Geoffrey & another v Kuria (Civil Appeal 158 of 2018) [2023] KECA 1167 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1167 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 158 OF 2018

HM OKWENGU, MA WARSAME & JM MATIVO, JJA

OCTOBER 6, 2023

BETWEEN

GITU GEOFFREY .... 1ST APPELLANT

SIMON GITUMBIRUA .... 2ND APPELLANT

AND

CHARLENE NJERI KURIA .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, J) delivered on 30th November 2016 in Civil Case No. 295 of 2014)

JUDGMENT

1. On October 16, 2012, the respondent Charlene Njeri Kuria (Charlene), was a passenger in motor vehicle Registration No KBM 089M, when the vehicle was involved in an accident and Charlene suffered serious injuries. The motor vehicle was owned by Gitu Geoffrey who is the 1st appellant before us. It was at the time of the accident, being driven by his son, Simon Gitumbirua who is the 2nd appellant. Charlene filed a suit in the High Court at Nairobi for general and special damages contending that the accident was caused by the negligence of the 2nd appellant for which the 1st appellant is vicariously liable.
2. Following negotiations between the parties, a consent was recorded on liability in favour of Charlene at 90%, Charlene bearing 10% contribution. Upon hearing the evidence of Charlene and that of the 2nd appellant, the High Court gave judgment in favour of Charlene against both appellants jointly and severally in the sum of Kshs 34,297,222 tabulated as follows:
   a. General damages - Kshs 5,000,000
   b. Special damages - Kshs 5,684,484

c. Cost of future medical care - Kshs 4,743,540

d. Loss of future diminished/ earning capacity - - Kshs 21,600,000

e. House help - Kshs 1,080,000 Sub-total = Kshs 38,108,024

Less 10% contribution - Kshs 3,810,802

Total = Kshs 34,297,222

3. The appellants who were dissatisfied with the judgment have appealed to this Court. In their memorandum of appeal, they have raised 7 grounds as follows:

    i. That the learned Judge erred in law and fact by entering judgment in favour of Charlene against the appellants for Kshs 34,297,222 which sum is manifestly excessive.

    ii. That the learned Judge erred in law and fact in not taking into account or properly considering past awards for comparable injuries and the progress that Charlene had made since the accident.

    iii. That the learned Judge erred in law and fact in apportioning liability in favour of Charlene at the ratio of 90% against the appellants and 10% on the part of Charlene.

    iv. That the learned Judge erred in law and fact in the assessment of quantum of general damages and loss of future diminished earning capacity.

    v. That the learned Judge erred in law and fact in assessing and awarding damages for services of a house help separately from the award of general damages.

    vi. That the learned Judge erred in law and fact by using a fixed multiplier of 30 years in the assessment of quantum on all headings of damages sought by Charlene.

    vii. That the learned Judge erred in law and fact by failing to appreciate the respondents' submission particularly on the quantum of damages.

4. The appellants have filed written submissions in which they argue that in assessing the damages due to Charlene, the trial Judge did not consider comparable awards made in past decisions, and that the amount awarded was excessive. In this regard, the appellants relied on *Sofia Yusuf Kanyare vs Ali Abdi Sabre & anor*, Nairobi HCCC No 478 of 2007, on the principles to be considered in awarding damages.

5. The appellants also cited several comparable authorities including *Mary Njoki Macharia vs James Oyugi* [2014] eKLR, where a sum of Kshs 2,200,000 was awarded, and *Nicholas Njue Njuki vs Eliud Mbugua Kahuro* [2014] eKLR, in which the Court, relying on several authorities where Kshs 1,500,000 was awarded, awarded the same amount. The appellants argued that an amount of Kshs 1,500,000 would have been appropriate as general damages to Charlene for pain, suffering, and loss of amenities.

6. In regard to cost of future medical care, it was pointed out that the trial Judge awarded Kshs 4,743,542 while Charlene had prayed for an amount of Kshs 158,118 per every three months. The appellants faulted the trial Judge for using a fixed multiplier of 30 years as Charlene who was 23 years old was optimistic that she would regain full mobility and be free of medication and rehabilitation.

7. *Simon Taveta vs Mercy Mutitu Njeru* [2014] eKLR, and *Douglas Odhiambo Apel & Anor vs Telkom Kenya Limited*, Civil Appeal No 115 of 2006 were cited, it being argued that Charlene never produced

any medical evidence to support the need for her future medical care, and that if the court was inclined to award damages for future medical care, the same should have been capped at 5 years.

