



REPUBLIC OF KENYA



**Kambura & another v Maseki (Civil Appeal 18 of 2021)
[2024] KEHC 1030 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 1030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL 18 OF 2021
JN ONYIEGO, J
JANUARY 31, 2024**

BETWEEN

DINAH KAMBURA 1ST APPELLANT

PETER ATUTI 2ND APPELLANT

AND

**TITUS WAMBUA MASEKI ALIAS WAMBUA MASEKI ALIAS WAMBUA
MASIKI RESPONDENT**

*((Being an appeal against the judgment of Mbuteti D. Hon.
and delivered on 27.04.2021 in Garissa CMCC No. 71 of 2019))*

JUDGMENT

1. The appellants herein being the defendants in the lower court filed the instant appeal having been dissatisfied by the trial magistrate's judgment delivered on 27th April 2021 in civil case number 71 of 2019 Garissa CM's court.
2. In his plaint dated 01.11.2019, the respondent averred that on or about 09.06.2019, he was lawfully travelling as a fare paying passenger in motor vehicle registration number KCD 769J beneficially owned by the 2nd Appellant and registered in the 1st appellant's name when either the defendants or their respective employee, servant, agent and/or authorized driver so carelessly and negligently drove, managed and/or controlled the said motor vehicle along Ilbibile Garissa -Mwingi road that he caused and/or permitted the same to lose control, veer off the road and violently overturned consequences whereof the plaintiff sustained severe personal injuries and suffered loss and damage.
3. The particulars of negligence and the injuries suffered were set out as follows:
 - i. Driving without due care and attention.



- ii. Driving at an excessive speed in the circumstances.
 - iii. Creating circumstances that precipitated and caused the accident.
 - iv. Failing to keep and/or maintain any or proper look out.
 - v. Failing to exercise the care and skill reasonably expected of a driver of a motor vehicle in the circumstances.
 - vi. Failing to brake in time or at all.
 - vii. Failing to have due regard to the safety of passengers travelling in motor vehicle registration number KCD 769J and in particular the plaintiff.
 - viii. Failing to keep and/or maintain motor vehicle registration number KCD 769J on the road and hence causing the accident.
 - ix. Failing to stop, to slow down, to swerve or in any other way so to manage and/or control the said motor vehicle and avoid the accident.
 - x. Failure to swerve and/or take any evasive action.
 - xi. Driving a defective motor vehicle.
 - xii. In so far as is reasonably practicable under the circumstances the plaintiff will rely on the doctrine of *res ipsa loquitur*.
4. The particulars of injuries were listed as follows:
- i. Mild head injury with brain oedema.
 - ii. Fracture of the left clavicle.
 - iii. Blunt neck injury.
 - iv. Blunt chest injury.
 - v. Blunt back injury.
 - vi. Easy forgetfulness.
5. Present complaints were noted as:
- i. Recurrent headaches.
 - ii. Neck pains.
 - iii. Poor eyesight.
 - iv. A difficulty in performing his duties.
 - v. Easy forgetfulness.
 - vi. Pains on the back and chest.
 - vii. Pain on the left shoulder.
 - viii. Permanent incapacity of about 10%.
6. Particulars of special damages were listed as follows:



- i. Medical legal report by Dr. Okere Kes. 2,000.00.
 - ii. Copy of records KCD 796J Kes. 550.00
 - iii. Treatment and medical expenses Kes. 12,300.00

