited [1958] EA 424*, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and

hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

17. It is thus settled that for the Appellate court, to interfere with the award it is not enough to show that the award is high or had if I handled the case in the subordinate court, I would have awarded a different figure. Where damages are found to be at large I will interfere. They must be commensurate with similar injuries.
18. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court’s exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.
19. Furthermore, in *Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29*, it was held that:

“It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be

considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."

20. There is no dispute that the Appellant suffered injuries as per paragraph 4 above. In assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The injuries also diminished the Plaintiff's working capacity. The loss of future earnings shall be part of the general damages awarded.

21. In awarding damages under the head of loss of earning capacity, the Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo (2007) eKLR* stated as follows:

“...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 the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to 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.”

22. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”
23. The principle on the award of damages is settled. In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -
- 1) *An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.*
 - 2) *The award should be commensurable with the injuries sustained.*
 - 3) *Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.*
 - 4) *Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.*
 - 5) *The awards should not be inordinately low or high.*
24. In *Nyaocha & ano v Osogo* [2025] eKLR, the Plaintiff sustained lumbar column fractures and spinal cord injuries, the High Court upheld the Lower Court’s award of Kshs. 3,500,000.00.

25. In the case of *Jackson Wahome Ngatia v Agridutt (K) Ltd* (Nairobi HCCC No. 531 of 2004), which is relied on by the Appellant, Kshs. 4,500,000.00 was awarded for more grave injuries than the Appellant.
26. Considering the lapse of time and inflation, the loss of earning capacity which need not be specifically pleaded nor proved but awarded as part of general damages, an Award of Kshs. 4,000,000/- for the Plaintiff herein is adequate compensation for General Damages. I therefore interfere with the award by the Trial Court to this extent.
27. As for future medical expenses, the Appellant submitted that the same had been pleaded and proved and prayed that a sum of Kshs. 1,500,000/=. The Respondent on the other hand disputed that the future medical expenses was pleaded and proved.
28. The governing principle was explained by the Court of Appeal in *Kenya Bus Services Ltd v Gituma* [2004] EA 91 as follows:

“And as regards future medication the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which

the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded”.

29. I have perused through the Amended Plaintiff. It is a fact that the claim was not specifically pleaded, though I the reliefs sought, the Plaintiff prayed for future medical expenses which does not amount to the claim being specifically pleaded. The claim fails.
30. On the award of special damages, I have perused through the receipts produced as exhibits. I do agree with the trial court's finding on some of the receipts that are questionable. However, I find the receipts from Pandya Hospital listed as hereunder as admissible, in addition to what was admitted by the trial court, and the same is awarded;

31/12/2019	Kshs. 40,000.00
31/12/2019	Kshs. 19,768.00
02/03/2020	Kshs. 20,000.00
30/09/2020	Kshs. 120,000.00
<u>S.D awarded</u>	<u>Kshs. 3,500.00</u>
<u>Total</u>	<u>Kshs. 203,268.00</u>

31. On loss of future earnings, it requires strict proof and is often based on the previous income with a multiplier of the number of years remaining to retirement. The Plaintiff was earning Kshs. 18,103/= per month and was 34years old. The normal retirement age is 60 years. In the case of Kenya Power

and Lighting Co. Limited, a multiplier of 20 years for a 28 year old was found not to be excessive. Considering that the monthly income will be deemed as constant over the years, a multiplier 15 years is applicable giving the Plaintiff active years of employment upto the age of 50 years. The award is therefore $18,103 \times 12 \times 15 = 3,258,540/=$.

32. On costs, the appeal being partially successful, each party is to bear its own costs.

Determination

33. In the upshot, I make the following orders: -
- i. Judgement of the Lower Court on General Damages is set aside and substituted with an Award of Kshs. 4,000,000/=***
 - ii. The award of Special Damages is set aside and substituted with an award of Kshs. 203,268/=***
 - iii. The award of future earnings is set aside and substituted with an award of Kshs. 3,258,540/=.***
 - iv. Claim for Future Medical Expenses fails.***
 - v. Each party to bear its own costs.***

Delivered, dated and signed at Mombasa on this 19th day of **March, 2026.**

.....

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of:

N/A by the Appellant

Ms. Itegi Advocate for the 1st Respondent

N/A by the 2nd Respondent

Ms. Gertrude, Court Assistant

ORIGINAL