8. In regard to future diminished/earning capacity, the appellants argued that the amount awarded was excessive as Charlene was not incapacitated, and was able to attend school; that she was also able to find suitable employment after completion of her course; that contrary to the doctor's assessment of her 100% incapacity, and an opinion that she will not walk again, Charlene had progressed from using a wheelchair to using crutches; that there was no risk that she would not get employment in the future; and that Charlene did not produce any evidence of her need for a house help.

9. Charlene on her part, filed written submissions in which the Court was cautioned that the assessment of damages is an exercise of judicial discretion by the trial Judge, and the appellate court should be slow to reverse the trial court's decision; that the appellate court should only interfere where it is demonstrated that the trial Judge acted on wrong principles or that the award was so excessive or so little, that no reasonable court could have made such an award; or that the trial court failed to take into consideration matters it should have considered; and that in considering the award, the appellate court should consider the severity of injuries, comparable awards for similar injuries, and the rate of inflation.

10. It was pointed out that the gravity and extent of injuries suffered by Charlene were never contested in the trial court, and the court properly assessed the damages having taken into account the severity of the injuries sustained, the pain and suffering, the numerous hospitalization and treatment, as well as the loss of 2 years as a result of the accident. It was submitted that the award of Kshs 5,000,000 for pain and suffering was not excessive. It was argued that the authority of *Mary Njoki Macharia vs James Oyugi* (*supra*) that was relied upon by the appellant, was of less severe injuries which were not comparable to the injuries suffered by Charlene.

11. In regard to the future medical cost, Charlene pointed out that her evidence in the trial court was that she was still undergoing medication and would require further treatment; that she still continues to undergo medication for neural rehabilitation and pain management therapy as her muscles from the knees downwards were yet to recover; and that she may need the rehabilitation and pain management for the rest of her life. Charlene submitted that the multiplier of 30 years was reasonable, and that in any case, the appellants did not dispute the sum of Kshs 158,119.59 that she expended every 4 months, which is what the court took into account in applying the multiplier of 30 years.

12. On damages for loss of future diminished/earning capacity, Charlene cited *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR, Civil Appeal No 91 of 2003, on the justification for awarding damages, and formula for assessing loss of earning capacity. Also relied upon was *Eric Onyango Okumu vs SDV Transami (K) Limited* [2007] eKLR, where it was stated that the factors to be considered in awarding such damages vary with the circumstances of each case and include age, and qualification of Charlene, as well as her remaining work life and disabilities. It was submitted that Charlene was 21 years old as at the time of the accident, and was a medical student studying dental surgery, who but for the accident would have completed her studies and obtained employment at 24 years.

13. Charlene argued that damages for diminished earnings are awarded not just for permanent disability or total unemployment, but for the risk of losing one's job in future; or the diminution of chances of getting an alternative job in the labour market; or the risk that one will not get employment or suitable employment in future due to the permanent or reduced capacity suffered as a result of the injuries sustained.

14. Charlene maintained that her working ability was greatly diminished, and this affected her marketability and effectiveness as a professional surgeon. Her employment opportunities had greatly reduced due to her permanent incapacity that was assessed at 60%, which assessment the trial Judge

took into account in assessing damages for loss of diminished earning capacity. She therefore urged the Court to uphold the award that was made in this regard by the trial court.

15. On the award for house help, Charlene drew the Court's attention to her evidence that her life has not been the same since her accident; that she cannot walk without crutches nor can she drive an ordinary car; that she needs help to do a lot of things; and that the doctor confirmed that due to her condition, she will need the services of a house help, although she needed the help on part-time basis. Charlene argued that the trial Judge who was able to observe her physical condition was able to appreciate her need for help. The Court was urged not to disturb the awards made by the trial Judge as they were based on sound legal principles.

16. We have carefully considered this appeal, the contending submissions, and the law. This being a first appeal, our duty as has been stated by this Court many times, is to reconsider the evidence and analyze it, with a view to arriving at our own conclusion, bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanour of the witnesses, which advantage we do not have and therefore we should defer to the findings of the judge on facts unless it is clear that he erred or misdirected himself. (See *Peters vs Sunday Post Ltd* [1958] EA 424; *Kenya Ports Authority vs Kuston (Kenya) Limited* (2009) 2EA 212; *Gitobu Imanyara & 2 others vs Attorney General* [2016] e KLR).

