



REPUBLIC OF KENYA



**Kyalo v Kivasu (Civil Appeal 084 of 2023) [2024] KEHC 324 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 324 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 084 OF 2023  
FN MUCHEMI, J  
JANUARY 25, 2024**

**BETWEEN**

**BENJAMIN KYALO ..... APPELLANT**

**AND**

**JAMES MUTHUI KIVASU ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. M. W. Kurumbu (SRM) delivered on 24th November 2022 in Thika CMCC No. 268 of 2018)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment in Thika CMCC No. 268 of 2018, a claim that arose from a road traffic accident whereby liability was apportioned at 100% as against the appellant. The respondent was awarded general damages of kshs. 600,000/- for pain, suffering and loss of amenities, loss of earning capacity of kshs. 2,448,000/-, future medical expenses of kshs. 200,000/- and special damages of kshs. 3,650/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 2 grounds of appeal as follows:-
  - a. The learned trial magistrate erred in fact and in law in the assessment of damages for loss of earning capacity;
  - b. The learned trial magistrate erred in fact and in law in awarding kshs. 200,000/- for future medical expenses.
3. Parties put in written submissions to dispose of the appeal.



## Appellant's Submissions

4. The appellant relies on the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR and submits that the trial court erred in failing to discount the award for loss of future earnings by the degree of permanent incapacity. The appellant argues that the trial court failed to consider that damages under the head of loss of future earnings was meant to compensate a claimant for the diminution of his marketability in the work market and not to compensate him for the loss of earnings, which are special damages in nature. The appellant further argues that the trial court erred by stating in its judgment, with no basis, that the respondent would be unable to find employment as a driver.
5. The appellant submits that the trial court erred in awarding a sum of kshs. 200,000/- for future medical expenses and prays that the court set the said award aside and substitute it with kshs. 90,000/-. He argues that it is trite law that when called upon to determine a fair award for future medical expenses, reference is made to the costs in a government hospital as was done by Dr. Wambugu in this case. Additionally, the appellant argues that it would be unreasonable to expect him to meet the cost of the procedure in a private hospital.

## The Respondent's Submissions

6. The respondent submits that on calculating the loss of earning capacity, the appellant has urged the court to adopt a global figure as opposed to the multiplier approach. The respondent argues that this is a new issue raised by the appellant as in the trial court he proposed the use of the multiplier method. As such, the respondent urges the court to dismiss the appeal under this head of damages.
7. The respondent cites the case of *Joseph Nyaboke Nyanchari v Stanley Nyabuto Mose* [2021] eKLR and submits that in awarding loss of earning capacity, a court is bound to apply the correct principles and take relevant factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability. In the instant case, it was not disputed that the respondent was a driver and was earning a monthly salary of kshs. 17,000/-. The respondent further submits that it was uncontroverted that he suffered incapacity of the lower limbs leading to the shortening of his left leg whereas the right leg was not healed and had a metallic rod in it. Thus the respondent contends that the trial court did not err by finding that having sustained incapacity to the lower limbs, his chances to work as a driver had been prejudiced and further did not err in applying the multiplier approach in calculating damages under loss of earning capacity. To support his contentions, the respondent relies on the case of *Kaluworks Limited v Nicholas Ngome Kombo* [2020] eKLR.
8. The respondent further relies on the case of *Simba Platinum Limited v Nicholas Auma Wandera* [2021] eKLR and submits that it is trite law that where a claimant has produced evidence such as proof of earnings, then in awarding general damages, the most reasonable method is the multiplier approach as in the instant case where the respondent proved that he was employed and produced a salary slip. Moreover, the respondent contends that the case relied on by the appellant, *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR, is distinguishable from the present case as the plaintiff in that case did not demonstrate that because of the disability he could not do the job for which he was trained for being mechanical fitting. Without prejudice to the foregoing, the respondent urges the court to award a sum of kshs. 3,000,000/- in the event the court is inclined to use the global award approach.
9. The respondent submits that it is not disputed that he is entitled to future medical expenses and that he pleaded and proved the same. The respondent further submits that the award of kshs. 200,000/- as awarded by the trial court was sound and reasonable and further that the appellant has not given any justification on why this court should disturb the said award.



## Issues For Determination

10. The main issues for determination are as follows: -
  - a. Whether the award for loss of earning capacity was made without consideration of the applicable principles;
  - b. Whether damages for future medical expenses was properly awarded.

## The Law

11. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

12. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

13. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
  - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

## Whether The Award Of Loss Of Earning Capacity Was Made Without Consideration Of The Applicable Principles.

14. As regards quantum of damages, the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:-

It is trite law that 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 court below simply because it would have awarded a different figure if it had tried the case at the first instance. The appellant court can justifiably interfere with the quantum of damages



awarded by the trial court if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor 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.

15. The appellant argues that damages under the head loss of future earnings ought to have been subjected to the degree of permanent incapacity. The respondent argues that the trial court did not err in adopting the multiplier approach as opposed to the global sum approach as alleged by the appellant. The method of assessing loss of earning capacity has evolved in courts as was stipulated in [\*James Mukatui Mavia v M. A. Bayusuf & Sons Limited\*](#) [2013] eKLR: -
16. The method evolved by the courts for assessing loss of earning capacity for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last (the multiplier) is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life.
17. The trial court found no justification in discounting the award with the degree of permanent incapacity as the respondent had proved he was working as a driver and due to the accident, his lower limbs were deformed which caused prevented him from continuing his work as a driver. The trial court further took into consideration the respondent's age and the fact that the accident considerably lowered his earning capacity. It is my considered opinion that the trial magistrate applied the correct principles and took into consideration the relevant factors in computing loss of earning capacity such as the respondent's age, his remaining length of working life and the degree of his disability to ascertain the approximate financial loss that the respondent suffered. Thus, it is my view that the sum of kshs. 2,448,000/- is reasonable and sufficient in the circumstances.

#### **Whether Damages For Future Medical Expenses Was Properly Awarded.**

18. The Court of Appeal in the case of [\*Tracom Limited & Another v Hassan Mohammed Adan\*](#) [2009] eKLR stated:-

We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court stated:-

And as regards future medication (physiotherapy) 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 damage and is a fact that must be pleaded if evidence thereof 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 raising naturally from infringement of a person's legal right should be pleaded.

We understand that to mean that once the plaintiff pleads that there would need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where treatment is undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment.



We think that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

19. The appellant faults the trial court for awarding kshs. 200,000/- as future medical expenses for the sole reason that the said figure has been assessed from a private hospital. The appellant argues that the costs ought to be computed from a government hospital.
20. On perusal of the court record, the respondent was admitted and treated in private hospitals. Thus, it would be reasonable to send him back to the hospitals he attended in order to remove the metal implants. It is clear from the case law that one of the factors to take into consideration while assessing future medical expenses is the place where treatment is undertaken. As such, the appellant is argument that future medical expenses ought to be awarded based on figures from a government hospital is misconceived.

### **Conclusion**

21. It is therefore my considered view that the award for future medical expenses was made in consideration of the applicable principles and ought not to be disturbed. The appellant has failed to satisfy this court on any of its two grounds of appeal.
22. In view of the foregoing, I find that the appeal lacks merit and dismiss it with costs to the respondent.

**DELIVERED DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**F. MUCHEMI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

