



**Sumac DTM Ltd & 2 others v Siele (Civil Appeal 191 of 2023)
[2024] KEHC 4134 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 191 OF 2023**

HM NYAGA, J

APRIL 24, 2024

BETWEEN

SUMAC DTM LTD 1ST APPELLANT

LOICE MUISALEL KONCHELAH 2ND APPELLANT

JOHN ALEMAN WALTER 3RD APPELLANT

AND

FESTUS KIPKEMOI SIELE RESPONDENT

*(Appeal against judgment and decree on quantum from the Judgment of Hon.Orange K.I,
Principal Magistrate delivered on 2nd August 2023 in Nakuru CMCC No. 728 of 2022)*

JUDGMENT

1. This Appeal arises from a judgment and decree entered in the aforesaid suit whereby the Respondent sued the Appellants for both general and special damages in respect of a road traffic accident in which he sustained personal injuries.
2. The Respondent alleged that on or about 27th May,2022 he was riding Motor Cycle Registration Number KMFK 095 M along Eldoret- Nakuru Road when the 3rd Appellant so carelessly and negligently drove and or controlled Motor Vehicle Registration No. KCN 448 A as a result of which it knocked him down.
3. The Appellants denied the entire claim by the Respondent vide their defence dated 8th September, 2022.In the alternative the Appellants averred that if any accident occurred, which was denied, the same was not caused by negligence on their part but was caused by or substantially contributed by the negligence of the Respondent.



4. The claim was fully defended and the trial magistrate in his judgment found the Appellants 100% liable for the accident and awarded general damages of Kshs. 1,500,000/= and special damages of Kshs. 396,609/=, Future Medical Expenses of Kshs. 100,000/= and Loss of Earning Kshs. 751,362/= plus costs and interest at court rates.
5. The Appellants are aggrieved with the judgment of the Learned Trial Magistrate on quantum only and they lodged this appeal on 7th August,2023 setting out the following grounds of appeal:
 - i. That the Honourable Magistrate erred in fact and in Law in awarding General damages the Respondent amounting to Kshs. 1,500,000/=
 - ii. That the Honourable Magistrate erred in fact and in Law in awarding Loss of Earnings/Income to the Respondent at Kshs. 751,362/=
 - iii. That the Honourable Magistrate erred in fact and in Law in awarding Special Damages to the Respondent at Kshs. 396,609/=
 - iv. That the quantum of General damages and Loss of Earnings/income is excessive and an erroneous estimate of the damages awarded to the Respondent due to the circumstances of the case before the subordinate court and weight of precedents in similar circumstances.
 - v. that the Honourable Magistrate erred in fact and in Law in relying on extraneous evidence in arriving at the decision on General Damages.
6. The appellants urged this court to allow this appeal, assess downwards the quantum on General damages, Loss of Earnings/Income and Special damages and order the Respondent to pay the costs of this Appeal and costs in the Lower court.
7. The appeal was canvassed by way of written submissions.
8. The appellants' counsel filed their written submissions dated 11th December,2023 on 12th January,2024 whereas the Respondent's counsel filed her written submissions dated 28th January,2024 on 31st January,2024.

Appellants' Submissions

9. On the award of General damages, the counsel submitted that in view of the injuries sustained and the medical reports by Dr. Kiamba and David Wamae, a sum of Kshs. 350,000/= would suffice as general damages. Reliance was placed on the cases of *Koyi vs Obanga & 2 others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment)* where the court upheld General damages of Kshs. 400,000/= for a claimant who had sustained fracture of the left femur and tibia, laceration on the left leg and soft tissue injuries of the chest with permanent disability assessed at 40% & *Reamic Investment Limited vs Joaz Ameyia Samuel [2021] eKLR* where the respondent suffered open left femur fracture, abrasion on the left knees, face, neck, right upper limb and left upper lip as well as a contusion on the anterior chest. The trial's court award of Kshs. 600,000/= as general damages was set aside by the appellate court and substituted with Kshs. 350,000/=
10. In regards to loss of earning/income, the counsel submitted that there was no evidence that the Respondent was a boda boda rider earning Kshs.1,000/- per day and that cross examination revealed that the respondent could conduct his day to day activities and therefore he was in a position to find another source of income. The Counsel further submitted the multiplier of 5 years used by the trial court in assessing damages under this head was exaggerated considering Dr. Kiambaa awarded the



respondent a temporary disability of 3 months based on the injuries sustained. The counsel posited that the respondent had healed as per examination done by Dr. David Wamae on 17th January, 2023.