17. In the grounds of appeal, the appellants have faulted the trial Judge for apportioning liability in favour of Charlene at the ratio of 90% as against them, and 10% on the part of Charlene. It is appropriate that at the outset, we determine whether liability is really an issue for our determination in this appeal. From the copies of proceedings of the High Court at page 434 of the record of appeal, it is recorded that on April 27, 2016, the parties' advocates appeared before the trial Judge and a consent was recorded in the following terms:

> "By consent judgment be and is hereby entered as against the defendant at the rate of 90%:10% in favour of the plaintiff and against the defendants. That all the filed documents by the defendants and the plaintiff be produced without calling the makers. That the matter proceeds for formal proof for purposes of assessment of damages. Hearing on 19th May 2016 at 11 a.m."

18. Any doubt regarding the above consent is dispelled by the written submissions that were subsequently filed by the parties in the High Court. Both the appellants and Charlene indicated in their written submissions that the judgment on liability was agreed upon between the parties at the ratio of 90%:10% in favour of Charlene as against the appellants, and it was clear from the written submissions that the issue of liability was no longer an issue for determination by the trial Judge, who was only left with the issue of the quantum of damages to be awarded. For these reasons, the appellants cannot renege from the agreement regarding liability, nor is it open for us to reconsider the issue. This ground of appeal, therefore, fails.

19. The facts are generally not in dispute to the extent that there was an accident involving the 1st appellant's motor vehicle, in which accident Charlene suffered serious injuries. What is in issue is the quantum of damages that were awarded by the trial Judge. In this regard, we reiterate what this Court held in *Catholic Diocese of Kisumu vs Tete* [2004] 2KLR 55:

> "(i) 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 lower court simply because it would have awarded a different figure if it had tried the case at first instance.

(ii) An 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 represent an entirely erroneous estimate."

20. With the above in mind, the issues for determination before us are: whether the damages awarded by the trial judge were excessive, whether the learned applied wrong principles, or took into account irrelevant principles. In particular, the issue of the fixed multiplier of 30 years; and whether the trial Judge failed to take into account the principles for awarding damages for future/diminished earning capacity are pertinent.

21. Charlene suffered serious injuries which were stated in full in three reports which were produced in evidence by consent. These were; a report by Dr. Jacinta Maina who examined Charlene on 1st September 2014, a report dated November 29, 2012 from the Aga Khan Hospital, where she was admitted immediately after the accident, and a report from Indraprastha Apollo Hospital in India where Charlene was admitted and treated from December 13, 2012 to January 12, 2013.

22. The injuries as summarized by the trial Judge, which summary has not been disputed were:

" i. Injury to the spine with transient alteration in the level of consciousness, due to the spine injury.

ii. Inability to walk because of profound weakness of both legs with sensory loss – paraplegic.

iii. Fracture dislocation at the level of L1 – L12 (complete anterolisthesis of L1 over L2 and wedge fracture of L2) with cord injury.

iv. Loss of sensation on the lower limbs distally.

v. Lower abdominal (lap belt) bruising.

vi. Lower back deformity."

23. The trial Judge having cited some High Court decisions and taken into account the age of Charlene, the nature of her injuries, and the degree of permanent incapacity, awarded her Kshs5,000,000 as general damages for pain, suffering, and loss of amenities. In the appellants' view, that award was too high and should be disturbed as an award of no more than Kshs1,500,000 would have been an appropriate award for pain, suffering, and loss of amenities.

24. We have considered the cases cited by the appellants in support of the amount proposed by them. The cases cited were all High Court authorities which were only of persuasive value to the trial Judge. Though the injuries had some element of similarities, they were not exactly the same. Moreover, the circumstances of the accident were different, the plaintiffs in the cited cases being much older than Charlene. In addition, the elements of inflation cannot be ignored as the judgments in the cited cases included judgments delivered 12 years before the judgment subject of this appeal. We are not persuaded that the trial Judge applied wrong principles or took into account irrelevant factors, or failed to take into account relevant factors in assessing the damages awarded as general damages for pain, suffering, and loss of amenities. Consequently, there is no reason for us to interfere with the award in this regard.

