



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kituva v Zuma (Civil Appeal E059 of 2022)  
[2024] KEHC 1827 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E059 OF 2022  
GMA DULU, J  
FEBRUARY 28, 2024**

**BETWEEN**

**VINCENT KITUVA ..... APPELLANT**

**AND**

**CYRIL MGANDI ZUMA ..... RESPONDENT**

*(From the judgment delivered by Hon. D. Wangeci (PM) at Wundanyi  
Law Courts on 7th November 2022 in CMCC Case No. E015 of 2021)*

**JUDGMENT**

1. In a judgment delivered on 7<sup>th</sup> November 2022 the learned trial Magistrate entered judgment in favour of the plaintiff and concluded as follows:-
  - “ 43. In the upshot, I enter judgment in favour of the plaintiff against the defendant as follows:-
    - a. Liability 100%
    - b. General damages Kshs. 600,000/=
    - c. Loss of earning capacity Kshs. 500,000/=
    - d. Future medical expenses Kshs. 60,500/=
    - e. Special damages Kshs. 153,720/=Total Kshs.1,216,020/=
  44. The plaintiff is also awarded the cost of the suit as well as interest at court rates.



2. Dissatisfied with the decision of the trial court, the appellant, who was the defendant in the trial court, has come to this court on appeal through counsel Philip Adede & Company on the following grounds:-
  1. That the learned Principal Magistrate erred in awarding a sum of Kshs. 600,000.00 to the respondent (herein after referred to as the plaintiff) as general damages for pain and suffering on the basis of 100% liability.
  2. That the said award of Kshs. 600,000.00 is in all the circumstances of this case so inordinately high that it amounts to a wholly erroneous estimate of damages awarded to the plaintiff considering the injuries suffered by him and the opinions of Dr. Kiema in his medical report dated 1<sup>st</sup> March 2021 and Dr. Udayan Sheth in his medical report dated 9<sup>th</sup> July 2021.
  3. That the said award of Kshs. 600,000.00 is altogether disproportionate to the injuries sustained by the plaintiff and is not in keeping with other comparable awards made in respect of similar injuries.
  4. That the learned Principal Magistrate erred in failing to consider or properly consider the medical report dated 9<sup>th</sup> July 2021 prepared by Dr. Udayan Sheth which was produced in evidence and marked (DEX1).
  5. That the learned Principal Magistrate erred in putting too much emphasizes on the medical report dated 1<sup>st</sup> March 2021 prepared by Dr. Darius W. Kiema as opposed to the one by Dr. Udayan Sheth dated 9<sup>th</sup> July 2021 when it was clear that Dr. Udayan Sheth being a Consultant Orthopaedic Surgeon is more qualified than Dr. Kiema who is an MBChB (Moi) with a Post Graduate Diploma in Diabetes, Royal Liverpool Academy (UK) and Dr. Sheth's report was more authoritative than Dr. Kiema's report.
  6. That the learned Principal Magistrate erred in awarding the sum of Kshs. 500,000.00 for future earning capacity when there was no documentary evidence led before him in respect of the same.
  7. The learned Principal Magistrate failed to give any or any adequate reasons of how she arrived at the figure of Kshs. 500,000.00 damages for loss of earning capacity which she awarded to the plaintiff on the basis of 100% liability.
  8. The learned Principal Magistrate erred in awarding to the plaintiff a sum of Kshs. 60,500.00 for future medical expenses when there was no documentary evidence led before her in respect thereof.
  9. That the learned Principal Magistrate erred whilst making awards under the various heads by failing to take into account that the general damages for pain and suffering, loss of earning capacity and future medical costs awarded to the plaintiff would be invested to earn interest. If the learned Principal Magistrate had borne that factor in mind it is reasonably possible that she would have awarded a lesser amount to the plaintiff under each head.
  10. That the learned Principal Magistrate erred in failing:-
    - a. To appreciate the significance of the various facts that emerged from Dr. Kiema's medical report dated 1<sup>st</sup> March 2021 and Dr. Udayan Sheth's medical report dated 9<sup>th</sup> July 2021.
    - b. To consider or properly consider all the evidence before her and/or



- c. To make any or any proper findings on the aspect of quantum of damages on the evidence before her.
11. That the learned Principal Magistrate erred in failing to adequately consider the written submissions filed by counsel for the defendant/appellant.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant's counsel as well as the submissions filed by the respondent's counsel.
4. This being a first appeal, I have to be guided by the principle restated in the case of *Selle =Versus= Associated Motor Boat Company Ltd (1968) EA 123* that I have a duty to put the evidence on record to a fresh evaluation and come to my own independent conclusions and inferences.
5. This also being an appeal principally on the quantum of damages awarded, I have to be guided by the principle that assessment of damages is an exercise of discretion by a trial court, and an appellate court should be slow to interfere with the exercise of that discretion unless the trial court took into account an irrelevant factor or failed to take into account a relevant factor or short of that the award is so inordinately low or so inordinately high, that it is obvious that it was an erroneous estimate of the damage – see *Kenfro Africa Ltd =Versus= A. M. Lubia & Another (1982 – 88) IKAR*.
6. At the trial, the respondent who was the plaintiff called three (3) witnesses PW1 Dr. Darius Wambua Kiema, PW2 Cyril Mgandi Zuma, and PW3 Cpl. Wesley Kirui. On their part, the appellant did not call any witness to testify but by consent the medical report prepared by Dr. Udayan Sheth was admitted in evidence, and thereafter parties counsel filed written submissions.
7. From the grounds of appeal as well as the written submissions filed herein, it is clear to me that the finding of the trial court of 100% liability in negligence has not been contested. The issue in contest are the amount of awards of Kshs. 600,000/= for pain and suffering, Kshs. 500,000/= for loss of earning capacity, and Kshs. 60,500/= for future medical expenses.
8. The main contention of the appellant's counsel is that the medical report of PW1 Dr. Kiema should have been overshadowed or superceded by the medical report of Dr. Udayan Sheth who is an Orthopaedic Surgeon while, Dr. Kiema was a general practitioner.
9. I have considered the two medical reports. The accident and injuries occurred in December 2020 while both medical reports were prepared in 2021. I note that the medical report prepared by Dr. Darius Wambua Kiema dated 1<sup>st</sup> March 2021 relied on treatment reports and notes relating the nature and effect of the injuries suffered. It also estimated costs of necessary future physiotherapy and cost of purchase of crutches. Disability was assessed at 30%. This doctor also testified in court and he was cross-examined.
10. On the other hand, the later medical report of Dr. Sheth was based on x-rays taken at the time of medical examination which would naturally capture the healing effect up to then. In addition, the doctor was not called to testify and be subjected to cross-examination.
11. In those circumstances, I find no mistake on the Magistrate placing more reliance on the report of Dr. Kiema than that of the Orthopaedic Surgeon Dr. Sheth, as the report of Dr. Kiema was more comprehensive and relied on treatment documents.
12. Coming now to the specific figures awarded by the learned Magistrates as damages under the various heads, I find nothing that would indicate that the Magistrate awarded amounts that were inordinately high to justify this court interfere with the power of the trial court to exercise its discretion in



assessing damages. The burden was on the appellant to demonstrate to this court that the awards were inordinate, and in my view the appellant has not in the submissions discharged that burden.

13. I thus find no merits in the appeal. I dismiss the appeal with costs to the respondent.

**DATED, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Alfred – Court Assistant

Ms. Mwanguo for appellant

Mr. Kazungu for respondent