11. The counsel argued that loss of earnings capacity has to be proved on a balance of probability. In buttressing this proposition, reliance was placed on the case of *Cecilia W. Mwangi & Another vs Ruth W. Mwangi* [1997] eKLR.
12. Regarding the award on special damages, the Counsel submitted that it is trite law that any claim for special damages must be specifically pleaded and strictly proved. He posited that in the instant case, the respondent pleaded for Kshs. 396,609/= but adduced receipts of Kshs. 154,797/= only. He thus urged this court to award Kshs. 154,797/= as special damages.

Respondent's Submissions

13. The Respondent's counsel submitted that the appeal herein is incompetent as the Appellants did not attach a copy of the decree in the record of appeal. The Counsel cited the provisions of Section 65(1)(b) of the *Civil Procedure Act* and order 42 rule 2 of the *Civil Procedure Rules* in support of her submissions.
14. The Counsel also placed reliance on the case of *Rachael Wambui Nganga & another vs Rahab Wairimu Kamau* [2020] eKLR where the court held inter alia that failure to attach a decree is fatal as the same goes to the root of the appeal and jurisdictional aspect of the court. For similar proposition, reliance was further placed on the cases of *Bwana Mohamed Bwana vs Silvano Buko Bonaya & 2 others* [2015] eKLR, *Chege vs Suleiman* [1988] eKLR, *Kilonzo David t/a Silver Bullet Bus Company vs Kyalo Kiliku & another* [2018] eKLR & *Lucas Otieno Masaye vs Lucia Olewe Kidi* [2022] eKLR.
15. Regarding the award on General Damages, the counsel submitted that in view of injuries sustained by the Respondent, the trial court's award on the same was reasonable and within the range of similar injuries. In buttressing her submissions, she relied on the case of *Penina Waithira Kaburu vs LP* [2019] eKLR where the claimant had sustained multiple fractures of the pelvis including bilateral superior and inferior pubic rami and rupture of the urethra. The Appellate court while upholding the trial's court award of Kshs. 2,000,000.00 as general damages stated as follows;

“By way of recapitulation, it cannot be denied that the respondent suffered severe injuries and endured a lot of pain in the process. He was admitted in hospital and operated on no less than two occasions. What's more, he is likely to be operated on in future, the two doctors having been agreement that the urethral stricture may recur. His doctor went further to warn that besides the recurrence of the stricture and the need for an operation, the respondent was also exposed to the danger of impotence. Apart from the damage to his body and body organs, the respondent also lost his valuable time while undergoing treatment; he couldn't attend college in his indisposed state. Taking all these factors into account, I am hesitant to disturb the learned magistrate's award of Kshs. 2,000,000/= in general damages.”

16. The Counsel also relied on the case of *Francis Ndungu Wambui & 2 others vs VK (a minor suing through next friend and mother MCWK)* [2019] eKLR where the appellate court upheld the trial court award of Kshs.1,000,000/- as general damages for a claimant who suffered soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident, and it was also noted due to the severity of the fracture he was at risk of secondary stress fractures on the same site.
17. On the award on Loss of Earnings, the respondent's counsel submitted that the respondent was unable to work from the date of accident up to the time he was discharged from the hospital and thus he lost income which he was entitled to be compensated. She argued that the trial court in awarding him Kshs.



751,362.00 adopted minimum wage and multiplier of 5 years since the same was uncontroverted. She urged this court to uphold the award under this head.

18. With respect to special damages, she submitted that the respondent pleaded and proved special damages by producing receipts totalling to Kshs. 396,609.00. She prayed that the same be upheld by this Honourable Court.
19. In regards to costs, the Respondent's counsel submitted that the appeal herein is unmeritorious and it should be dismissed with costs to the Respondent.

Analysis & Determination

20. This appeal is against quantum only.
21. This being a first appeal, parties are entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
22. In *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n 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 allowances in this respect”
23. In *Peters vs Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
24. Similarly, in *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* [2013]eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
25. With the above in mind, I will now proceed to determine the Appeal.
26. Having considered the record of appeal, the submissions and the authorities relied on by the respective parties, I opine that the issues for determination are;
 - I. Whether the Appeal is incompetent and should be struck out.
 - II. Whether the quantum for general damages and Loss of earnings awarded by the trial court was manifestly excessive.



III. Whether the special damages awarded were strictly proved.

27. I will deal with each issue sequentially.

28. It is true that the Appellants failed to attach a copy of the decree in the Record of Appeal. That notwithstanding, it is my opinion that the Appeal is not incompetent since as per Section 2 of the [Civil Procedure Act](#), a decree for purpose of appeal can include a judgment. The said Section 2 provides that: -

“Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up”.