25. On damages for loss of future/diminished earning capacity, the trial Judge did not refer to any decision in this regard. In *Butler vs Butler* [1984] KLR 225, this Court considering the issue of loss of earning capacity held as follows:

> "i. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.
>
> ii. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
>
> iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.
>
> iv. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.
>
> v. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not improper to award it under its own heading.
>
> vi. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.
>
> vii. ...
>
> viii. In awarding damages, a court should consider the general picture and all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts.
>
> ix. ....
>
> x. The assessment of damages is more like an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

26. In *Mumias Sugar Company Ltd vs Francis Wanalo* [2007] 2 KLR 74, this Court having considered English case law and the *Butler vs Butler* (*supra*) decision, identified the following principles as emerging:

> "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."

27. In brief, loss of earning capacity is a different head of damages from loss of future earnings. The former focuses on the reduction of earning capacity, whilst the latter focuses on the loss of earnings in the future. Loss of earning capacity is a loss that arises from decreased earning value of the plaintiff in the employment market because he/she if employed is exposed to a risk of having to leave the employment earlier than he/she would have done if it were not for the injuries, or if he/she is not employed, the risk that it may be difficult for him/her to get employment or employment compatible with his/her qualifications and experience. This is what leads to the reduced/loss of earning capacity. The damages can be assessed and awarded as part of general damages or claimed and computed as a separate head.

28. The trial Judge in computing the award in regard to cost of future medical care and what he described as loss of future/diminished earning capacity, had this to say:

> "There is evidence that the plaintiff shall continue to be under medication for many years to come. A sum of Kshs158,118 shall be required for three sessions in a year. At the age of 23 years now, I believe a multiplier of 30 years is reasonable considering the nature of the treatment which she is currently undergoing. Under that head, I make an award of Kshs4,743,540.
>
> The plaintiff is studying dental surgery and there is no doubt that even after completion of her studies, her earning capacity will be diminished considerably. She looks forward to being employed and a payslip from a doctor employed by the Kiambu County has been provided to guide the court in that regard. A sum of Kshs100,000 as salary is not misplaced for a dental surgeon. Again I have used a multiplier of 30 years but that has to be subjected to 60% incapacity as assessed by Dr. Maina, leading to a figure of Kshs21,600,000.
>
> Due to her condition, the plaintiff will need the services of a house help. A modest salary of Kshs 6,000 has been suggested and also that this house help will be working half a day. Again a multiplier of 30 years is not unreasonable and under this head I make an award of Kshs1,080,000."

29. From the above, although Charlene was still undertaking her training to become a dental surgeon, the trial Judge was of the opinion that Charlene's earning capacity would be diminished because of the

residual effects of her injuries. That opinion was anchored on the report from Dr. Maina who stated that Charlene's injuries had subjected her to 60% permanent incapacity. Based on that evidence, the learned Judge used a multiplier of 30 years, taking into account Charlene's age. The learned Judge had to consider and make a firm determination on whether there was a risk that Charlene would lose her job or would be unable to get a job due to her injuries.

30. In her report, Dr. Jacinta Maina who examined Charlene noted that she had mild loss of sensation on the lower limbs distally, and was not able to walk without support. She formed the opinion that:

> " The injuries Charlene Kuria Njeri sustained in this accident were very severe and they caused her pain and suffering and blood loss. The injuries are varied and consistent with the mode of injury. The period of recovery was a time of added psychological, social, emotional and financial distress and temporary incapacitation. <u>The injuries have so far not healed and there is permanent disability of 60%. The patient will require further evaluation and treatment. The scars are of a cosmetic significance to this lady.</u><u>The prognosis of this kind of injury are worse and can cause permanent disability as well as paralysis of the lower limbs</u>." (Emphasis added)

31. At the time of examination, the doctor found that Charlene's injuries had resulted in a permanent disability of 60%. The doctor noted the need for further evaluation and treatment, but no further medical report was availed to us. Therefore, we can assume that Charlene's injuries did not become worse. The trial Judge pegged his assessment of the damages on loss of earning capacity on the permanent disability of 60%. However, the two do not necessarily go together. Charlene was a dental surgeon by profession. Her injuries which she suffered during her first year in the university did not prevent her from completing her five-year training to qualify as a dental surgeon.

32. We appreciate that as a dental surgeon, her performance may be affected by the residual injuries especially because of her mobility. However, it would not be totally right to say that she has a reduced earning capacity of 60%. That percentage was only relevant in considering the residual effect of her injuries in assessing the general damages for pain, suffering, and loss of amenities, or damages for loss of future earnings. The reference by the trial Judge to the award as an award for loss of future/diminished earning capacity reveals a confusion in the mind of the trial Judge and he may not have appreciated that he was dealing with a claim for loss of future earning capacity and not loss of future earning per se. In our view, the Judge erred in adopting the 60% permanent incapacity in assessing the loss of diminished earning capacity.

