



**Chege & another v Ngari (Civil Appeal E349 of 2023)
[2024] KEHC 6121 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E349 OF 2023
HI ONG'UDI, J
MAY 30, 2024**

BETWEEN

GRACE WANJIRU CHEGE 1ST APPELLANT

JAMES KAMAU NJENGA 2ND APPELLANT

AND

PETER MUNGAI NGARI RESPONDENT

(Being an appeal from the Judgment and decree of Hon. S Lesootia Principal Magistrate delivered on 25th April, 2023 in Nairobi Milimani Civil Suit No. 8790 of 2021)

JUDGMENT

1. This appeal stems from Milimani CMCC No. E8790 of 2021 where the respondent was the plaintiff while both appellants were the defendants. The claim was for special and general damages, compensation of loss of earnings and loss of earning capacity, costs and interest.
2. The 1st appellant filed a statement of defence dated 26/08/2021 denying the claim. A reply to it was filed by the respondents and it's dated 13/09/2021. Parties filed agreed issues dated, 13/09/2021. The 2nd appellant was served but he did not enter appearance. Interlocutory Judgment was entered against him on 24/09/2012. The matter proceeded to full hearing and thereafter Judgment in favour of the respondent delivered on 25th April, 2023.
3. Being dissatisfied with the Judgment the appellants filed this Appeal citing the following grounds:
 - i. That the learned Magistrate in the matter herein delivered Judgment on 10th February, 2023 in favour of the Respondent herein thus contrary to the law and facts availing before the honourable court.



- ii. That the learned Magistrate erred in fact and law in finding that the Respondent was entitled to general damages for pain and suffering of Ksh 1,000,000/= that were too high in view of the fact that compared to the injuries suffered by the Respondent.
 - iii. That the learned Magistrate erred in fact and law in finding that the Respondent was entitled to special damages Ksh 48,332/= that were not justified and proved.
 - iv. That the learned Magistrate erred in fact and law in finding that the Respondent was entitled to loss of earning capacity/future prospects and loss of earning Ksh 800,000/=, that were not justified, proved and too high
 - v. That the learned Magistrate erred in law and fact in failing to appreciate the long established principle of state decisis precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, I particular relating to damages.
 - vi. That the learned Magistrate erred in law and fact in failing to appreciate the Respondent's pleadings, submission and the evidence tendered in support thereof was incapable of sustaining the award of Ksh 1,848,332/=.
 - vii. That the learned Magistrate erred in law and fact in entering Judgment in favour of the respondent against the Appellant in spite of the Respondents miserable failure to establish her case more especially on quantum.
4. The following is a summary of the claim. The respondent called three (3) witnesses. PW1, P. C Ayub Mathenge of Makuyu police station traffic section testified that the motor vehicle registration No. KBU 972J was driven on the opposite side from country station towards Dohnholm to the city. This was on 5/4/2019. Along the way the driver made a wrong U turn at Morsa and obstructed an oncoming motor vehicle registration No. KCJ 069H and rammed into it. The respondent was one of the passengers in KCJ 069H and he sustained serious injuries.
 5. PW2 Dr. Washington Wokabi a consultant surgeon personally examined the respondent and did a medical report and receipts (PEXB 12-13) for him following a road traffic accident. He explained that the disability mentioned in the report was based on his appreciation of the respondent's infirmity, and reliance on WIBA scales. He did not look at the report by the 1st appellant's doctor.
 6. PW3 – Peter Mungai Ngari the respondent adopted his witness statement plus the documents filed as his evidence. He said his hand was weak and he had not fully healed. He used to be a businessman earning Ksh 1,500/- per day.
 7. In cross examination he said he had gone to Makongeni to collect groceries for resale. He confirmed that he cannot handle anything with his right arm though he did not keep a record, of this.
 8. The 1st appellant closed her case without calling any witness. She however annexed a medical report to her submissions forming part of the defence.
 9. The trial court found the appellants 100% liable jointly and severally. The respondent was awarded the following General damages Kshs 1,000,000/=Loss of earnings Kshs 800,000/=Special damages Kshs 48,332/=
 10. The Appeal was canvassed by way of written submissions.