29. In exercising judicial authority, as per article 159 (2) (d) of [the Constitution](#), justice should be administered with less reverence to procedural technicalities. This position was pronounced in the Court of Appeal case [Emmanuel Ngade Nyoka vs Kitheka Mutisya Ngata](#) [2017] eKLR. It was held thus;

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of order 42 rule 2 of the [Civil Procedure Rules](#) which provides inter alia:

1. “Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.”
- ii. However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The judge did not agree with him reasoning that:
 1. “The word “decree” has been defined by the [Civil Procedure Act](#), cap 21 to include judgment. In fact, the [Civil Procedure Act](#) has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.
 - iii. This is the essence of the proviso to the definition of the term “decree.”
 - iv. According to the judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.
 - v. We entirely agree with the reasoning of the learned judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the [Civil Procedure Act](#). Finally, one would ask what prejudice did the appellant



suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

30. Guided by the above authority, I find the appeal herein is competent since the Appellants have attached a copy of the Judgment of the subordinate court.
31. I will now deal with the next issue that of the award of damages.
32. It is imperative to note that an appellate court would not easily interfere with the trial courts’ discretion on this issue unless it found that the trial court applied wrong principles in arriving at the finding.
33. This position was reiterated by the Court of Appeal in the case of *Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A M. Lubia and olive Lubia* (1985) 1 KAR 727. The court held that;

“.... the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....”
34. The same Court in *Odinga Jackton Ouma vs Moureen Achieng Odera* [2016] eKLR stated that-
“comparable injuries should attract comparable awards”
35. The Respondent pleaded that he sustained the following injuries: -
 - i. Displaced fracture of the Left Femur.
 - ii. Blunt injury to the forehead leading to soft tissue injuries.
 - iii. Open wounds on the left knee exposing the bones.
 - iv. Blunt injuries to the chest leading to soft tissue injuries.
 - v. Blunt injuries to the right and left wrist joint leading to soft tissue injuries.
 - vi. Cut wound on the chin leading to soft tissue injuries
 - vii. Bruises on the left and right hand leading to soft tissue injuries.
 - viii. Blunt injury to the left hip leading to soft tissue injuries.
36. The outpatient card from Nakuru County Referral and Teaching Hospital shows that the respondent sustained soft tissue injuries and shaft femur fracture. The discharge summary from Tenwek Hospital shows that the respondent was admitted for 4 days and diagnosis made was left mid shaft femur fracture and open knee injury.
37. Dr. W. Kiamba, who examined the Respondent, confirmed he sustained the pleaded injuries and classified the degree of injury as grievous harm and awarded a temporary disability of 3 months and a permanent disability of 20%.
38. The Appellants have referred to the Medical Report by Dr. David Wamae in their submissions. However, the same is not part of the record as it was not produced in evidence during the trial. It is inappropriate to refer to a document that the appellant did not produce.



39. The injuries sustained by claimants in the cases cited by the Appellants were almost similar compared to those by the Respondent herein while the cases cited by Respondent were of more severe injuries than what he sustained.
40. In arriving at an award of Ksh1,500,000/=, the learned trial magistrate was guided by the case of *Pestony Limited & another vs Samuel Itonye Kagoko* [2022]eKLR, where the respondent sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh and the court set aside an award of Kshs 1,400,000/= as general damages and substituted it with an award of Kshs 800,000/= & the case of *Penina Waitbira Kaburu vs LP* (supra).
41. The trial court rightly observed that the injuries sustained by the claimant in the latter case were more severe compared to the injuries that were sustained by the respondent herein. The trial court rightly relied on the former case as the injuries sustained by the claimant therein were similar to the ones sustained by the respondent.
42. However, I am of the view that the award of Kshs.1,500,000/- was on the higher side and manifestly excessive.
43. Considering the respondent's injuries and the authorities cited, I opine the sum of Kshs. 1,000,000/= as general damages would suffice as adequate compensation. I therefore set aside the trial court's award and substitute it with Kshs. 1,000,000/= as general damages.
44. I will now consider the award on Loss of Earnings.
45. In *Mumias Sugar Company Ltd vs Francis Wanalo* (2007) eKLR case, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in *Butler vs Butler* (1984) KLR 225, where, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity. The Court of Appeal stated:

“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 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 the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

45. The principles regarding such an award were also stated in *SJ vs Franscesco Di Nello & Another* (2005) eKLR, where the Court of Appeal held as follows:

“Claims under the leads of loss of future earning capacity are discretionary 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 in earnings 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”



