



**Migeke v Chomba & another (Civil Appeal 146 of 2019)
[2024] KEHC 658 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 146 OF 2019

DAS MAJANJA, J

JANUARY 31, 2024

BETWEEN

NICHOLAS NDANYI MIGEKE APPELLANT

AND

ROBERT CHOMBA 1ST RESPONDENT

PAUL THIONGO WAMBUGU 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Peter Muboli, dated 20th February 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 4404 of 2016)

JUDGMENT

Introduction and Background

1. The Appellant is dissatisfied the judgment of the Subordinate Court dated 20.02.2019 finding him fully liable for injuries he sustained as a result of an accident that occurred on 06.07.2013 along Lusaka road while he was riding motor cycle registration number KMDA *M and motor vehicle registration number KBJ *D driven and owned by the Respondents. The Appellant was also awarded Kshs. 1,200,000.00 and Kshs. 135,260.00 general and special damages respectively, Kshs. 153,000.00 as costs of future medical expenses and Kshs. 1,080,000.00 for loss of earnings bringing a total net award of Kshs. 2,568,260.00.
2. In his case before the Subordinate Court, the Appellant claimed that the accident was caused by the Respondents' negligence which led to the Appellant sustaining compound dislocation of the right ankle joint, compound fracture of the right tibia malleolus and a compound fracture of the right fibula malleolus. That he had incurred loss by way of medical expenses and other miscellaneous costs in form of a raised boot and that he was likely to incur future medical expenses and thus claimed special damages



- of Kshs. 129,760.00 for medical expenses, Kshs. 5,500.00 for medical reports, future medical expenses of Kshs. 150,000.00 and the cost of the raised boot at Kshs. 3,000.00 per year in his lifetime. The Appellant also sought general damages and loss of past and future earnings as he claimed that prior to the accident he was in good health and was employed as a boda boda rider at a salary of Kshs. 30,000.00 per month and that he had had lost earnings for 3 years from the date of the accident. The Appellant thus stated that the Respondents were vicariously liable for the accident.
3. In response to the claim, the Respondents denied being the registered and/or beneficial owners or drivers of the subject motor vehicle. They further denied the claims of negligence on their part and that if anything, it was the Appellant who was negligent.
 4. The matter was set down for hearing where the Appellant (PW 2) testified and called as his witnesses Dr. Washington Wokabi, a consultant surgeon (PW 1) and his employer Priscilla Adeye Adhiambo (PW 3). The Respondents did not call any witnesses or produce any evidence.
 5. As stated, the Subordinate Court found the Respondents fully liable. In the court's view, the Respondents' driver was the one joining the road and the rider was on the main road and that the driver was under legal duty to ensure that the road was clear before joining and had a duty to stop at the junction from the petrol Station before joining. The trial magistrate accepted the testimony of PW2 and the findings on the police abstract and that it was therefore safe to make a conclusion that the Respondents' driver carelessly joined the road from Petro Petrol station and he was to blame for causing the accident.
 6. On quantum of damages, the trial magistrate observed that from the injuries sustained by the Appellant, he had undergone several operations in different hospitals as evidenced in the discharge summaries placed before the lower court as exhibits. That upon filing of the suit, PW 1 examined the Appellant and prepared a medical report dated 01.10.2018 which indicated that the Appellant suffered pains after each of the surgical procedures and that the injuries have attracted a 25% disability and that due to the multiple surgeries he is unlikely to recover and the only surgery he can undergo is that to remove the screws which he estimated that it would cost Kshs 150,000.00. PW 1 also stated that the Appellant may have to raise the size of his shoe by 6 cm to reduce the limping and that due to the nature of the injury he will not be able to resume the work of boda boda riding and he may require Kshs 3,000.00 every year to raise the shoe. The trial magistrate noted that the Respondents had referred the Appellant for re-examination but failed to tender the medical report. That trial magistrate therefore held PW 1 opinion was largely unchallenged hence there was no reason to doubt that the Appellant sustained the pleaded injuries.
 7. On the appropriate award, the Subordinate Court noted that the Appellant had urged to be awarded Kshs. 3,000,000.00 by relying on the following cases; Regina Mwikali Wilson v Stephen Gichuhi & Anor [2015]eKLR, David Kariuki v Peter Kiarie Wambui & Anor[2014]eKLR and Rebecca Mumbua Musembi v Lucy K Kinyua [2014] eKLR. The Respondents urged the court to award Kshs. 700,000.00 and relied on the cases of Kakamega HCCA No. 78 and 79 of 2012; Paul Otieno Obuya & Anor vs Joshua Atuti Negoto & Anor and Nairobi CA No. 65 of 2006 Ram Gopa Gupta vs Nairobi Tea Parkers & 2 Ors [2017] eKLR. Having considered the injuries sustained, the opinion in the medical report, the evidence of the Appellant, comparable cases, the fact that the Appellant sustained a 25% incapacity and taking into account the rate of inflation, the trial magistrate awarded Kshs. 1,200,000.00 as general damages for pain and suffering. He also awarded the pleaded sum of Kshs. 135,260.00 which he stated had been proved as special damages. On future medical expenses, accepted PW 1's unchallenged testimony that the Appellant would require Kshs. 150,000.00 to remove the screws. The trial magistrate awarded this sum and a one-off payment for the adjustment of the boot at Kshs 3,000.00. On loss of earnings, the trial magistrate held that the Appellant had proved that he was denied



