



REPUBLIC OF KENYA



**Mburu & another v Kinge (Civil Appeal 277 of 2023)  
[2024] KEHC 1889 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1889 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 277 OF 2023  
FN MUCHEMI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**PETER NJOROGE MBURU ..... 1<sup>ST</sup> APPELLANT**

**CATHERINE MUTHONI IRUNGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**COLLINS MUTUA KINGE ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. C. A. Otieno Omondi  
(SRM) delivered on 26th February 2021 in Ruiru SPMCC No. 310 of 2019)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment in Ruiru SPMCC No. 310 of 2019 in a claim arising from a road traffic accident whereby liability was apportioned at the ratio of 80 : 20 in favour of the respondent as against the appellants. The respondent was awarded general damages of Kshs. 2,500,000/- for pain suffering and loss of amenities, Kshs. 90,000/- for future medical expenses, Kshs. 400,000/- for diminished capacity and Kshs. 293,508/- for special damages.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 13 grounds as follows:-
  - a. The learned trial magistrate erred in fact and in law by awarding an inordinately high award for general damages for pain suffering and loss of amenities at of Kshs. 2,500,000/-;
  - b. The learned trial magistrate erred in law and in fact in awarding future medical expenses of Kshs. 90,000/- without any concrete documentary evidence;
  - c. The learned trial magistrate erred in law and in fact in awarding diminished and/reduced earning capacity of Kshs. 400,000/- yet the respondent was a student;



- d. The learned trial magistrate erred in law and in fact in awarding special damages of Kshs. 293,508/- which the respondent failed to prove.
3. Parties put in written submissions to dispose of the appeal.

### **Appellants' Submissions**

4. The appellants submit that the treatment notes and the plaint indicate conflicting injuries as suffered by the respondent. According to the plaint dated 6/2/2019, the respondent sustained the following injuries:- severe head injury with cranial and basal fractures, diffuse axonal injury & coma for 8days, acute right epidermal hematoma and anterior left subarachnoid haemorrhage, retrograde amnesia and contusion, right eye optic neuropathy with severe loss of visual acuity in the same eye at 3/60 not improving with refraction; multiple bruises and lacerations on the scalp; fracture of the right radius; segmental fracture of the left tibia; distal fracture of the left tibia and bruises and lacerations over lumbar region. The medical report by Dr. Nicholas Koome dated 28/2/2017 lists similar injuries to those of the plaint.
5. The P3 dated 11/9/2016 indicates that the respondent sustained severe head injuries with periorbital swelling, fracture of the tibia and fibula whereas the treatment notes from Kenyatta National Hospital dated 19/9/2016 indicate that the respondent sustained severe head injury, fracture of the tibia and radius and post traumatic confusion. Thus, the appellants submit that from the treatment notes and P3 Form, there is no indication that the respondent was in a coma or suffered any of the injuries as listed in the plaint. Furthermore, the respondent did not experience any form of blindness as he was examined at Lions Sightfirst Eye Hospital where both of his eyes were found to be normal. In view of the foregoing, the appellants contend that the respondent sustained severe head injury, fracture of the fibula and radius and therefore the award of Kshs. 2,500,000/- for pain, suffering and loss of amenities, Kshs. 400,000/- for diminished capacity and Kshs. 293,508/- for special damages was unwarranted. The appellants argue that the sum of Kshs. 600,000/- will be sufficient and adequate compensation for the respondent and relies on the cases of S.A.O (Minor suing through next friend M.O.O) vs The Registered Trustees of the Anglican Church of Kenya Maseno North Parish [2017] eKLR where the plaintiff sustained a head injury with brain concussion and damage to the right lower mandible jaw and left cheek, blunt chest injury, multiple lacerations/bruises on the right elbow joint, fracture of the right tibia at the mid shaft region, compound fracture of the left tibia/fibula at the distal metaphysis, multiple cut wounds on the left ankle joint involving thigh down to knee region, fracture left ankle joint involving malleolus bones and dislocation right ankle joint. The court enhanced an award of Kshs. 200,000/- to Kshs. 600,000/- in 2017. The appellants further cited the case of Gladys Lyaka Mwombe vs Francis Namatsi & 2Others [2019] eKLR where the plaintiff sustained head injury, cut wounds on the scalp, spinal cord neck injury and fracture of the left lower limb. General damages were awarded at Kshs. 300,000/- by the trial court which was upheld by the High Court on appeal. In Daniel Otieno Owino & Another vs Elizabeth Atieno Owuor [2020] eKLR the respondent sustained injuries involving compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose, blunt chest injury, soft tissue injury on the left lower limb involving the high ankle region. Permanent incapacity was assessed at 50% and the court substituted an award of Kshs. 600,000/- as general damages with Kshs. 400,000/-.
6. The appellants further argue that the award for future medical expenses at Kshs. 90,000/- was not supported as the treatment notes from Kenyatta National Hospital and the P3 Form did not indicate that the respondent would suffer any future medical complications as a result of the accident. Furthermore, the appellants contend that Dr. Koome examined the respondent 5 months after the accident and thus it cannot be ascertained whether in the said duration, the respondent was involved



in another accident that led to Dr. Koome to find that the respondent would require future medical treatment. Consequently, the appellants urge the court to dismiss the award as it was not proved to the required standard.