Appellants' submissions

11. These were filed by Kimondo Gachoka & Company advocates and are dated 8/11/2023. Counsel submitted that though the Appeal contains seven (7) grounds they can be summed up to one issue which is quantum. He cited the injuries in the amended plaint dated 3rd August, 2021 to be as follows:
 - a. Fracture of the carpal bones of the right hand
 - b. Fracture of the right radial styloid process
 - c. Dislocation of capital joints
 - d. Blunt and bruise facial injuries
12. Its his submission that a summary of the doctors' medical reports reveals that the respondent's injuries can be classified as fracture and soft tissue injuries. That the awards made were high and suggested an award of between Ksh 300,000/= - Ksh 500,000/= to be sufficient for everything. He relied on the case of Power Lighting Company Ltd & another V Zakayo Saitoti Naingola & another [2008] e KLR cited in the case of Jennifer Mathenge V Patrick Muriuki Maina [2020] e KLR where the principles to be considered in determining whether the court should interfere with quantum or not were set. These are:
 - a. Damages should not be inordinately too high or too low.
 - b. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.
 - c. Where past decisions are taken into consideration, they should be taken as mere guides and each case depends of its own facts.
 - d. Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.

Counsel further cited the cases of Patrisia Adhiambo Omolo Vs Emily Mandala [2020] eKLR; Bawani Stores Ltd & another V Margaret Maguri Gitau [2015] e KLR and Civicom Ltd V Richard Njomo Omwancha & 2 others [2019] e KLR, in support
13. He additionally submitted that the respondent should not be awarded for loss of earnings and or lost earnings for the reason that the same were not proved. Reference was made to the case of John Didi Omulo V Small Enterprises Finance Co Ltd & another [2005] e KLR. He submitted that the respondent did not prove that he was conducting a business which was affected as a result of the injuries suffered; further that there was no documentation of any business he was doing by then.
14. He urged the court to allow the appeal and order that they be paid costs based on section 27(1) of the [*Civil Procedure Act*](#).

Respondents submissions

15. These were filed by Waithaka & partners advocates and are dated 28th February, 2024. On the duty of a court of first appeal he cited the case of Silverio Mbiti Njiru & 2 others V Elizabeth Syombua Munyoki [2018].
16. Counsel submitted that the only issue for determination is on quantum. He thus urged the court to be reluctant in disturbing the trial court's decision on quantum. On this he cited several authorities in support namely:



- i. Mrima J in Eunice Auma Onyango V Salim Akinyi Oluoch [2015] eKLR, citing the Court of Appeal in Kemfro Africa Limited T/A Meru Express Services Gathongo Kaninin V A. M. M. Lubia & another (1982 - 1988) IKAR 777 stated thus:

“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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.
 - ii. Gicheru V Morton & Another (2005) 2 KLR 333
 - iii. Shreeji Enterprises Ltd V John Mungau [2010] e KLR
 - iv. Gicheru V Morton & Another [2005] 2 KLR 333
17. It is counsel’s submissions that the respondent incurred severe injuries which have permanently incapacitated and changed his life. Reference was made to both medical reports. Further that the award of damages is within the discretion of the trial court, and the Appeal can only interfere where it is shown that the court acted on wrong principles or that the award is excessive. Reference was made to the case of Charles Oriwo Odeyo V Appolo Justus Andabwa & another [2017] e KLR; Butler V Butler (1984) KLR 225.
 18. Counsel compared the respondent’s injuries in other similar cases and submitted that the trial court did not err in making the award complained of. Examples are: Daniel Kaveke V Neil Kusumo [2019] e KLR; Joseph Musee Mua V Julius Mbogo Mugi & 3 others [2013] eKLR among others. He argued that the cases cited by the appellants relate to parties whose injuries were less serious compared to those of the respondent.
 19. On general damages for loss of earning capacity/future prospects and lost earnings prospects he referred to the respondent’s evidence on what he used to do and earn. He supported this by the case of Kimatu Mbuvi t/a Kimatu Mbuvi & Bros V Augustine Munyao Kioki [2006] eKLR where the Court of Appeal held:

“A victim does not lose his remedy in damages merely because qualification is difficult”
 20. He urged that the trial court considered that with the permanent incapacity of 18% he could not be as vibrant in business as he had been. Reference was also made to the case of Simba Platinum Ltd V Nicholas V Nicholas Auma Wandera [2021] e KLR.
 21. He further referred to Jacob Aviga Maruja & Another V Semeon Obaya [2005] eKLR where the Court of Appeal stated as follows:

“we do not subscribe to the view that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps (sic) no record and yet earn their livelihood in various ways. If documentary evidence is available that is well and good. But we reject any contention that any documentary evidence can prove these things”.



