



**Don Woods Company Limited & another v Leajore (Civil Appeal
E034 of 2023) [2024] KEHC 1878 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E034 OF 2023
LM NJUGUNA, J
FEBRUARY 28, 2024**

BETWEEN

DON WOODS COMPANY LIMITED 1ST APPELLANT

PETER OTIENO ODERO 2ND APPELLANT

AND

DAVID SAGINI LEAJORE RESPONDENT

*(Appeal arising from the decision of Hon. L. Ambasi CM in Chief Magistrate's
Court at Embu CMCC No.17 of 2020 delivered on 27th March 2023)*

JUDGMENT

1. The appellants have filed a memorandum of appeal dated 13th July 2023 challenging the decision of the trial court and seeking orders that the appeal be allowed, the award of Kshs.2,000,000/= as general damages and Kshs.2,517,494/= as damages for loss of future earning capacity be set aside and the same be substituted with lesser amounts in view of the pleadings, evidence and submissions, and costs of the appeal. The appeal was premised on the grounds that the learned magistrate erred in law and fact:
 - a. By awarding general damages of Kshs.2,000,000/= which award is inordinately high in the circumstances;
 - b. By proceeding to award loss of future earning capacity at Kshs.2,517,494/= which award is inordinately high in the circumstances and which is not supported by evidence adduced;
 - c. In using a multiplier of 35 years while assessing the damages for loss of future earning capacity, which multiplier was inordinately high in the circumstances;



- d. By failing to consider the evidence and exhibits on record, the defendant's list of documents, submissions and the authorities annexed thereon in awarding damages for loss of future earning capacity;
 - e. By failing to consider the consent by the parties which was adopted by the court, but went ahead to admit it as far as liability and dismiss the rest of the items;
 - f. By apportioning liability as per the consent, yet she had dismissed the consent; and
 - g. By failing to adopt the part of the consent by the parties, which was to the effect that they could produce documents without calling the makers of the same, thereby disregarding the appellant's bundle of documents.
2. The claim was filed through the plaint dated 07th February 2020 in which the plaintiff/respondent sought judgment against the defendants/appellants for general damages, special damages of Kshs.30,783/=, damages for loss of future earning capacity and costs of the suit with interest. The particulars of the claim were that on 01st October 2017, the plaintiff/respondent was lawfully and carefully travelling as a pillion passenger on motorcycle registration number KMEE 986X along Embu-Meru road when the motor vehicle registration number KBU 932A was so recklessly and carelessly driven that the same was allowed to knock down the plaintiff occasioning him severe bodily injuries and has since suffered loss and damage.
 3. In the plaint, the respondent listed the injuries he suffered as a result of the accident and he also produced documentary evidence in support of his claim for damages. The appellants filed their statement of defense in which they denied the allegations made by the respondent in the plaint and attributed negligence to him. The matter proceeded to hearing. The parties agreed on apportionment of liability at the ratio of 90%:10% in favour of the respondent and that they did not need to call the makers of the documents that would be produced as evidence. This consent was recorded and adopted by the court. However, the court issued a ruling reviewing its order adopting the consent and stated that the consent is only adopted to the extent of apportionment of liability.
 4. The parties were directed to file their submissions on quantum and the court took viva voce evidence. PW1 was the respondent who adopted his witness statement as evidence-in-chief, wherein he narrated the circumstances under which the accident occurred. He also produced documentary evidence and added that as part of the treatment, metal implants were placed in his right hand and will need to be removed in the future at a cost. He urged the court to grant the prayers sought. The appellants did not testify, neither did they call any witnesses but they relied on their written submissions.
 5. The trial court found that the appellants were 90% liable for the accident and awarded special damages of Kshs.3,550/=, general damages of Kshs.2,000,000/= and Kshs.2,517,494/= as damages for loss of future earnings. She relied on the cases of North End Trading Company Limited registered as Kenya Refuse Handlers Limited v. City Council of Nairobi (2019) eKLR, Montex Kinitwear Limited v. Gopitex Knitwear Mills Limited (2007) eKLR, Edward Mariga through Stanley Mobisa Mariga v. Nathaniel David Shutler & Another (1979) eKLR and CMC Aviation Limited v. Crusair Ltd (No.1) (1987) KLR 103.
 6. The appeal was canvassed by way of written submissions.
 7. In their submissions, the appellants relied on their pleadings and the case of Boniface Waiti & Another v. Michael K. Kamau (2007) eKLR and stated that damages are not supposed to enrich the respondent and should be awarded modestly. That the award of Kshs.2,000,000/= was inordinately high and should be reduced and they placed reliance on the cases of John Njenga Maina v. Humprey K. Bukenia