46. The Court in *Archer Ebanus vs Japther Mclly Mouth* Civil 2004 HCv R172 explained the different methods for quantifying loss of earnings capacity as follows:
1. If the Claimant is working at the time of the trial and the risk of losing the job is low amount then the lump sum methods is more appropriate and the record should be done.
 2. If the Claimant is working at the time of the trial and if there is a real serious risk of losing the job and there is evidence. That if the current job is lost there is high probability and the Claimant will have difficulty procuring an equally paying or better paying job, then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influential by the time at which the risk may materialize.
 3. If the Claimant is a high income earner, the multiplied/ multipliable method may be more appropriate.
 4. The lump sum is not determined by reference to any comparison with previous cases.
 5. If the Claimant is not working at the time of the risk and the unemployment were as a result of the loss of earning capacity.
47. In *Patrick Chupson vs Everlin Eucal Smith & another* (2013) JMCA Morrison JA stated as such
- “Therefore, once the Judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the Court.”
48. In the instant case the Respondent specifically prayed for the loss of income/ earning for the period he had not been at work. He testified that he was a boda boda rider earning Kshs. 1,000/= per day.
49. The trial magistrate, in assessing damages under this head, adopted a multiplier method. He used a multiplier of 5 years and minimum wage in arriving at the sum of Kshs. 751,362/=.
50. The lower court record shows that the respondent never tendered any evidence to show that he was duly licenced to operate a boda boda. For instance a driving licence with the necessary endorsements would have been able to establish that he was duly authorised to ride a motorcycle and carry pillion passengers for a fee.
51. In my view the claim that he was earning Kshs. 1000/- in a day was not backed by sufficient evidence. I am thus of the view that the principles applied by the trial magistrate were erroneous.
52. Having stated the above, I am also alive to the fact that the respondent was an adult and was expected to have been earning a living. In the absence of proof of actual income, I would adopt the minimum wage for a general labourer as per the Regulation of wages (General) (Amendment) 2022, which is Kshs. 15,201.65 per month.
53. There is really no dispute that the Respondent was involved in the accident in question. The evidence adduced shows that he was taken to Nakuru County Referral and County Hospital for treatment on the same day. Subsequently, on 29th May, 2022 he was admitted at Tenwek Hospital and was discharged on 2nd June, 2022. He was examined by Dr. Kiamba on 22nd July, 2022 and the doctor awarded him a temporary disability of 3 months.
54. There was no cogent evidence that he would not be able to carry on his business as a boda boda operator or any other work upon full recovery. Therefore from the date of the accident up to the time of examination by Dr. Kiamba, he was away from work for about 3 months. He was expected to heal after 3 months based on the temporary incapacity that was awarded.



55. During hearing the respondent testified that he had not fully healed. However, no medical documents were produced to show that he was still receiving treatment. In the circumstances, the multiplier adopted by the trial court had no basis, as correctly submitted by the Appellants.
56. In my view and based on the evidence on record, the trial court ought to have adopted a multiplier of 6 months, the ones stated by the respondent's own doctor.
57. The award therefore under this head is 15,201.65 x 6 months = Kshs. 91,209.90.
58. I therefore set aside the lower court's award of Kshs. 751,362/= and substitute it with Kshs. 91,209.90.
59. On Special damages, the law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See *Capital Fish Limited vs Kenya Power and Lighting Company Limited* [2016] eKLR).
60. In *Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa*, ((KSM Civil Appeal No 179 of 1995), the court stated:
- “It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”
61. I have considered the evidence on record on this issue. The Respondent pleaded for Kshs. 396,609/- but produced receipts, which poring over each one only amounted to Kshs. 251,812/-. I noted that the exit slip from Tenwek Hospital for Kshs. 124,247/- is actually an aggregate of the amounts reflected in IPD Receipt dated 3rd June 2022 for Kshs. 57,852/- and IPD Receipt dated 23rd June 2022 for Kshs. 66,395/-. It appears like the trial court took these receipts and the exit slip to be separate receipts, hence arriving at a higher figure.
62. I therefore set aside the award of Kshs. 396,609/- under this head and substitute it with an award of Kshs. 251,812/=.
63. In the premises, the Appeal succeeds. The judgment of the lower court is set aside and is substituted with the following award;
- a. General damages - Kshs. 1,000,000.00/=
 - b. Special Damages - Kshs. 251,812.00/=
 - c. Loss of income/earnings Kshs. 91,209.90/=
- Total Kshs. 1,343,021.90/=
64. On costs, it is trite law that costs follow the event. The Appellants have been successful in this Appeal. I therefore award them costs of this Appeal only.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF APRIL, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Kipsugut

Miss Timbwa for Appellant



Ms Kamau for Chelangat for Respondent