33. At best, since Charlene was still able to do her work as a dental surgeon, her mobility could only affect her earning capacity to a limited extent. In our view, a reduction of 30% earning capacity, would be a reasonable estimate of her loss arising from her diminished earning capacity. We agree that the disadvantage of reduced earning capacity is one that Charlene may be exposed to for the rest of her life, and therefore, the use of 30 years that was adopted by the trial Judge as a multiplier was reasonable, given Charlene's age at the time of the accident. Using the anticipated salary of Kshs100,000 per month that was not disputed, the damages ought to have been calculated as follows: 100,000 x 30/100 x 12 x 30 = 10,800,000. For this reason, we would reduce the damages awarded to Charlene for diminished/ loss of earning capacity from Kshs21,600,600 to Kshs10,800,000.

34. As for the cost of future medical care, Charlene stated that she would need Kshs158,118 per 3 months for cost for neural rehabilitation and pain management for the rest of her life. This was a claim that was introduced in an amended plaint which was admitted on July 5, 2016 after the defence case had been closed. In her evidence Charlene had testified that she buys medication and was being attended by a pain management specialist and was also undergoing rehabilitation training of the nerves. The medical

reports did not indicate how long future medical care was necessary, nor was any approximate cost of such care given. Nonetheless the trial Judge proceeded to use the figure of Kshs158,118 that was given in the amended plaint and a multiplier of 30 years. With respect, the learned Judge fell into error. The need for the award for future medical care for the period of 30 years should have been supported by cogent evidence, as should the figure of Kshs 158,118. Pleadings are not evidence and the trial Judge could not take the amount as established.

35. It is apparent that contrary to the fear expressed by Dr. Jacinta Maina in her medical report that Charlene's injuries would cause 'permanent disability as well as paralysis of the lower limbs', Charlene's condition kept on improving to the extent that after 2 years, she was able to go back to school and was even been able to complete her 5 years training. Much as Charlene needed medical care and medication for pain management and nerve rehabilitation, it was anticipated that her condition would continue improving. In the absence of evidence regarding the period required for the medical care, the learned Judge ought to have adopted a reasonable period necessary for care and recuperation. In our view, a maximum period of 10 years would suffice.

36. In her amended plaint Charlene pleaded an amount of Kshs 158,118 as required every 3 months for the future medical care. In light of the fact that she did not produce evidence to support this amount, and taking cognizance of the fact that the need for medical care would continue reducing as her condition improved, we accept the figure of Kshs 158,118 as an average amount of her annual medical requirement during the 10 years that she will require future medical care. The award shall therefore be 158,118 x 10 = 1,581,180.

37. The other contentious award is Kshs1,080,000 which was awarded for the house help. The learned Judge reasoned that:

> "Due to her condition the plaintiff will need the services of a house help a modest salary of Kshs6,000 has been suggested and also that this house help will be working half day. Again a multiplier of 30 years is not unreasonable and under this head, I make an award of Kshs1,080,000."

38. We note that the learned Judge having had the advantage of observing Charlene's physical condition appreciated her need for help. The help was limited to half day at a reasonable salary of Kshs 6,000 per month. In the circumstances, we find no justification to interfere with the award for damages in regard to the househelp.

39. The upshot of the above is that we allow this appeal, only to the limited extent of setting aside the awards made by the trial Judge for cost of future medical care and loss of future diminished earning capacity and substituting thereto an award of Kshs 1,581,180 and Kshs10,800,000 respectively. The final award for Charlene shall therefore be:

General Damages ....Kshs 5,000,000

Special damages..............................Kshs 5,684,484

Cost of future medical care..................Kshs 1,581,180

Loss of future/diminished earning capacity...Kshs 10,800,000

House help ....<u>Kshs 1,080,000</u>

Subtotal ....Kshs 24,145,664

Less 10% contribution ....Kshs 2,414,566.40

Total ....Kshs 21,731,097.60

40. Even though the appellant has partially succeeded in this appeal, we do not find it appropriate in the circumstances of this appeal to award any costs. Each party shall, therefore, bear their own costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

HANNAH OKWENGU

....

JUDGE OF APPEAL

M. WARSAME

....

JUDGE OF APPEAL

J. MATIVO

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR