



**Kiiru v Malungu (Civil Appeal E939 of 2022)
[2024] KEHC 1960 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1960 (KLR)

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

CIVIL

CIVIL APPEAL E939 OF 2022

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

JOSEPH KIIRU APPELLANT

AND

SAMUEL MUNYOKI MALUNGU RESPONDENT

*(Being an appeal from the judgment and decree of A.N. Makau (PM) delivered
on 25th October 2022 in Nairobi Milimani CMCC No. 8661 of 2019)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 25.10.2022 in Nairobi Milimani CMCC No. 8661 of 2019. The suit was commenced by way of a plaint filed on 25.11.2019 by Simon Munywoki Malungu the plaintiff in the lower court (hereafter the Respondent) against Joseph Kiiru the defendant in the lower court (hereafter the Appellant) seeking inter alia general and special damages in respect of a road traffic accident that occurred on 17.04.2019.
2. It averred that the Respondent while riding as a lawful pillion passenger aboard motorcycle registration number KMCG 781Y along Kangundo Road was injured when the Appellant's motor vehicle registration number KCL 234A lost control and hit the Respondent. It was further averred that the accident was caused by the carelessness and negligence of the Appellant's driver then driving the said motor vehicle and a result of the said accident the Respondent sustained injuries and incurred expenses.
3. The Appellant filed a statement of defence denying the key averments in the plaint and liability. He went on to aver in the alternative, and without prejudice to the averments in the statement of defence that, any such occurrence of an accident as the Respondent may prove, was not due to any negligence on the part of the Appellant but solely and or substantially contributed to by the negligence of the



rider of motor cycle registration number KMCG 781Y who failed to yield the way for motor vehicle registration number KCL 234A.

4. The suit proceeded to full hearing, during which both parties adduced evidence in support of the averments in their respective pleadings. In its judgment, the trial court found the Appellant wholly liable for causing the accident and awarded damages to the Respondent as hereunder: -

General Damages– Kshs. 1,200,000.00/-

Special Damages – Kshs. 68,050.00/-

5. Aggrieved with the outcome, the Appellant preferred this appeal challenging the finding by the lower court specifically on quantum based on the following grounds in his memorandum of appeal: -

- “ 1. The learned magistrate’s decision was unjust, against the weight of the evidence and was based on misguided points of fact and wrong principle of law and has occasioned a miscarriage of justice.
2. The learned magistrate erred in law and in fact when she failed to consider the Appellant’s evidence, judicial authorities and submissions on points of law and facts as damages payable in quantum to the Respondent. The learned magistrate further awarded the Respondent amounts in excess as prayed for by the Respondent in their submissions.
3. The learned magistrate erred in law and in fact in awarding excessive and undeserved general damages to the Respondent in the tune of Kenya Shillings One Million, Two Hundred Thousand for the injuries the Respondent suffered.
4. The learned magistrate erred in law and in fact in unduly disregarding the submissions and judicial authorities cited by the Appellant and the Respondent on quantum and instead relied wholly on the authorities not cited by either party.”

6. The Respondent equally aggrieved with the lower court’s finding on damages filed a cross-appeal on the following grounds: -

- “ 1. The trial court erred in law and fact by failing to assess and award general damages for diminished earning capacity.
2. The trial court erred in law and fact by failing to assess and award general damages for future medical expenses.” (sic)

7. The appeal was canvassed by way of written submissions. Counsel for the Appellant in his submissions argued that the P3 Form, the Medical Report dated 19.06.2019 and the Original Treatment Note from Kenyatta National Hospital dated 29.04.2019 all confirmed that the Respondent sustained a fracture of the femur and soft tissue injuries. Hence, the trial court’s award in general damages was inordinately high and ought to be substituted with an award of Kshs. 400,000/-.

8. In support of the foregoing argument counsel called to aid the decisions in Kenya Power Lighting Company Limited & Another v Zakayo Saitoti Naingola & Another [2008] eKLR as cited in Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR, Jackson Mbaluka Mwangangi v Onesmus Nzioka & Another [2021] eKLR, Jitan Nagra v Abednego Nyandusi Oigo [2018] eKLR and Reamic Investment



Limited v Joaz Amenya Samuel [2021] eKLR. Counsel urged the court to allow the appeal as prayed with the attendant costs in favour of the Appellant.

9. On the part of the Respondent counsel addressed the respective appeals. Submitting on the Appellant's appeal, he argued that to justify interference by this court on the award on general damages, the Appellant must establish that the trial court proceeded on wrong principles or misapprehended the evidence thereby reaching an erroneous decision. That from the material before the trial court, the injuries sustained by the Respondent were not disputed as including a fracture of the right ankle and abrasion on the left ankle. It was further submitted that the trial court was convinced that the Respondent's injuries were grievous enough to warrant the award on general damages.
10. That the Appellant has not demonstrated through this appeal that the trial court proceeded on a wrong principle or that it misapprehended the evidence therefore this court ought not disturb the said award on general damages. The decisions in Jackson Mbaluka Mwangangi (supra) and Zachary Kariithi v Jashon Ochola [2016] eKLR were relied on in that regard. It was thus contended that the Appellant's contention that the trial court disregarded both parties' submissions on the issue of general damages is misplaced as submissions are not binding on the court as they are intended to persuade the court towards a specific inclination in respect of party's case.
11. Submitting the cross-appeal, counsel began by arguing that the trial court failed in its judgment to assess damages for diminished earning capacity and future medical expenses despite the same being pleaded and proved. In urging the court to award Kshs. 510,000/- for diminished earning capacity and Kshs. 100,000/- for future medical expenses counsel relied on the decision in Lei Masaku v Kalpama Builders Ltd [2014] eKLR. In summation, the court was urged to dismiss the appeal and allow the cross-appeal with costs.
12. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.

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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. As earlier noted, the main appeal and cross-appeal before this court turn on the singular issue of damages; - the Appellant's appeal specifically challenging quantum of general damages



while the Respondent's appeal relates to the trial court's denial of damages for diminished earning capacity and future medical expenses.

14. The Respondent by his plaint averred at paragraph 3, 7 and 8 that:

3.....

“Particulars of injuries sustained.

Fracture of the Right Femur.Abrasions on the Left Ankle

Present Condition

Difficulties of getting around.He cannot work.Thus the Plaintiff claims general damages for pain and suffering.4.....5.....6.....7. Prior to the accident above, the Plaintiff worked and earned his living as a carpenter but since the said accident he has lost Kshs. 30,000/= monthly as he cannot work in his physical condition. He therefore claims damages for lost earning and or diminished earning capacity for 17 months from the date of the accident within period his injuries will heal and rehabilitate.8.The Plaintiff also claims general damages in relation to future surgery expenses which have been estimated to cost Kshs. 100,000/= for the removal of the metal implant.” (sic)

15. In its judgment, the trial court after restating and examining the respective parties' evidence stated as follows: -

“General Damages

.....I have given due consideration to the parties' written submissions, the evidence on record, and case law quoted and provided, and I have compared them with the case at hand. The Plaintiff herein suffered a fracture of the right femur he was treated at KNH for the injuries he sustained. He was admitted to the facility on 17/4/2019 (date of the accident) and was discharged on 29/4/2019. The findings of the medical officer as per the discharge summary dated 29/4/2019 are tender deformed right thigh. A medical report produced as an exhibit by Dr. Wokabi confirms the injuries and observation that the Plaintiff has a K nail on the right leg and suffered a permanent disability of 10% and that he will require 100,000/= for removal of the K nail.

.....This was confirmed by the medical doctor who examined him and prepared a report. I have no reasons to doubt the uncontroverted evidence. Having made considerations and comparisons of the case law herein above and being guided by the decisions of the superior courts and putting into account the rate of inflation and passage of time am persuaded to find that Kshs. 1,200,000/= is sufficient compensation to the Plaintiff as general damages for pain and suffering and loss of amenities. It is trite that special damages must be specifically pleaded and strictly proved. I find the Plaintiff has proved the pleaded damages. I therefore, award the same. As such I enter judgment for the Plaintiff against the Defendant for;

- a. General damages of Kshs. 1,200,000/=
- b. Special damages of Kshs. 68,050/=
- c. Costs of the suit
- d. Interest at court rates from date of judgment till payment in full.” (sic)

16. The court proposes to first deal with the main appeal. In considering the main appeal, the court will be guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited



t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

17. The same court stated in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 1988] 1 KAR 5 that:

“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 either inordinately high or low”.

See also *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* [1979] EA 414; *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001*; [2004] eKLR.

18. During the trial, the Respondent testified as PW2. He produced the P3 Form as PExh.4, Discharge Summary from Kenyatta Hospital as PExh.5, the medical report prepared by Dr. Wokabi dated 20.06.2019 as PExh.6 and later by consent the Medical Report by Dr. Jenipher dated 24.09.2019 which the trial court inadvertently failed to mark. The earliest report, PExh.5, was prepared close to two (2) months after occurrence of the accident. It listed the Respondent’s injuries to comprise of a deformed right thigh but with the distal neurovascular status being intact.