7. The appellant further submit that the sum of Kshs. 293,508/- was not proved by the respondent as the respondent only produced a receipt of Kshs. 10,000/- in respect of the medical report as prepared by Dr. Koome.
8. The appellants contend that the trial magistrate erred by awarding a sum of Kshs. 400,000/- as diminished capacity yet the respondent was a student. The respondent was involved in an accident on 11/9/2016 and he completed his studies on December 2019 and testified in court on 8/9/2020. Thus, the appellants argue that the respondent ought to have shown through tangible evidence how the accident affected him as a student to the extent of not completing his studies or that he could not get employment as a result of the injuries. To support their contentions, the appellants rely on the case of *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR. Thus, in the absence of proof, the appellants urge the court to dismiss the award of diminished capacity.

### **The Respondent's Submissions**

9. The respondent submits that an award of Kshs. 2,500,000/- for pain suffering and loss of amenities in the circumstances of the case was commensurate with the injuries he sustained which incapacitated him at the degree of 50% due to the loss of sight in the right eye. The respondent further submits that Dr. Godfrey Nyaga confirmed that he has 30% loss of eyesight of the right eye which remains irreversible. The respondent further contends that he spent 8 days at the Intensive Care Unit (ICU) and underwent physiotherapy for 26 days. The appellant thus submits that the multiple injuries he sustained are evidenced in the medical reports.
10. The respondent argues that the appellants did not call any witnesses during trial and it is at the submissions stage that they gave lengthy submissions on the issue of permanent loss of eyesight on the basis of the report by their doctor which was not produced in court. Whilst relying on the cases of *Benson W. Kaos & 72 Others vs The Hon. A.G. & 85 Others* (2022) eKLR and *Daniel Torotich arap Moi vs Mwangi Stephen Muriithi & Another* (2014) eKLR, the respondent argues that submissions do not constitute evidence and thus his evidence in support of the case in the lower court remains unchallenged.
11. The respondent states that the sum of Kshs. 90,000/- for future medical expenses is justified as he had an implant in the left tibia which will require to be removed in the future. Moreover, the respondent submits that the appellants did not offer any evidence on the contrary and thus the sum of Kshs. 90,000/- as awarded by the trial court was justified.
12. The respondent submits that an award of loss of earnings when the claimant is not employed yet does not necessarily require the production of documents to prove the same. The respondent argues that he lost part of his eye sight having just graduated yet he has a long working life ahead of him. Further given the nature of his profession which involves long hours of computer work, partial loss of his eye sight is a great loss to him as it impairs his equal chances of getting employment in the future. Thus, the respondent submits that the award of Kshs. 400,000/- was justified.
13. On the award of special damages, the respondent contends that he pleaded for a sum of Kshs. 890,127/- yet the trial court awarded him Kshs. 293,508/- which was found to be proved by receipts.
14. The respondent submits that the allegation by the appellants that the trial court disregarded their defence lacks merit as the appellants only filed their defence and did not offer any evidence in support



of their allegations in the defence. Consequently, the respondent argues that his evidence in the lower court remained uncontroverted. The respondent relies on the cases of Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others (2009) eKLR and Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya [2007] eKLR to support his contentions.

15. The respondent relies on Section 78 of the *Civil Procedure Act*, Order 42 Rule 27 of the Civil Procedure Rules and the case of Wanjie & Others vs Sakwa & Others (1984) KLR 275 and submits that the appellants' application to put in their medical report and call the medical doctor as a witness is merely a ploy by the appellants to relitigate the case afresh. Furthermore, the respondent argues that the appellants have not demonstrated any exceptional circumstances to constitute a sufficient reason for receiving fresh evidence at this stage.
16. The respondent further submits that the appeal is an abuse of the court process and ought to be struck out in its entirety from the onset as it is an attempt to re-open the appellant's case at appeal. The appellants were accorded an opportunity to present their evidence before the magistrate's court and to ventilate their defence on 8<sup>th</sup> September 2020 but they sought an adjournment on account of their own inadvertence which the trial court declined marking the closure of their case. The appellants having being aggrieved by the said order, filed an application dated 3/10/2020 in which they sought review of the proceedings and reopening of the defence case and the same was dismissed for lack of merit vide a ruling dated 29/1/2021. Relying on the case of Akamba Public Road Services Ltd vs Patrick Okille Meru HCCA No. 16 of 2000, the respondent argues that the appellants were presented with an opportunity to present their case at the lower court which they forewent by seeking adjournments and therefore they could not revisit the same at appeal.