Total Kes. 14,850.00
7. The plaintiff sought for a judgment against the defendants jointly and severally for:
 - i. Special damages aforesaid of Kes. 14,850.00.
 - ii. General damages for pain, suffering and loss of amenities.
 - iii. General damages for reduced /diminished earning capacity.
 - iv. Costs of the suit.
 - v. Interest on (a), (b), (c) and (d) above at court rate and
 - vi. Any other or further relief that the Honourable Court deemed just to grant.
8. The appellants entered appearance and further filed a defence dated 02.01.2020 denying the occurrence of the accident on the material day and the averment that the respondent sustained injuries as pleaded in the plaint. They also denied the particulars of negligence as pleaded by the respondent. That without prejudice and in the alternative to the foregoing, the occurrence of the accident was caused solely and/or substantially contributed by the plaintiff's own negligence.
9. The particulars of the plaintiff's negligence were listed as follows:
 - i. Failing to take any or adequate precaution for her own safety.
 - ii. Failing to heed the instructions on safety precautions when travelling.
 - iii. Failing to heed the traffic rules and regulations when travelling.
 - iv. Failing to wear a seatbelt while traveling.
10. In a reply dated 02.03.2020, the respondent denied every allegation of fact and law in the defence. Further, he denied every allegation of negligence attributed to him and put the appellants to strict proof thereof.
11. The matter proceeded to full hearing and the trial magistrate after considering the law and evidence adduced before him, reached a determination that the appellants were jointly and severally 100 % liable for the accident. He awarded the respondent an amount of Kes. 600,000.00 as general damages for pain and suffering and loss of amenities, Kes. 100,000.00 as general damages for diminished/reduced earning capacity and Kes. 14,850 as special damages.
12. The appellant being dissatisfied with the said judgment, listed seven (7) grounds of appeal in the memorandum of appeal dated 23.10.2021. Principally, the appellants' grievance lay squarely on the alleged excessive quantum of damages as awarded by the trial court.
13. The appeal was disposed of by way of written submissions. Unfortunately, only the appellants complied with the direction. It was submitted that an assessment on quantum in a claim for general damages is a discretionary exercise to which the law has set dimensions which must be exercised judicially with wise circumspect and upon some legal principles. It was contended that the said



dimensions are vital such that when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court.

14. It was further contended that awards must be within consistent limits and court awards for damages must be made taking into consideration comparable injuries or similar injuries and awards. To buttress that argument, reliance was placed on the case of *Denshire Muteti v Kenya Power & Lighting Co. Ltd.* [2013] where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
15. This court was urged to disturb the award of Kes. 600,000 as general damages and Kes. 100,000 in diminished earning capacity as the same were so high as to be erroneous estimates because the plaintiff sustained soft tissue injuries. Reliance to that end was placed inter alia on the cases of *George Mugo & Another v AKM (minor suing through next friend and mother of A.N.K)* [2018] eKLR, where Kemei J. awarded Kes. 90,000/- for soft tissue injuries. In the same breadth, the court was referred to the case of *Lamu Bus Service & Another v Carren Adhiambo Okello* [2018] eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Kes. 200,000/- was reduced to Kes. 130,000/-.
16. The appellant proposed an amount of Kes. 80,000/- as the appropriate award for the claimant herein. Further, the appellant urged this court to award them costs of the appeal herein.
17. This court has carefully considered the submissions by the appellants against the grounds of appeal. As the 1st appellate court, am bound to re-evaluate, re-assess and reconsider afresh the evidence tendered before the trial court and arrive at an independence decision bearing in mind that I did not see nor hear witnesses testify to be able to assess their general demeanour. [See *Peters v Sunday Post* 1958 (EA) 424].
18. The court therefore finds that the sole issue for determination is whether taking into account the nature of the injuries sustained by the respondent, comparable awards and inflation or passage of time the award of the trial magistrate was inordinately excessive as to warrant this court to interfere.
19. It is trite that the circumstances under which a court can upset such a determination have been previously laid down by various case law. The Court of Appeal in the case of *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982 – 88] IKAR 278 stated thus:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”
20. From the plaint, it is noted that the respondent suffered mild head injury with brain oedema, fracture of the left clavicle, loss of consciousness for sometime, blunt neck injury, blunt chest injury, blunt back injury and easy forgetfulness.
21. In the case of *Gabriel Maina Mungai v Jane Wanjiku Mwaura* [2019] eKLR where the respondent sustained a head injury with loss of consciousness for almost 3 weeks, Fracture of left clavicle bone, cut wound on the head, Permanent incapacity assessed at 15%, termination of a six – month pregnancy and soft tissue injury to abdomen the court awarded Kes. 750,000 for general damages and general damages for loss of future earning capacity of Kes. 250,000.
22. In the case of *Yobesh Makori v Elmerick Mobisa Bota* [2021] eKLR, the respondent suffered Head injury; Deep laceration on the scalp; Left clavicle fracture; Bruises on the upper limbs Crushed left leg; Dislocation of the right tarsal bone; and Cut wound on the right leg wherein the trial court had