19. It further documented the fact that the injury was managed by way of Open Reduction and Internal Fixation (ORIF), Buttress Plating and Analgesia. This was confirmed by PExh.4. These injuries were not seriously challenged at the trial, and it seems that at the behest of the Appellant, the Respondent was subjected to a second medical examination. Hence the medical report by Dr. Jenipher dated 24.09.2019 that was produced at the trial by consent.

20. PExh.6 was prepared more than two (2) months after the accident. The report set out in detail the Respondent’s injuries as a fracture of the right femur and abrasion of the left ankle with attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

“He suffered a lot of pain from the injuries that he sustained following a road accident. He also suffered pain after the major surgery to fix a metal K-nail. He is still healing and rehabilitating on the right leg. It will take him 12 to 15 months from now for the rehabilitation to be optimal. At optimum rehabilitation permanent disability will have settled at 10% (ten percent).

Elective removal of the metal implant will cost Shs. 100,000/= (one hundred thousand shillings)The small scars on the left knee will become smaller in size and could even disappear.....” (sic)

21. The medical report by Dr. Jenipher dated 24.09.2019 which should have been marked as D.Exh 1 was prepared about five (5) months after the accident and was the most recent on the Respondent’s



injuries. The report set out in detail the Respondent's injuries and attendant sequela. The prognosis on the Respondent was captured in extenso therein as follows; -

“Findings:

Initial-comminuted fracture at the distal third of femur

Check adequately united plated fracture at the distal third of right femur, position is satisfactory

Physical disability resulting from the injuries:

10%

Estimated costs of future treatment:

40,000

Relevant comments that may affect the assessment of the claim:

He might require removal of implant at a cost of Ksh. 40,000 at KNH where he was treated.

Recommendations:

Sustained right femur fracture” (sic)

22. Undoubtedly, the injuries suffered by the Respondent herein were relatively severe and must have caused him a great deal of pain and an extended period of morbidity. According PExh.6 and the medical report by Dr. Jenipher dated 24.09.2019, the injuries predisposed him to residual attendant sequela. As important as consistency in awards for similar injuries might be, the court appreciates that it is nigh impossible to find two cases reflecting injuries that are similar in every respect and the court's duty is to do its best to assess appropriate damages, based on the most reasonably comparable authorities. The trial court restated in detail the evidence and submissions before it in respect of the Respondent's injuries, primarily PExh.5 and PExh.6. And further considered the authorities and proposals by the respective parties before it. As observed by the Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001 [2004] eKLR* the award of general damages is discretionary 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 in the first instance”.
23. The Respondent's injuries in this case, though of relatively severity, resulting in 10% permanent disability as confirmed by PExh.6 and the medical report by Dr. Jenipher. The Respondent maintains on appeal that the award on general damages was justified and in urging an award of Kshs. 1,000,000/- before the trial court relied on the decisions in *Jackson Mbaluka Mwangangi (supra)* and *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors Agoro Yombe Secondary School [2018] eKLR*. The plaintiff's injuries in the former case cited by the Respondent in the lower court involved blunt injury to the right shoulder and a fracture of the femur and compare well with injuries sustained by the Respondent. On appeal the claimant therein was awarded Ksh.600,000/- in general damages.
24. The Appellant on his part relied on *Reamic Investment Limited (supra)* which equally compares with this case as the claimant therein sustained a fracture of the femur and soft tissue injuries for which the appellate court awarded Ksh.350,000/- in general damages. Hencer the Appellant's proposal of Kshs. 300,000/- before the trial court and Kshs. 400,000/- before this court. That said, both parties are guilty of citing on this appeal, authorities not placed before the trial court. This practice is to be frowned upon and this court echoes the sentiments of *Ochieng J (as he then was) in Silas Tiren & Another v*



Simon Ombati Omiambo [2014] eKLR in that regard. Meanwhile, the trial court in awarding Kshs. 1,200,000/- for the injuries sustained by the Respondent did not specifically cite the decisions of the superior court it drew guidance from.

25. The sentiments of the English Court in *Lim Poh Choo v Health Authority* [1978] 1 ALL ER 332 and echoed by Potter JA in *Tayab v Kinany* (1983) KLR 14, quoting dicta by Lord Morris Borth-y-Gest in *West (H) v Sheperd* [1964] AC 326, at page 345 bear restating:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.”