Other cases referred to by counsel are: *Mumias Sugar Company Ltd V Francis Wanalo* [2005] eKLR; *Boniface Nzioka Malundu Vs Jeremiah Kariuki Mwaniki* [2020] eKLR; *Simba Platinum Ltd (supra)*, *Kaluworks Ltd (supra)*.

22. It is his submission that the appellants have not challenged the special damages of Ksh 48,332/=. He urged the court to dismiss the appeal with costs.

Analysis and determination

23. I have carefully considered, the grounds of appeal, record of appeal, both parties' submissions and the law. I am satisfied that the appellants have no issue with liability which was assessed at 100% against the appellants. The issue in contention is the quantum awarded by the trial court.

24. This being a first appeal this court has a duty to re-evaluate and re-consider the evidence and arrive at its own independent conclusion. It must also remember it did not hear or see the witness. See *Selle Vs Associated Motor Boat Company Ltd & Others* (1968) EA 123; *Kiruga V Kiruga* (1988) KLR 716, *Silverio Mbiti Njiru & 2 others (supra)*.

25. The assessment of general damages was done by two doctors who produced their reports. The one by Dr. W. M. Wokabi (PW2) produced as PEXB 12 dated 26/4/2021, reveals the following as the injuries;

- i. Fracture of the carpal bones
- ii. Fracture of the right radial styloid process
- iii. Dislocation of capital joints
- iv. Blunt and bruise facial injuries

He assessed the permanent disability to be at 10%. He confirmed that the facial injuries were healed. He added that the right forearm is maximally rehabilitated but he was exhibiting moderate disability.

26. The 2nd Medical report by Ruth Ichamwenge (DEXB 1) is dated 16/3/2022. It shows that:

- a. Physical examination showed wrist joint movements
- b. Subluxation of carpus anteriority
- c. Physical disability resulting from the injuries from the injuries – was at 15% due to wrist stiffness.

27. It is noted that the 2nd report was done three (3) years after the accident. Some healing may have taken place but Dr. Ichamwenge still found his level of disability to be at 15%. This confirms that unless a miracle takes place he will not be able to use his right hand. Therefore, the injuries suffered by the respondent have been confirmed by the medical reports and P3 Form, besides the cases cited by both parties on general damages.

28. I have considered the case of *Barchia Leonard Mbaabu V Angeline Ngesa Rambini* [2019] eKLR where permanent disability was 20% and damages were Ksh 1,500,000/=. The injuries were slightly more serious than those suffered by the respondent. Further in *Isaac Mworira M'Nabea V David Gikunda* [2017] eKLR the injuries suffered were as serious as those of the respondent. An award of Ksh 600,000/= was made as general damages but on appeal it was enhanced to Ksh 1,000,000/=.

29. The trial court assessed the injuries and compared awards in other decided, cases and arrived at a figure of Ksh 1,000,000/= as general damages. That is the court that came face to face with the respondent and assessed his physical appearance. This court being well guided by authorities from the Court of



Appeal, will only interfere with such an award where it is a clear misapplication of the law and/or the award is so excessive or so low. See Charles Oniwo Odeyo V Appollo Justus Andakisa (supra). None of these instances has been cited here. I therefore do not find any good reason to make this court interfere with the award of general damages.

30. The loss of earnings was pleaded at Ksh 468,000/=. This being the case, the respondent had a duty to prove this by way of evidence. It is a special damage and that is what the law provides. A special damage must be strictly proved. The trial court did not allow this one.
31. The one other issue is the award of Ksh 800,000/- for loss of earning capacity. It is not disputed that by virtue of the permanent disability the respondent may not be able to earn as he used to though the court is not clear on his exact earnings. In that case the court may only make a global award but in consideration of the fact that an award for general damages has been made. I find the award of Ksh 800,000/= to be too high in the circumstances. I therefore set it aside and substitute it with an award of Ksh 300,000/=
32. The Appeal succeeds on the award of the damages for lost earnings and loss of earning capacity. Save for that, the other awards in the lower court Judgment are upheld. The orders are as follows:
 - i. Liability upheld at 100%
 - ii. General damages – Ksh 1,000,000/=
 - iii. Loss of earning capacity – Kshs 300,000/=
 - iv. Special damages – Kshs 48,332/=
 - v. Loss of earnings disallowed
33. The respondent to get ½ costs in Lower court and High court.
34. Orders accordingly.

Delivered virtually, dated and signed this 30th day of May, 2024 in open court at Nakuru.

H. I. ONG’UDI

JUDGE

4 | Page