the opportunity to work and that he was not able to work a period of 3 years after the accident hence lost earning amounting to Kshs 1,080,000.00. On loss of earning capacity, the trial magistrate lower court relied on *William J Butler v Maura Kathleen Butler* [1984] eKLR to hold that this claim is taken care of by an award of general damages. That it was also on record that the Appellant had only lost the use of the limbs and he could engage in activities that require the use of hands and it does not mean that because he was a boda boda rider he must only engage in that trade and no other as he is not totally incapacitated to attract an award under this head. Consequently, the trial court declined to award any sums for loss of earning.

8. The Appellant is dissatisfied with the judgment and has grounded his appeal on his memorandum of appeal dated 18.03.2019. The Appeal has been canvassed by way of written submissions.

Analysis and Determination

9. In determining this appeal, I am cognizant of the role of the first appellate court which is to re-evaluate and re-assess the evidence before the court of first instance. At the same time, keeping in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).

10. The Appellant is aggrieved by the Subordinate Court's assessment of the general damages and its refusal to award his claims under the head of loss of future earnings and future medical expenses for the raised boot as pleaded. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 as follows:

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low.

11. It was not disputed that the Appellant sustained a compound dislocation of the right ankle joint, a compound fracture of the right tibia malleolus and a compound fracture of the right fibula malleolus. In the cases relied on by the Appellant, that is *Regina Mwikali Wilson v Stephen Gichuhi* (Supra), the plaintiff therein sustained multiple fractures of the right side involving the 3rd, 4th, 5th and 6th ribs, comminuted fractures of the right radius bone; fracture of the femur involving the neck; shaft and supra condoler region which was severely comminuted in many pieces; fractures of the right tibia and fibula bones on the same leg. On the left leg a fracture of the femur and a deep cut wound on the left knee and abrasion wound over the right supra orbital above the eye brow. The fractures on both femurs were managed by open reduction and fixed with metal implants. She developed an infection of the right femur which necessitated a re-do surgery by removal of the metal implants and the application of a different type of metal implants. She also attended rehabilitation physiotherapy. For these injuries, she was awarded general damages of Kshs. 2,500,000.00.
12. In *David Kariuki v Peter Kiarie Wambui* (Supra), the plaintiff therein suffered a fracture of two upper incisors teeth which eventually resulted into loss of those teeth, Head injury with deep cut wound on the Occipital laceration on the left periorbital region, fracture of the left ulna and radius and Multiple cut wounds on the left forearm, fracture of the femur, Amputation of the left lower limb below the knee and Compound comminuted fracture of the right tibia and fibula. He was awarded general damages of Kshs. 3,000,000.00. In *Rebecca Mumbua Musembi v Lucy K. Knyua* (Supra) the plaintiff therein pleaded Loss of 12 teeth, Compound fractures of the right tibia and fibula in the middle third, Compound comminuted fractures in the upper third of the left tibia and fibula, Undisplaced fracture