- (2016) eKLR where the court awarded Kshs.750,000/= and *Jane Macharia v. Godfrey M. Mnega & Another* (2020) eKLR. On loss of future earning capacity, they submitted that the respondent alleged that he was a rider earning Kshs.1,500/= daily but he did not produce a driving or PSV licence to prove that he was a rider. That the trial magistrate erred in applying a multiplier of 35 years to the minimum wage in awarding damages under this head.
8. They relied on the case of *Charles Mwaniki v. Costal Kenya Enterprises Limited* (2016) eKLR where damages under this head were assessed at Kshs.750,000/= where the plaintiff suffered 20% incapacity. They urged the court to find that the degree of incapacity that would diminish future earnings, was not proved in order to warrant this award. It was their case that if this appellate court should decide to go by the multiplier method, a multiplier of 25 years should be used and not 35 years. That the trial court erred in failing to adopt the entire consent by the parties and then went ahead to fault the appellants for failing to produce any documents as evidence and therefore their evidence was not considered. They urged the court to consider their evidence and submissions at the trial and then allow the appeal.
 9. The respondent submitted that the consent adopted by the trial court was only meant to apportion liability and nothing else. He relied on the cases of *Dorcas Wangithi Mwaura v. Samuel Kaburu Mwaura* (2015) eKLR where the court awarded Kshs.2,000,000/= as general damages for similar injuries and *Zipporah Nangalia v. Eldoret Express Limited & 2 Others* (2016) eKLR where the court awarded general damages of Kshs.2,400,000/= for similar injuries.
 10. It was also his argument that the trial court was well persuaded by the available evidence and exercised its discretion on the awards which were not too high or too low. Reliance was placed on the case of *Peter Namu Njeru v. Philemone Mwangoti* (2016) eKLR where it was held that damages may only be unsettled by an appellate court if the same are erroneous. On the award for loss of future earning capacity, the respondent relied on the cases of *Butler v. Butler* (1984) KLR 225, *John Wamae & 2 others v. Jane Kituku Nziva & Another* (2017) eKLR and *Beartice Murage v. Consumer Transport Ltd & Another* (2014) eKLR where the court held that the minimum wage may be applied as a multiplicand where proof of earnings is absent.
 11. That the trial magistrate correctly applied the minimum wage of Kshs.17,982.10/= for a driver according to the Regulation of Wages (General) (Amendment) Order, 2017. He relied on the case of *Hellen Waruguru Waweru* (suing as the Legal Representative of Peter Waweru Mwenja (Deceased)) v. *Kiarie Shoe Stores Limited* (2015) eKLR and urged the court to uphold the findings of the trial magistrate.
 12. In my view, the issues for determination are as follows:
 - a. Whether general damages as awarded by the trial court are inordinately high;
 - b. Whether the trial court should have awarded damages for loss of future earning capacity; and
 - c. Whether the trial magistrate should have considered the consent initially recorded by the parties.
 13. It is worth reiterating that the appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Okeno vs. Republic* (1972) EA 32 wherein the court held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion. It must make its own finding and draw its own conclusions



only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

14. On the issue of whether the general damages awarded are inordinately high, I shall revisit the nature of injuries suffered by the respondent. It was the respondent's case through the plaint, that he suffered the following injuries: fractures on the right radius, right ulna, midshaft fibula and midshaft tibia, lacerations on the scalp and right cheek, recurrent headaches, pain on the right forearm and the right lower leg, inability to fully utilize the right hand, difficulty in walking, lacerated scar on scalp and right cheek, surgical scar on right forearm, healed fractures and he walks with a limp.
15. According to the medical examination report by Dr. Okere, the respondent sustained the following injuries: lacerations on the scalp and right cheek, fractures on the right radius, ulna midshaft tibia and fibula. The report stated that the respondent was complaining of recurrent headaches, pain in the right forearm, inability to fully utilize the right hand and difficulty in walking. That there were metal implants placed within the fractured areas and the same would need to be removed at a cost of Kshs.150,000/=.
16. General damages for pain and suffering are usually awarded by the court on its discretion but the award is guided by the nature of injuries sustained and decided cases where the plaintiff suffered similar injuries. It is not the intention of the courts to award damages that are either inordinately high so as to enrich the plaintiff, or inordinately low so as to fail to compensate the injured person for the pain and loss suffered. In the case of *John Kipkemboi & Another v. Morris Kedolo* (2019) eKLR the court stated:

“The assessment of damages in personal injury case by court is guided by the following principles: -

 - 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained;
 - 2) The award should be commensurable with the injuries sustained;
 - 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts;
 - 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account; and
 - 5) The awards should not be inordinately low or high (See *Boniface Waiti & another Vs Michael Kariuki Kamau* (2007) eKLR.”
17. In the present case, the court awarded Kshs.2,000,000/= as general damages for pain and suffering. In the case of *Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd* [2013] eKLR, the claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joint associated with a fracture of the radial head; dislocation of left lunate bone and bruises on the parietal scalp. The Court of Appeal awarded Kshs. 1,500,000/= general damages when in fact the fractures in the case were much more serious.
18. In the case of *Joseph Musee Mua vs. Julius Mbogo Mugi & 3 Others* [2013] eKLR, the claimant sustained much more serious injuries resulting in surgeries in several hospitals and treatment. He had an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right



shoulder injury as well as bruises on the left elbow. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected and the Court awarded KShs.1,300,000/= as general damages.