awarded Kes. 2,000,000.00 as general damages and Kes 130,000 as future medical expenses. The High Court at upheld the said awards.

23. Equally, in *Sofia Yusuf Kanyare v Ali Abdi Sabre & Another* [2008] eKLR the plaintiff was awarded a sum of Kshs. 1,970,000/= as compensation for a head injury; loss of 10 teeth, amputation of the right upper limb; cuts over left upper limb and stitching of a few cuts. Taking into account the nature of the injuries sustained; rate of inflation and comparable case law quoted, I find the amount of Kshs 600,000 awarded by the court to be on the upper side. In my view a sum of Kshs 400,000 will be sufficient compensation.
24. On diminished earning capacity, the appellants submitted that the same ought to be entirely set aside as the plaintiff did not prove any effect on her earning capacity.
25. In the case of *Butler v Butler* [1984] KLR 225, the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:
 1. 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
 2. 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.
 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them.
 4. Loss of earning capacity can be a claim on its own, as where a 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.
 5. 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; and
 6. 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.
26. In the case herein, the respondent pleaded for an order for general damages for reduced/diminished earning capacity. The respondent stated that he was a carpenter and he used to earn at least 40,000 – 60,000 per month. That for 8 months, he did not earn and further, he had since returned to work but he only supervises as he could no longer use his hands to work. It was his evidence that he now earned an amount of Kes. 10,000.00 as he had not fully recovered from the accident.
27. It is trite that diminished earning capacity need not be specifically pleaded and proved. [Also see *Nyatogo v Mini Bakeries Limited (Civil Appeal E38 of 2021)* [2023] KEHC 1593 (KLR) (10).
28. The respondent's incapacity was examined at 10% by Dr. Cyprianus Okoth Okere. The assessment of damages in respect to diminished earning capacity is also a discretionary matter and it depends on the circumstances of each case. Where a victim is an adult and employed, there is general consensus that the the person's earning capacity is diminished when say he loses an arm in an accident.



29. In the *Mumias Sugar Company Ltd v Francis Wanalo* [2007] eKLR case, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in *Butler v Butler* [1984] KLR 225, where, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity.
30. The Court of Appeal stated:
- “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 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 the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”
31. In the case of *Blowplast Ltd v Julius Ondari Mose* [2018] eKLR the court reduced an award of Kshs. 1,000,000/= as damages for loss of earning capacity to Kshs. 400,000/= where the respondent suffered an amputated distal phalanx, fracture of the right index finger, and loss of dexterity/grip of the right hand; and where disability was fixed at 25%.
32. In the case of *Gabriel Maina Mungai v Jane Wanjiku Mwaura* [2019] eKLR where the court awarded the plaintiff/respondent Kes. 250,000 had suffered a 15% disability, slurred speech and impaired hearing, an obstacle in dealing with clients or even other people. Taking into account the nature of the injury suffered and the degree of incapacitation, a sum of Kshs 100,000 is reasonable award.
33. From the foregoing, it is my finding that;
- i. Kes. 600,000.00 for general damages is hereby set aside and the same substituted with a sum of kes 400,000 as general damages for pain and suffering and loss of amenities.
 - ii. An amount of 100,000/- as general damages for diminished earning capacity is upheld.
 - iii. Special damages were not contested and the same remains as Kes 14,850.00
 - iv. No order to costs as the respondent chose not to participate in the appeal herein despite being served.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY 2024

J. N. ONYIEGO

JUDGE

