



REPUBLIC OF KENYA



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**Alobei & another v Mohammed (Civil Appeal E074 of 2022)
[2025] KEHC 1687 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E074 OF 2022
EM MURIITHI, J
FEBRUARY 27, 2025**

BETWEEN

FRANCIS GITOMBE ALOBEI 1ST APPELLANT

NANCY NG'ASIKE LOPADIS 2ND APPELLANT

AND

ADAN ADEN MOHAMMED RESPONDENT

*(Being an appeal from the judgment delivered by Hon. L.
Mutai (CM) on 24/5/2022 at Isiolo CMCC No. 22 of 2019)*

JUDGMENT

1. By a plaint dated 10/9/2019, the Respondent sued the Appellants seeking special damages of Ksh. 17,850, general damages for pain and suffering and loss of amenities and future medical care, loss of earning capacity and future earning capacity, costs of this suit and interest. He pleaded that on or about 2/12/2018, he was lawfully walking along Isiolo-Marsabit Road, when the 1st Appellant, being an agent, driver, servant and/or employee of the 2nd Appellant so negligently drove, managed and/or controlled Motor Vehicle Reg. No. KCJ 047 N Toyota Hilux that it veered off the road and knocked him down, thereby occasioning him severe injuries. He used to work and support his family as a night watchman earning Ksh. 12,000 per month, but after the accident, he could not eke a living anymore, and thus he sought loss of earning capacity and loss of future earning capacity. As a result of the accident, he suffered loss and damage for which the 2nd Appellant was vicariously liable.
2. The Appellants denied the claim by their joint statement of defence dated 3/6/2021 and prayed for the Respondent's suit to be dismissed.
3. The parties recorded a consent on liability at the ratio of 80:20 in favour of the Respondent against the Appellants and upon full hearing on quantum, the trial court awarded special damages of Ksh.



17,850, general damages for pain and suffering and loss of amenities of Ksh. 800,000, loss of future earning capacity and medical expenses (Minimum wage (Ksh.12,522) × Total number of months in a year (12) × Multiplier (4) × Dependency Ratio ($\frac{2}{3}$) = Ksh. 400,704 totaling to Ksh. 1,218,544 less 20% contribution = Ksh.974,835.20.

The Appeal

4. On appeal, the Appellants filed their memorandum of appeal on 15/6/2022 raising 3 grounds as follows:
 1. The learned Trial Magistrate erred in law and fact by awarding damages for future earnings without any evidence or basis to support such an award.
 2. The learned Trial Magistrate erred in law and fact by failing to distinguish awards for future earnings and loss of future earning capacity and thereby fell into error by making an award that is not supported by the evidence adduced.
 3. The learned Trial Magistrate erred in law and fact by awarding damages for future medical expenses which were not pleaded and proved.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).

Evidence

6. PWI Adan Aden Mohammed, the Respondent herein and a watchman adopted his statement dated 19/9/2019 as his evidence in chief. He produced the police abstract, P3 form, medical report dated 24/8/2019, receipt for medical report, receipt for medical expenses, motor vehicle search certificate, copy of demand notice and postage receipt of demand notice as exhibits in court.
7. On cross examination, he stated that, “I am still on treatment. I had no employment contract to prove payment of wages.”
8. The Appellants closed their case without calling any witnesses.

Submissions

9. The Appellants cite *Cecilia W. Mwangi and Another v Ruth W. Mwangi* [1997] eKLR, where the Court of Appeal held that, “Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved.” They fault the Respondent for failing to establish that he was employed and earning Ksh.12,000 per month. They fault the trial court for failing to distinguish between damages for loss of future earnings and damages under loss of earning capacity, and rely on *SJ v Francesco Di Nello & Another* [2015] eKLR and *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR. They urge that damages for loss of future earnings can only be awarded for real assessable loss proved by way of evidence, which the Respondent failed to do. They fault the Respondent for failing to properly plead and prove his claim on future medical expenses, and pray for the appeal to be allowed.
10. The Respondent urges the court to find that he could no longer work as a watchman while walking with the aid of crutches. He urges that he pleaded for future medical expenses, and prays for the dismissal of the appeal with costs.