of the right acetabulum and right pubic rami, Internal fixation of the fractures and reconstruction surgery with metal plates, Extensive surgical scars and that she required total hip replacement. For these injuries, the plaintiff therein was awarded Kshs. 3,000,000.00.

13. From the above cases, it is evident that the plaintiffs therein suffered far more serious injuries than those of the Appellant. There was therefore no way he could have been awarded his proposed sum of Kshs. 3,000,000.00 as awarded in those cases. In awarding him the sum of Kshs. 1,200,000.00, I find that the trial magistrate was rightly guided by the correct principles including the injuries sustained by the Appellant, comparable authorities, inflation and the evidence on record and as such, there is no reason for the court to interfere with this award. This ground of appeal by the Appellant fails.
14. On loss of earning capacity, the trial court declined to award sums under this head for the reason that the same had already been taken care of under the head of general damages. This position was affirmed by the Court of Appeal in *Butler v Butler* (Supra) where Chesoni Ag. J.A., held as follows:

Loss of earning capacity or earning power may and should be included as an item within general damages, Lord Denning MR in *Fairley v John Thomson* [1973] 2 Lloyd's Rep 40 at 42 (CA) but where it is not so included, it is not improper to award it under its own heading as the learned judge in this case did. Indeed, the judge should have said "general damages" for pain, suffering including loss of earning capacity...
15. Guided by the aforementioned decision, the trial magistrate found that the Appellant had only lost the use of the limbs and he can engage in activities that require the use of hands and it does not mean that because he was a boda boda rider he must only engage in that trade and no other. That he is not totally incapacitated to attract an award under this head.
16. In line with the decision in *Butler v Butler* (Supra), the trial court was entitled to make a separate award for loss of earning capacity or include it in the award for general damages. In either case, the award must be supported by evidence and ought to be fair and reasonable. It is clear that the trial magistrate declined to make an award for loss of earning capacity hence it could not have been included in the award for general damages.
17. An award for loss of earning capacity is intended to compensate plaintiff for diminution in earning capacity as a result of the accident. The nature and extent of injury and the resultant disability will obviously affect the level of award and the fact that the plaintiff may be able to engage in another trade does not disentitle him to an award. It is only a factor to be taken into account. In this case the Appellant sustained injuries that led to shortening of his leg that would affect his prospects given his earlier occupation. I would therefore make a global award of Kshs. 600,000.00 under this head.
18. On the future medical expenses for the cost of raised shoe, the Appellant had sought Kshs. 3,000.00 per year in his lifetime but the lower court awarded a one-off payment of Kshs. 3,000.00. Whereas it is true as the Appellant submits that his doctor had recommended a boot for the rest of his life time, a reading of the said medical report does not recommend a change of the boot every year as claimed by the Appellant. Therefore, I cannot fault the learned magistrate for awarding a one-off payment of Kshs. 3,000.00 for the boot. This ground of appeal fails.

Disposition

19. Overall, the appeal is allowed only to the extent that the Appellant is awarded Kshs. 600,000.00 on account of the loss of earning capacity. The Respondent shall pay the Respondents costs assessed at Kshs. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.



D. S. MAJANJA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Ms Kimani instructed by A. M. Kimani and Company Advocates for the Appellant.

.....instructed by Humphrey and Company LLP Advocates for the Respondents.