See also *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] eKLR and *Kigaraari v Aya* [1982-88] 1 KAR 768.

26. Cumulatively, it appears upon my own review of the material presented before the trial court and comparison with authorities cited on this appeal, that the general damages award is rather high and excessive and possibly erroneous estimate in the circumstances of this case. The court feels justified in interfering. There is merit in the main appeal and the court will set aside the award of the trial court and substitute it with an award of Kshs. 800,000/- as general damages for pain, suffering and loss of amenities.
27. Concerning the cross-appeal, it is evident from the Respondent’s pleadings captured earlier in this judgment that he specifically damages for diminished earning capacity and future medical expenses. The trial court in its judgment appeared alive to the claims but whether by inadvertence or not, failed to consider the claims and to make awards thereon. The distinction between lost earnings and diminished earning capacity is now settled. The Court of Appeal in *S J v Francesco Di Nello & Another* [2015] eKLR while making the distinction 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 for by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Llyod’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

28. The court proceeded to state that: -

“The correct position as in the *Fairley* case (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* CA No. 251 of 1996 as hereunder:



“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved.”

In the authority of *Butler v Butler* [1984] KLR 225, the issue of awarding damages for loss of earning capacity was carefully considered and Chesoni Ag. JA (as he then was) said:

“Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ... Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

29. The Respondent in his pleadings claimed, “damages for lost earning and or diminished earning capacity for 17 months from the date of the accident within period his injuries will heal and rehabilitate”. However in his cross-appeal, he specifically challenged the trial court’s decision for failure to award damages for diminished earning capacity. The trial court did not address the issue in its judgment and its award of general damages was clearly stated to encompass compensation for pain, suffering and loss of amenities. That said, the onus was on the Respondent to prove his claim. His adopted witness statement dated 24.09.2019 ideally reiterated the averments in paragraph 7 of the plaint replicated elsewhere in this judgment.

30. PExh.6 and the medical report by Dr. Jenipher dated 24.09.2019 highlighted the sequela arising from the Respondent’s injuries. Both doctors assessed the degree of permanent incapacity at 10%. The Court of Appeal in *Mumias Sugar Co. Ltd v Francis Wanalo* [2007] eKLR restated the findings in *Butler v Butler* [1984] KLR 225. In that case, 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.

31. The court stated that :

“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.”

See also *James Mukatui Mavia v M. A. Bayusuf & Sons Limited* [2013] eKLR

32. A global award where monthly income is unknown is also an appropriate way of assessing damages for diminished earning capacity. Based on the Respondent’s evidence, the consequence of his injuries was diminished or loss of earning capacity as a carpenter. Though not totally incapacitated, the Respondent could return to his trade upon recovery with slight incapacitation. The Respondent specifically sought an award of diminished earning capacity in the sum of Kshs. 350,000/-. In the court’s view a global sum of Kshs. 350,000/- is reasonable and adequate damages for diminished earning capacity.



33. Equally, the claim for future medical expenses was pleaded, but the trial court failed to consider or award damages under the said head. The court agrees with the Respondent's counsel that a plaintiff who suffers injury is entitled to future medical expenses arising from any necessary remedial medical procedures to mitigate the adverse sequela arising from such injuries. Such a plaintiff is duty bound to justify the expenses. In this instance, the Respondent was seeking future medical expenses related to removal of the metal implant. PExh.6 estimated the cost at Kshs. 100,000/- whereas Dr. Jenipher estimated that the procedure would cost Kshs. 40,000/- at Kenyatta National Hospital. Taking an average of the two figures, and the fact that the procedure was described as elective, the court is persuaded to award the sum of Kshs. 70,000/- as costs of future medical expenses.
34. In conclusion, both the main appeal and cross appeal have succeeded and are allowed. In the result, the awards in respect of general damages by the trial court are hereby set aside, and in addition, the court allows the claims in respect of diminished earning capacity and future medical expenses. The Court substitutes therefor the following awards:
- a. General damages for pain, suffering and loss of amenities: Kshs. 800,000/- (Eight Hundred Thousand Shillings).
 - b. General damages for diminished earning capacity: Kshs. 350,000/ (Three Hundred and Fifty Thousand Shillings).
 - c. Future Medical Expenses Kshs. 70,000/- (Seventy Thousand Shillings).
35. The award for special damages was not challenged on appeal and is therefore maintained as awarded by the lower court. As both appeals have succeeded, each party will bear their own costs on this appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kabita

For the Respondent: Ms Gichana h/b for Mr Kiondi

C/A: Carol

