



REPUBLIC OF KENYA



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**Mutugi v Waymark Safaris Limited (Civil Appeal E838 of 2022)
[2024] KEHC 2832 (KLR) (Appeals) (15 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2832 (KLR)

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

APPEALS

CIVIL APPEAL E838 OF 2022

DAS MAJANJA, J

MARCH 15, 2024

BETWEEN

MARTIN MUGO MUTUGI APPELLANT

AND

WAYMARK SAFARIS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Aduke, SRM dated 20th September 2022 at the Nairobi Magistrates Court, Milimani in Civil Case No. 7408 of 2018)

JUDGMENT

1. The Appellant appeals against the judgment of the Subordinate Court dated 20.09.2022 where the court awarded him Kshs. 600,000.00 general damages, Kshs. 119,590.00 special damages and Kshs. 700,000.00 future medical expenses. The court rejected the claim for loss of earnings. The court also awarded him costs and interest. The Appellant's suit arose from a road traffic accident that took place on 19.07.2017 while he was riding motor cycle registration number KMCX *Y when it collided with the Respondent's motor vehicle registration number KBL * L. The issue of liability was settled by consent in the ratio of 80:20 against the Respondent. Thus this appeal is against the quantum of damages.
2. In the judgment rendered on 20.09.2022, the Subordinate Court noted that the record had receipts amounting to Kshs. 119,590.00 only and thus awarded this sum. It declined to award any sum under the head of loss of earnings on the ground that this was in the nature of a special damage claim which was not supported by documentary proof of the Appellant's income prior to the accident. On the basis that the Appellant suffered a fracture of the right thigh, leg, blunt injuries and soft tissue injuries, the Subordinate Court awarded him Kshs. 600,000.00.



3. In his memorandum of appeal dated 19.10.2022, the Appellant is dissatisfied with the award of general and special damages and the rejection of the claim for loss of future earning capacity and/or diminished earning capacity. The appeal has been canvassed by way of written submissions which I have considered and will make relevant references and highlights in my analysis and determination below.
4. As stated, the Appellant is aggrieved with the quantum of damages awarded. The general principle upon which an appellate court can interfere with an award of damages was stated in the case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 as follows:

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 inordinately high or low.
5. A court should also be mindful to make fair and consistent awards in line with the principle that similar injuries must attract similar awards (see *Maore v Geoffrey Mwenda* [2004] eKLR).
6. The Appellant pleaded that he sustained a comminuted fracture right mid femur, transverse fracture right tibia/fibula, dislocation-right knee, both right and left PCL & ACL (Anterior Cruciate Ligament) tears, blunt injury pelvic region, blood loss, soft tissue injuries and physical and psychological pains. This was also stated as per the medical report of Dr. Kayo dated 15.05.2018 who also assessed permanent disability at 30%. As per the treatment notes from Ladnan Hospital where the Appellant was first presented for treatment on the day of the accident, it was reported that he had a right femoral shaft fracture, right knee dislocation with right tibia/fibula open fracture. In 2020, the hospital stated that in January 2019, the fracture of the tibia had healed and they removed the interlocking nail. However, the femur fracture was yet to heal. Going through the said medical report and treatment notes, I cannot fault the subordinate court's conclusion that the Appellant suffered a fracture of the right thigh, leg, blunt injuries and soft tissue injuries.
7. The Appellant had sought to be awarded Kshs. 2,500,000.00 and he relied on the decision of *Michael Njagi Karimi v Gideon Ndungu Nguribu & Another* [2013] eKLR where the plaintiff therein sustained bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus, deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement, injury to the right lower limb involving the right leg which was tender, swollen and deformed. X-ray examination showed a fracture of the right tibia and fibular and swelling and deformity of the left thigh with apparent shortening; x-ray revealed a segmental fracture of the left femur with marked displacement. He was awarded Kshs. 2,000,000.00. He also relied on *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR where the plaintiff therein sustained a fracture of the right femur, fracture of the ribs 3-6, Pain in the right side of the chest and the right thigh and persistent pain in the right knee and she was awarded Kshs. 4,000,000.00.
8. On its part, the Respondent submitted that an award of Kshs. 800,000.00 would have been appropriate and relied on *Alphonse Muli Nzuki v Brian Charles Ochuodho* [2014] eKLR where the respondent was awarded Kshs. 800,000.00 for sustaining compound comminuted fracture right tibia and fibula and degloving injury medial aspect of right leg and foot. It also cited *Benuel Bosire v Lydia Kemunto Mokora* [2019] eKLR where the respondent was awarded Kshs. 700,000.00 for sustaining compound fracture of the left femur which is uniting with malunion, extreme scarring which were disfiguring on both limbs and the limb was unlikely to achieve the original state hence permanent disability which was assessed at 40% and *Wycliffe Omurwa Masanta v Easy Coach Limited & another* [2019] eKLR where the appellant was awarded Kshs. 500,000.00 posterior dislocation of the right hip joint, transverse



fracture of the right fibula, head injury scale 14/14, soft tissue injuries of the forehead, right periorbital haematoma, laceration on the lower lip (right side) and deep laceration and swelling of the left leg.