19. In the case of Mwaura Muiruri vs. Suera Flowers Limited & Another [2014] eKLR the Plaintiff sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left sub-axillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia compound double fractures of the right leg upper and lower third tibia fibula. Court awarded Kshs.1,450,000/=.
20. In the case of James Gathirwa Ngungi vs. Multiple Hauliers (EA) Limited & another [2015] eKLR the Plaintiff suffered compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of left ulna, head injury, deep cut wound of the parietal region about 4cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological /re-fracture of the right leg. Court awarded KShs.1,500,000/=.
21. The above cited guiding cases were decided in the years 2013, 2014 and 2015. Much time has passed since and the economy has changed. It is my view that for the injuries suffered herein, an award of Kshs.2,000,000/= as awarded by the trial court is modest in the circumstances.
22. On the question of whether the damages for loss of earning capacity should have been awarded, the trial magistrate stated that she relied on the evidence available on record. At the trial, the appellants did not adduce any evidence to controvert the position taken by the respondent but they relied on their submissions. The respondent stated that he was a 25-year-old motorcyclist who used his motor cycle to earn a living. The trial magistrate applied the minimum wage as a multiplicand and a multiplier of 35 years and then she reduced the amount by 70%, stating that the respondent did not suffer any permanent incapacity from the accident. The appellant still thinks that the award, which is 30% of what should have been awarded, is inordinately high.
23. From the medical examination report by Dr. Okere, the respondent suffered 20% permanent incapacity of the forearm and 30% permanent incapacity on the right leg. The trial magistrate considered this incapacity and reduced the award by 30%.
24. The plaintiff/respondent, sought for damages for loss of future earning capacity. The crafting of the prayer in the plaint is not clear to the court as the court can draw 2 meanings from it. First, it can be interpreted to mean that as a result of the accident, the respondent has suffered such incapacity that he will be completely unable to earn an income from his business of riding a motor cycle because he will not be able to ride. This meaning should lead to a claim for damages for loss of future earnings, which falls under special damages that should be specifically pleaded and strictly proved.
25. The second meaning that can be deduced from the prayer is that as a result of the accident, the respondent suffered injuries that will reduce his normal ability to return to his motorcycle business but does not altogether discount the fact that he will be able to earn an income. From this meaning, the respondent can seek for damages for diminished/ loss of earning capacity, which is usually awarded as general damages and is assessed with reference to applicable jurisprudence.
26. The distinction between these 2 claims was discussed in the case of in S J v. Francesco Di Nello & another [2015] eKLR where the Court of Appeal held 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 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 by an award in general damages, once proved. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd's Law Reports 40 at pg 14 wherein Lord Denning M. R. said in part as follows:

“It is important to realize that there is a difference between an award for loss of earning 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.”

27. Further, in the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

28. Additionally, on the same issue, the court in the case of *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR stated thus:

“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 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 factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

29. The court reiterated this position in the case of *Butler v. Butler* [1984] KLR 225 at 232 (supra) where it was held:

“Loss of earning capacity 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 by Lord Denning M.R. in *Fairely vs John Thompson (Design & Contracting Division) Ltd* [1973]2 Lloyd's Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

30. In my view, it is not clear as to whether the respondent sought for special damages for loss of future earnings or general damages for diminished/loss of earning capacity. Having determined that these are 2 distinct heads, I think that the trial court should not have made an award for loss of future earning capacity as the same was not clearly pleaded by the respondent. In any event, it is not upon the courts to interpret the meaning of pleadings where counsel or parties fail to clarify the prayers sought. To do so is to descend into the arena of litigation, and far be it from the courts to do so.

31. On the issue of whether the trial court should have considered the consent in its entirety, I shall review the proceedings of the trial court. On 22nd September 2022, the parties notified the court that they had agreed on apportionment of liability and that both parties would be producing their documentary evidence without calling the makers thereof. The consent was adopted by the court. On 20th December 2022, while in chambers, the trial magistrate reviewed the consent and only adopted it as far as apportionment of liability is concerned.



32. This ruling was delivered in court on 16th January 2023 in the presence of both parties. The matter proceeded to hearing where both parties were present. The respondent testified and then closed his case while the appellant's counsel stated that he relied on his written submissions. The ruling reviewing the parties' consent was not unsettled in any way. The appellants had the option of appealing against the said ruling but they did not. The issue, therefore, cannot be brought through this appeal because it has been beaten by time. More so, the ruling was delivered in the presence of both parties.
33. In the end, I find that the appeal partially succeeds, with orders as follows:
- a. The trial court's award of Kshs.2,000,000/= as general damages for pain and suffering is hereby upheld;
 - b. The trial court's award of Kshs.2,517,494/= as damages for loss of future earning capacity is hereby set aside;
 - c. Each party to bear its own costs of the appeal.
34. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the 1st Appellant

.....for the 2nd Appellant

.....for the Respondent

