



REPUBLIC OF KENYA



**Mbasu & another v Swaka (Civil Appeal E061 of 2022)
[2024] KEHC 2210 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E061 OF 2022
REA OUGO, J
FEBRUARY 27, 2024**

BETWEEN

ENES MBASU 1ST APPELLANT

AL-RIAZ INTERNATIONAL LTD 2ND APPELLANT

AND

ISSA WANGA SWAKA RESPONDENT

JUDGMENT

1. The appeal before the court is against the trial magistrate's award on quantum. According to the Memorandum of Appeal, the appeal is premised on the following grounds:
 1. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum by awarding Kshs 300,000/- loss of earning capacity despite the respondent not tendering any evidence of earnings.
 2. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum by awarding Kshs 3,000,000/- for general damages an award which was excessive and erroneous estimate of the damages awardable compared to the injuries sustained by the plaintiff/ respondent.
 3. That the Learned Trial Magistrate erred in law and in fact in the assessment of quantum by awarding future medical expenses of Kshs 500,000/- despite the respondent not pleading nor proving.
 4. That the Learned Trial Magistrate erred in law and misdirected himself to the extent and value of the respondent's injuries and thereby erred in law in his assessment of damages.



5. That the Learned Trial Magistrate erred in law and in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that s appropriate and applicable in similar cases as the case she was deciding.
 6. That the Learned Trial Magistrate's exercise of discretion in the assessment of quantum was injudicious.
 7. That the Learned Trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions on both liability and quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived in unjustified decision on quantum.
2. The appellant seeks that the award of quantum be set aside and that the court should re-assess the evidence on record and make its award on damages.
 3. The background of the appeal is a road accident that occurred on 2/4/2020. The respondent was riding a motorcycle along Bungoma-Chwele road when the appellant's driver negligently drove motor vehicle reg. no. KBZ 575P causing the vehicle to lose control and knock the respondent. As a result of the accident, the respondent sustained the following injuries: mingled right foot with compound fractures of the right tibia and fibula; cut wound on the knee; below knee amputated right leg.
 4. A full trial ensued and at the end, the trial magistrate in his judgment found the appellants 100% jointly and severally liable for causing the accident. The issue of liability has not been challenged in this appeal.
 5. The appeal was canvassed by way of written submissions. The appellants filed their submissions on 13/6/2023. It was submitted that the court should find that the respondent sustained only below the knee and an award of Kshs 500,000/- would suffice. They cited the decision in *Charles Oriwo Odeyo v Appollo Justus Andabwa & another* [2017] eKLR where the court awarded Kshs 800,000/- to the Respondent who suffered an amputation to the right leg below the knee, injuries on his left leg leading to inability to walk, head injury leading to loss of consciousness and lacerations to the leg and hands.
 6. On future medical expenses, the trial court made an award of Kshs 500,000/- yet there was no basis for this award. In the respondent's plaint filed on 8/7/2020, there was a prayer for future medical costs however the respondent did not plead the exact amount. In the case of *Samuel Kipkemoi Kirui v Ibrahim Shero Husein & 2 others* [2016] the court stated that a claim for future medical expenses is a special damage claim. The respondent at the hearing indicated that he had an artificial limp which his brother bought him and the same is indicated to be Kshs 50,000/-. Therefore, if the respondent is awarded costs of future medical treatment while the same has been awarded as special damages for the sum of Kshs 50,000/- for the receipt dated 17/6/2020 from Orthopaedic, Technology, Physiotherapy and Occupation therapy services, the same will amount to unjust enrichment.
 7. On the issue of loss of earning capacity, the appellants submit that the award is a special damage claim which was not strictly proved. No material evidence was placed before the court in terms of the earnings of the respondent. The respondent alleged that he was a motorcycle rider earning Kshs 15,000/- yet there was no evidence to support his claim.
 8. The respondent opposed the appeal. In their submissions, they argue that the award of Kshs 3,000,000/- for pain and suffering is neither inordinately high nor excessive. In *Abdi Werdi Abdulahi v James Royo Mungatia & Another* (2019) eKLR, the court awarded the plaintiff therein Kshs 3,500,000/- after his right lower limb was amputated. Similarly, in *Macharia Francis Mundui & Another v Joel Wanje* (2017) eKLR, the court upheld an award of Kshs 3,000,000/- for pain and suffering to the plaintiff/respondent who suffered nearly similar injuries to the ones in the instant case



that included amputation of the leg below the knee. The award by the trial court was within the range of the cited decisions.

9. On the issue of loss of earning capacity, it was argued that the respondent's ability to engage in gainful employment was diminished due to the loss of the lower limb. In *Abdi Werdi Abdulabi v James Royo Mungatia* the court awarded the plaintiff therein who was a motorcycle rider aged 38 years old a global sum of Kshs 500,000/- under this head. The respondent in this case was 30 years old at the time of the accident and sustained a permanent disability assessed at 50% and therefore the award by the lower court was not excessive.
10. Finally, on the issue of future medical expenses, Dr. Charles Andai opined that the respondent will need an artificial leg and a good artificial leg would cost Kshs 500,000/-. In *Samuel Kipkemoi Kirui v Ibrahim Shero Husein & 2 Others* [2016] eKLR the amount of special damages was not disclosed in the medical report hence the court lacked a basis for awarding future medical expenses. The figure for future medical expenses was disclosed as Kshs 500,000/-. The trial court was therefore justified in making the award.