9. Going through the above decisions, I find that the decisions cited by the Appellant concerned more severe injuries than those suffered by him and as such, the awards given in those decisions are not comparable and could not properly guide the subordinate court in this matter. On the flipside, I find that the decisions cited by the Respondent are closely related to the injuries of the Appellant and provided a better guide to the Subordinate Court. However, I find that the sum of Kshs. 600,000.00 awarded by the Subordinate Court was inordinately low as compared to the awards given in those decisions and factoring inflation. I agree with the Appellant that there was no basis for the Subordinate Court to award a lower sum than that proposed by the parties themselves when in fact there were supporting decisions like those cited by the Respondent. I therefore set aside the award of Kshs. 600,000.00 and substitute it with an award of Kshs. 800,000.00.
10. In refusing to award damages for loss of future earning capacity/diminished earning capacity, the Subordinate Court stated that it was guided by the decision in *Benuel Bosire v Lydia Kemunto Mokora* (*supra*). The Appellant relies on *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR, where the Court of Appeal considered the principles applicable in determining a claim for loss of earning capacity as follows:

From the above analysis of the English case law and the decision of this Court in *Butler v Butler* [1984] KLR 225, the following principles, among others, emerge. 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 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 trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. 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 approximate financial loss that the plaintiff has suffered as a result of disability.

11. The Appellant submits that even the Respondent did appreciate the Appellant ought to be awarded under this head and that Dr. Kayo in his medical report assessed permanent disability at 30%, the Appellant was still in crutches and is to undergo knee re-construction whose outcome is known and the consequences thereof. He urges the court to find the trial court erred in failing to make an award under this head and find that an award of Kshs. 1,500,000.00 would be reasonable in the circumstances. On its part, the Respondent submits that while the doctor assessed incapacity at 30%, he never stated that the Appellant will not be able to engage in any gainful employment in future due to his incapacity.
12. While the Subordinate Court states that in *Benuel Bosire v Lydia Kemunto Mokora* (*supra*) the court stated that an award under loss of earning capacity is a special damage claim, my perusal of the said judgment does not reveal any such dictum. The court cited and quoted the Court of Appeal decision in *Mumias Sugar Company Limited v Francis Wanalo* above and the court reiterated what was stated by the appellate court that, “each case must depend on its own facts and circumstances.” The Court of Appeal stated expressly that loss of earning capacity can be claimed and awarded as part of general



damages or as a separate head of damages and the Subordinate Court therefore erred in holding that an award under this head is a special damages claim that required to be proved by way of documentary evidence only.

13. The Appellant pleaded that he was in the business of selling motor vehicle spare parts earning an average monthly income of Kshs. 194,000.00 and that by reason of the accident he has been unable to resume his economic activities and that his earning capacity was diminished by 30%. Whereas documentary evidence is not mandatory for proof of loss of earning capacity, I refuse to believe that the Appellant ran a business without keeping business records such as copies of orders and receipts that show purchases and proceeds of his sales. I agree with the Subordinate Court that the Appellant did not adduce evidence to substantiate the claim of his earnings and how the same was diminished. It was not enough for him state in his pleadings that he was earning Kshs. 194,000.00 per month from sales and leave it at that.
14. The medical report on record did not also show that as a result of the injuries sustained, the Appellant's earnings diminished and therefore, the subordinate court did not err in not awarding this sum in the absence of such evidence (see *Bhaven Harjivan Kurji v Trivedi Susbil Liladhar* [2020] eKLR). This ground of appeal by the Appellant fails.
15. While the Appellant prayed for Kshs. 823,964.00 special damages, the trial court awarded only Kshs. 119,590.00. The Appellant complains that he proved the entire amount by way of producing receipts duly numbered and none being similar to the other and that the total receipts therein amount to Kshs. 486,169.00. Thus, the Appellant urges the court to find that it pleaded and proved special damages totaling Kshs. 486,169.00 and not Kshs. 119,590.00. Going through the said receipts and as submitted by the Appellant, there are some that are not clearly visible. However, my summation of the receipts that are legible reveal that they add up to more than Kshs. 119,500.00 and specifically add up to Kshs. 429,479.00. I have also counterchecked the said receipts to establish whether there is duplication and I have found none. Thus, the Subordinate Court erred in rejecting these receipts on the ground that they were duplicated. I therefore set aside the special damages award of Kshs. 119,500.00 and substitute it with Kshs. 429,479.00.

Disposition

16. The Appellant's appeal succeeds and the judgment of the Subordinate Court dated 20.09.2022 is set aside to the extent of the awards for General and Special damages and substituted with the following award: Kshs. 800,000.00 as General Damages for pain and suffering and loss of amenities and Special Damages of Kshs. 429,479.00.
17. The special damages shall earn interest from the date of filing of the suit while the general damages shall earn interest from the date of judgment of the Subordinate Court until payment in full.
18. The Appellant shall also have the costs of the suit together with this appeal assessed at Kshs. 50,000.00.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

Mr Gacheru instructed by Wamaitha Ndungi and Company Advocates for the Appellant.

Mr Chengecha instructed by Wangai Nyuthe and Company Advocates for the Respondent.