Analysis and Determination

11. From the grounds of appeal, the sole issue for determination is whether the awards for future earnings and future medical expenses were justified.
12. The Court of Appeal in *S J v Francesco Di Nello & another (Supra)* cited by the Appellants, while making a distinction between loss of future earnings and loss of earning capacity stated that:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real or actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.
13. Similarly, in *Douglas Kalafa Ombeva v David Ngama [2013] eKLR*, the Court of Appeal stated that:

“It is common ground, and it is an established principle that a claim for loss of earnings is in the nature of a claim for special damages that must be pleaded and proved.”
14. It is therefore accepted that loss of future earnings is awardable for real assessable loss proved by evidence while loss of earning capacity is awardable as part of the general damages.
15. The Respondent recorded in his statement, which was adopted as his evidence in chief that:

“As a result of the said accident, I sustained severe body injuries and was hospitalized at the Isiolo District Hospital where I was admitted for 126 days. I still undergo treatment as an outpatient to this date. I therefore seek to be compensated in terms of both special and general damages.”
16. The injuries sustained by the Respondent are particularized at paragraph 8 of the Complaint and in the medical report by Dr. J.W Kihumba to be compound left leg comminuted tibial and segmental fibula fracture with an extensive wound anteriorly, right scapular infraglenoid fracture, soft tissue injuries of the right chestwall and numb right 5th finger.
17. When the Respondent was examined by Dr. J.W Kihumba on 24/8/2019, approximately 8 months after the accident, he complained of chronic pain and stiffness in the right shoulder especially in cold weather, numbness of the right 5th finger and swelling of the left foot on walking short distances. He was walking with the aid of crutches and had scarification on the left leg but graft had taken well. The doctor opined that:

“Following the accident, Adan sustained serious injuries to his left leg and right shoulder. Has complains of chronic pain and is at risk of posttraumatic osteoarthritis of the left ankle and knee. He’s on long term pain relief. Numbness of the 5th finger is possibly due to ulnar nerve injury/entrapment and will require further investigation and exploration.”
18. There is no contestation from the evidence on record that the Respondent’s injuries were majorly soft tissue in nature save for the fractures to the compound left leg comminuted tibial and segmental fibula and right scapular infraglenoid.



19. This court finds that the award of Ksh.1,218,544, was an erroneous estimate of the loss suffered by the Respondent, because as conceded by Dr. Kihumba in his medical report, most of the injuries he sustained had since recovered save for residual pain and scarification.
20. The Respondent pleaded that he was gainfully employed as a night watchman earning a monthly income of Ksh.12,000 which he used to support his family. He testified that the accident left him in crutches thereby incapacitating him which completely diminished his ability to ever work in future as a watchman. He, however, did not plead the loss of earnings as special damages.
21. The court finds that the Respondent did not provide proof of any real assessable loss to justify the award of Ksh.1,218,544. Dr. Kihumba opined in his report that the graft in the Respondent's left leg had taken well and it would be reasonably expected that he would make a full recovery with time, because there was no permanent disability at all.
22. In *Kenya Bus Services Ltd v Gituma* [2004] 1 EA 91, the court held that:

“While an award of damaged to meet the cost of future medication is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award thereon. In personal injury cases, the only damage that is contemplated by law as arising naturally is the personal injury itself and the consequential pain and suffering. Accordingly, matters pertaining to hospitalization, treatment and management, the need for further medical care, the disabilities, and attendant pecuniary losses (present and future) are special damages which must be pleaded.”
23. When the Respondent was cross examined, he stated that he was still on treatment without giving details of what that treatment entailed and how long he would require it.
24. The court finds that the award of Ksh.1,218,544 for loss of future earnings and future medical expenses was not only excessive in the circumstances but also erroneous.
25. However, the Court finds that the trial court's award of general damages of Ksh.800,000 ought to have taken into account as general damages the Respondent's diminution of his ability to earn a living, which the Plaintiff improperly pursued as loss of future earnings. Moreover, in consideration of the recent loss of value of the shilling, this Court shall enhance the award of general damages for pain and suffering and loss of amenities to Ksh.1,000,000/-.

Orders

26. Accordingly, for the reasons set out above, the Court finds that the appeal has merit and it is allowed in the following terms:
 1. The award of Ksh.1,218,544 for loss of future earnings and future medical expenses is set aside in its entirety.
 2. The award of general damages for pain and suffering and loss of amenities of Ksh.800,000 is set aside and substituted with an award of Ksh.1,000,000/-.
 3. The other awards remain undisturbed.
 4. There shall be no order as to costs on the appeal.

Order accordingly.



DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Muchiri, Advocate for Respondents.

N/A for the Appellants.