### **Issues for determination**

17. The main issues for determination are:-
  - a. Whether the award on general damages was manifestly excessive.
  - b. Whether the award of loss of earning capacity was made without consideration of the applicable principles;
  - c. Whether damages for future medical expenses was properly awarded.
  - d. Whether the special damages awarded were specifically pleaded and proved.
  - e. Whether the trial court considered the appellant's defence.

### **The Law**

18. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs 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.”

19. In *Gitobu Imanyara & 2 Others vs 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.

20. 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 on general damages is manifestly excessive.**

21. The Court of Appeal in *Catholic Diocese of Kisumu vs 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 awarded different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only 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.”

22. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

23. The plaint filed on 9<sup>th</sup> September 2019 by the respondent shows injuries sustained as follows:-
  - a. Severe head injury with-Cranial and basal skull fracturesDiffuse axonal injury and coma for 8 daysAcute right epidermal hematoma and anterior left subarachnoid hemorrhageRetrograde amnesia and contusionRight eye optic neuropathy with severe loss of visual activity in the same eye at 3/60 not improving with refraction



- b. Multiple bruises and lacerations on the scalp
  - c. Fracture of the right radius
  - d. Segmental fracture of the left tibia
  - e. Distal fracture of the left fibula
  - f. Bruises and lacerations over the lumbar region.
24. The trial magistrate awarded a sum of Kshs. 2,500,000/- for general damages, pain and suffering. The appellants submit that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The appellants argue that the injuries sustained by the respondent as pleaded in the plaint differ from the treatment notes. It was submitted that the respondent sustained a severe head injury and a fracture of the fibula and radius and urges the court to award Kshs. 600,000/- based on the case law cited. The respondent submits that the award is justifiable and comparable to the injuries he sustained.
25. From the record of appeal, the injuries sustained by the respondent as pleaded in the plaint were confirmed by Dr. Nicholas Koome in his medical report dated 28/2/2017. In the said report, Dr. Koome indicated that he relied on the summary notes from Kenyatta National Hospital, restore physiotherapy Rehab Centre, the P3 Form and the radiographs. Upon examination of the respondent, he classified the degree of injury as grievous harm and assessed permanent disability at 50%.
26. The P3 Form dated 11/9/2016 indicates that the respondent sustained severe head injury, fracture of the tibia and fibula and altered level of consciousness. The report further indicates that the respondent was initially in a coma for eight (8) days. The treatment notes from Kenyatta National Hospital particularly the case summary indicates that the respondent sustained severe head injury fracture of the fibula and radius. The case summary further indicates that the respondent was admitted on 19/9/2016 and discharged on 3/11/2016, which is about 1 month and 15 days.
27. The respondent was further referred from Kenyatta National Hospital to Restore Physiotherapy Rehabilitation Centre for further treatment. He was admitted on 3/11/2016 and discharged on 29/11/2016. The respondent also underwent treatment at Lions Sightfirst Eye Hospital on 16/1/2017 where he was diagnosed with optic neuropathy and the doctor found that his visual activity was 3/60 and was not improving with refraction. Although the appellants argue that the respondent did not suffer any form of blindness as according to the ophthalmoscopy both of his eyes were found to be normal, they have not offered any evidence to contradict the same. Similarly on the injuries sustained by the respondent, the appellants did not challenge the respondent's evidence in the trial court nor did they call any witnesses. Moreover, the treatment notes from Kenyatta National Hospital, Restore Physiotherapy Rehabilitation Centre, P3 Form, various MRI scans, CT scan reports and x-rays and notes from Lions Sightfirst Eye Hospital confirm the respondent sustained the injuries as listed in the plaint and medical report by Dr. Koome.
28. The appellants further argue that the respondent ought to be given an award of Kshs. 600,000/- for pain suffering and loss of amenities. Looking at the decisions relied on by both parties, the decisions cited by the appellants contain injuries that are less severe than those the respondent suffered whereas the ones cited by the respondent contain injuries which are more severe than those he sustained in this case. The learned magistrate when arriving at the award of Kshs. 2,500,000/- took into consideration the nature of the injuries suffered by the respondent and the degree of permanent disability which was assessed at 50% due to the loss of his eye sight in the right eye. Taking into consideration the severity of the respondent's injuries which required him to undergo surgery and physiotherapy, the degree



of permanent disability and the duration the respondent spent in hospital, it is my considered view that Kshs. 2,500,000/- is reasonable compensation as general damages for pain, suffering and loss of amenities.