Analysis and Determination

11. I have carefully considered the appeal, the rival submissions by parties, and the evidence on record. The only issue is whether the damages awarded under the head pain and suffering, future medical expenses and loss of earning capacity were excessive. I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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”
12. In this case, it is not in contention that the respondent sustained compound fractures of the right tibia and fibula leading to below knee amputated right leg. In *Abdi Werdi Abdulabi v James Royo Mungatia* (*supra*) the respondent sustained multiple fractures on the right lower limb leading to amputation of the right lower limb; multiple fractures and bruises on the upper right limb leading to affixation of two metal plates; injury to the right eye leading to impaired vision; compressed burst L4 vertebra with retro pulsed fracture fragments; and other soft tissue injuries. The court awarded the respondent therein Kshs 3,500,000/- as general damages. The injuries sustained by the respondent therein were more severe in comparison to those of the respondent in this case. In the case of *Macharia Francis Mundui & another v Joel Wanje* (2017) eKLR, the respondent therein had a major severe crash injury of the left leg in the region of the thigh and knee leading to amputation of the left leg above the knee and a complete fracture of the left femur. In this case, the amputation of the respondent was below the knee.
13. The trial magistrate in arriving at her decision relied on the case of *Peter Mogaka v Zipporah Gesare Omuya* [2022] eKLR in awarding damages at Kshs 3,000,000/-. The respondent sustained the following injuries: severe head injury thereby losing consciousness and was managed in ICU while in comatose for 3 months; fracture of the cervical bone C6-7 leading to obstruction of the upper airway tracheotomy; rupture of the oesophagus necessitating tracheotomy; multiple disfiguring lacerations on the head; extensive decubitus (ulcers of the pelvic); and compound fracture of the left tibia/fibula leading to above knee amputation. The respondent's injuries in the *Peter Mogaka v Zipporah Gesare Omuya case* (*supra*), were more severe compared to this case and further, the disability in that case was assessed at 75%.



14. The current awards by courts for below-the-knee amputation range between Kshs 2,000,000/- to Kshs 2,500,000/-. In *Akwaba Olubuliera Nicodemus v Dickson Shikuku* [2020] eKLR the respondent sustained injuries on the right clavicle bone and crush injury to the right leg leading to below-knee amputation of the right leg and was awarded Kshs 2,000,000/- as general damages. In *Rai Cement Limited v Michael Ochieng Otieno* [2022] eKLR the respondent therein sustained the following injuries: multiple fractures of the right tibia and fibula leading to amputation of the right lower limb below the knee; massive damage of the right supra-pelvic and lower abdominal region; fracture of a rib from the right rib cage, with multiple soft tissue injuries; and soft tissue damage of the right hip region with haematoma. The respondent in that case was awarded Kshs 2,500,000/-. In *Yobesh Makori v Elmerick Mobisa Bota* [2021] eKLR the respondent sustained soft tissue injuries, a fracture of the left clavicle, dislocation of the right tarsal bone and crushed left leg leading to amputation of the left leg and was awarded Kshs 2,000,000/- as general damages.
15. I am persuaded that the Kshs 3,000,000/- awarded under the head pain and suffering was excessive. Having considered the rate of inflation and the comparable awards I hereby substitute the award of Kshs 3,000,000/- with an award of Kshs. 2,500,000/.
16. I now turn to consider the award of Kshs 500,000/- for future medical expenses. According to paragraph 8 of the plaint, the respondent sought costs for an artificial limb estimated to cost Kshs 500,000/-. The respondent in cross-examination admitted that he was wearing a prosthetic leg bought by his brother. I have carefully considered the evidence on record and observed that there are multiple receipts dated 11/5/2020, 22/5/2020, 27/5/2020, and 17/6/2020 for payments made to Orthopaedic Technology & Physiotherapy & Occupational Therapy Services. These receipts pertain to payments made for the acquisition of the new prosthesis. The deposits for the prosthetic leg that the respondent had at trial were bought before the report by Dr. Andai and the respondent was entitled to claim it as a special damage claim. According to the report made by Dr. Andai on 5/6/2020, the doctor opined that the respondent would further need a good artificial leg in future which would cost Kshs 500,000/-. I therefore find no reason to interfere with this award.
17. I now turn to consider the award of loss of earning capacity. The respondent testified that he was a boda cyclist and farmer earning a monthly income of Kshs 15,000/-. The trial court awarded a global sum of Kshs 300,000/-. The appellant argued that the award was a special damage claim and that documentary evidence to prove earning was necessary. I however hold the view that loss of earning capacity is compensated by an award in general damages, once proved. In the *S J -vs- Francesco Di Nello & Another* [2015] eKLR the court 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.”
18. The court in the case of *Beatrice Anyango Okoth -vs- Rift Valley Railways (Kenya) Limited & Another* [2018] eKLR, similarly observed that:
- “...Damages under this heading are awarded where it is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he



held before the injury are diminished or just lowered. It must be differentiated with loss of earning capacity which occurs where there chances of earning are literally erased...”

19. The respondent, in this case, was 30 years old at the time of the accident and was working as a boda boda rider. Having considered his injuries as well as the opinion of Dr. Andai, who assessed his disability at 50%, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished. In *John Kipkemboi & Another vs Morris Kedolo* [2019] eKLR where the Respondent suffered the amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/- for loss of earning capacity. In this case, had the respondent filed a cross-appeal against this head, I would have been persuaded to interfere with the finding of the trial court. There being no cross-appeal before the court, I find no reason to interfere with the sum of Kshs 300,000/-.
20. In the end, the appeal is partially successful to the extent of loss of dependency. The respondent will have judgment made up as follows:
- a. Pain and suffering Kshs 2,500,000
 - b. Loss of earning capacity Kshs 300,000
 - c. Future medical expenses Kshs 500,000
 - d. Special damages Kshs 90,000
- Total Kshs 3,390,000/-
21. The appeal having been partially successful, the appellant is awarded 1/3 of the cost of the appeal. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2024

R. E. OUGO

JUDGE

In the presence of:

Appellants- Absent

Respondent-Absent

Ms Wilkister C/A