**Whether the award of loss of earning capacity was made without consideration of the applicable principles.**

29. The Court of Appeal in *Butler vs Butler* [1984] KLR 225 had this to say:-

A plaintiff's loss of earning capacity occurs where, as a result of his 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...It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of general damages.

30. The award of loss of earning capacity is given to a party who shows that the disability due to the accident has reduced his earning capacity. This principle was enunciated in the case of *Mumias Sugar Limited vs Francis Wanalo* [2007] eKLR where the court held:-

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 of the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market, while the justification for the award where the plaintiff is not employed at the date of the trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future....

31. The appellants in the instant case argue that the respondent should not have been awarded damages under this head as he was a student and that is not an occupation. From the case law cited, it is evident that one need not be employed for one to benefit from this award. What one needs to show is the risk he will not get employed due to the disability he has been exposed to. The respondent testified that he was a student at JKUAT pursuing a Bachelor's degree in Business Information Technology at the time of the accident and due to the said accident he lost his eye sight in the right eye. The loss of his eye sight in the right eye impairs the respondent's equal chances of getting employment in the future given the nature of his profession. Moreover, despite the injuries he sustained, the respondent graduated in his degree course in 2019. Thus, it is my considered view that a sum of Kshs. 400,000/- is reasonable compensation and ought not to be disturbed.

**Whether damages for future medical expenses was properly awarded.**

32. The Court of Appeal in the case of *Tracom Limited & Another vs 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 vs 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.

33. The appellant faults the trial court for awarding Kshs. 90,000/- as future medical expenses for the sole reason that the same was not proved. The medical report by Dr. Koome dated 28/2/2017 indicated that the respondent would require further treatment to remove the implant in the left lower limb at an approximate cost of Kshs. 90,000/-. The respondent pleaded for future medical expenses in his plaint and proved the same through the medical report by Dr. Koome. The appellants did not produce any evidence to counter that of the respondent. Thus, it is my considered view that the award for future medical expenses was made in consideration of the applicable principles and ought not to be disturbed.

#### **Whether the special damages awarded were specifically pleaded and proved.**

34. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved.....for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

35. The appellants argue that the sum of Kshs. 293,508 was not proved by the respondent. On perusal of the court record, in his plaint dated 6<sup>th</sup> February 2019, the respondent pleaded Kshs. 890,127/- as special damages. The trial court awarded Kshs. 293,508/-. The court record shows that the respondent pleaded and proved the sum of Kshs. 293,508/- as follows:- Kshs. 20,000/- for court attendance as pleaded by the respondent although he produced receipt no. 246 of Kshs. 60,000/-, receipt no. 083 for Kshs. 10,000/- for the medical report, receipt no. 499 for Kshs. 69,500/- for nursing care, buying crutches and gastric peg and invoice dated 19<sup>th</sup> September 2016 for Kshs. 194,008/-.
36. The claim by the appellant that special damages of Ksh.293,508 awarded to the respondent was not proved has no basis.

#### **Whether the trial court considered the appellant's defence.**

37. I have perused the court record and noted that the matter proceeded for full hearing on 8/9/2020 where the appellants sought to proceed with the respondent's case only as their witness, a doctor was in Thika. The court allowed the adjournment and scheduled the matter for defence hearing on 21<sup>st</sup> September 2020. On 21<sup>st</sup> September 2020, the appellants were not ready to proceed on grounds that their witness, the doctor travelled to Molo. The application for adjournment was opposed and the trial court declined to grant an adjournment on the basis that no evidence was availed to prove the doctor



was in Molo and that the date was taken in the presence of the appellants' advocates. The appellants then filed an application on 3<sup>rd</sup> October 2020 seeking for orders of review or setting aside of the orders of 21<sup>st</sup> September 2020 and give the appellants a chance to call their key witness, the doctor. The trial court rendered its ruling on 29<sup>th</sup> January 2021 and dismissed the appellants' application on the grounds that they had been given ample time to present their case but failed to do so leading to their application for adjournment being declined.

38. It is evident that the appellant filed his statement of defence dated 20<sup>th</sup> September, 2019. The respondent filed a reply to the defence challenging the contents of the defence. The appellant was required to support his defence with evidence which he failed to do. The judgment of the honourable magistrate was well reasoned and considered all the issues raised by the parties in their pleadings as well as the evidence adduced. It is therefore, incorrect for the appellant to claim that his defence was not considered. The correct position is that the appellant did not adduce any evidence in support of his defence.

### **Conclusion**

39. It is therefore my finding that the appeal lacks merit and is hereby dismissed with costs to the respondent.
40. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUCHEMI**

**JUDGE**

