



**Koech & another v Mbusya (Civil Appeal E111 of 2021)
[2022] KEHC 14919 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 14919 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E111 OF 2021
RN NYAKUNDI, J
NOVEMBER 7, 2022**

BETWEEN

DANIEL KIRWA KOECH APPLICANT

AND

CAROLINE JEPKOECH KIPLAGAT APPELLANT

AND

MUNYAO MBUSYA RESPONDENT

(Being an Appeal from judgment and decree of Hon. S. Wewa Senior Principal Magistrate in Eldoret CMCC NO.360 OF 2018 delivered on the 29th September, 2020)

JUDGMENT

1. The Appeal is mainly on quantum. In the trial Court, the Respondent had sued the Appellants claiming general damages for pain, and suffering, loss of amenities, future medical expenses, loss of earnings and earning capacity and special damages arising from a road accident involving the motor vehicle registration number KAK XXXT/ZB XXX7 being driven by the Respondent and the motor vehicle registration number UAQ XXXNN/UAP XXXC Mercedes Benz owned by the 2nd Appellant and driven by the 1st Appellant at the material time.
2. In their joint statement of defence dated July 13, 2018 the Appellants denied the occurrence of the accident. Alternatively, they blamed the driver of the motor vehicle registration number KAK XXXT/ZB XXX7 for causing the accident
3. After trial Judgment was delivered on September 29, 2020 and the Appellants were found 100% liable and damages assessed as hereunder: -
 - a) General Damages..... Kshs.4,000,000/=



- b) Special Damages..... Kshs.31,335/=
- c) Plus, costs and interests
4. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (3) grounds: -
1. That the learned Magistrate erred in law and fact by misapprehending the evidence on record, the resultant effect was that the entire decretal sum arrived at on quantum was erroneous and inordinately high.
 2. That the learned Magistrate erred in law and fact for failing to consider conventional awards for general damages in comparable and similar cases, the result effect was that the judgment was erroneous.
 3. That the learned Magistrate misdirected herself in both matters of law and fact so as to occasion miscarriage of justice to the Appellant.

The Appellants submissions

5. The Appellants filed their submissions dated 1/8/2022 on the same date.
6. On the issue of quantum, the Appellants submitted that the award of Kshs.4,000,000/= was inordinately high and that the trial Court give any reasons whatsoever for arriving at the said sum. The Appellants faulted the trial Magistrate for failing to take into account the awards in comparable cases.
7. The Appellants submitted that the Respondent herein suffered blunt injury to the chest, blunt injury to the back, fracture of right humerus, fracture of right femur, fracture of left femur, fracture of right tibia/fibula, fracture of left tibia/fibula and degloving injury to the left leg.
8. The Appellants relied on the following cases; *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & Another* [2017] eKLR where Kshs.800,000/= was awarded, *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR where the trial Court had awarded damages of Kshs.1,600,000/= which on appeal were reduced to Kshs.800,000/= *Mary Pamela Oyioma v Yess Holdings Limited* [2011] eKLR, where Kshs.900,000/= was awarded, *Mary Adkinyi v Jared Otieno & another* [2019] eKLR, where the awarded was enhanced from Kshs.500,000/= to Kshs.1,000,000/=, *Godfrey Wamalwa Wamba & another v Kyalo Wambua* [2018] eKLR, where Kshs.700,000/= was awarded *Joseph Mwangi Thuita v Joyce Mwole* [2018] eKLR, where Kshs. 700,000/= was awarded and *Reuben Mongare Keba v L P N* [2016] eKLR where Kshs.800,000/= was awarded.

Respondent's Submissions

9. The Respondents opposed the appeal and filed his submissions dated June 28, 2022 on the same date.
10. On the issue of quantum, the Respondent submitted that as a result of the said accident he suffered the following injuries; blunt injury to the chest, blunt injury to the back, fracture of right humerus, fracture of right femur, fracture of left femur, fracture of right tibia/fibula, fracture of left tibia/fibula and degloving injury to the left leg. The Appellant submitted that he had been treated in several hospitals due to the severity of the injuries that he had sustained.
11. The Appellant further submitted that during the trial Dr. Joseph C. Sokobe appearing as (PW2) classified the Respondent's injuries as grievous and assessed the Respondent's permanent disability at 20%. That the doctor also told the Court that the Respondent had sustained multiple severe bone and



soft tissue injuries which had not healed and had deformed lower limbs and the right elbow had metal implants in situ that needed to be removed thus future costs were estimated at Kshs.300,000/=.

12. The Respondent further submitted that at the time of the accident, he had been employed as a driver with Multiple Haulers Ltd and used to earn Kshs.33,000/=. He had pleaded for loss of earning capacity at Kshs.5,940,000/=. The Respondent submitted that he was 37 years at the time of the accident. The Respondent contends that due the said injuries he could no longer work as a driver.
13. The Respondent maintained that the award issued by the trial Court was reasonable in view of with the injuries and the loss suffered.
14. The Respondent submitted that special damages of Kshs.31,335/= were specially pleaded and proved.
15. The Respondent cited the case of *Shreeji Enterprises Limited v John Mungai Chai* [2020] eKLR where Kshs. 4,176,323/= was awarded.
16. The Respondent urged the Court not disturb the award by the trial Magistrate.

Determination

17. This being the first appellate court, I am required to re-evaluate evidence adduced before the trial court and arrive at an independent determination. This position was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] E.A 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

18. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v AM. Lubia and Olive Lubia* {1982-88} 1 KAR 727 at p. 730 Kneller J. A. 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 Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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.”

19. Similarly, in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal held that –

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A 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.’

20. From the foregoing, this court can only interfere with assessment by the trial court where it is satisfied that the court took into account an irrelevant factor or left out a relevant factor or the award was either inordinately high or low as to amount to an erroneous estimate of the damage or that the assessment was not based on evidence.
21. The facts speak for themselves that an accident indeed occurred on July 25, 2017 involving motor vehicle registration number UAQ XXXNN/UAP XXXC Mercedes Benz owned by the 2nd Appellant and driven by the 1st Appellant at the material time and a motor vehicle registration number KAK XXXT/ZB XXX7 being driven by the Respondent.
22. The issue for determination here is whether the award of general damages of Kshs.4,000,000/=in light of the injuries stated above is inordinately high to persuade this court to interfere with it. The Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR stated that “comparable injuries should attract comparable awards”.
23. To begin, the injuries suffered by the Respondent were listed in the treatment notes, the P3 form and the Medical report by Dr. Joseph C. Sokobe as:
 - 1) blunt injury to the chest
 - 2) blunt injury to the back
 - 3 fracture of right humerus
 - 4) fracture of the right ulna
 - 5) fracture of right femur
 - 6) fracture of left femur,
 - 7) fracture of right tibia/fibula,
 - 8) fracture of left tibia/fibula
 - 9) degloving injury to the left leg.
24. In his plaint dated March 29, 2018 the Respondent pleaded for general damages for loss of earnings and earning capacity. The trial Magistrate however failed to quantify the award under this heading.
25. It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. The Court of Appeal in *SJ v Francesco Di Nello & Another* [2015] eKLR while making a distinction between loss of future earnings and loss of earning capacity stated that: -
26. 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.”



27. The Court of Appeal in the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007]eKLR stated that:

“.....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.”

28. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable. In the *Andrew Ebanks –v- Jeaphther McClymouth* Claim No.2004 HCV172 the court considered the sets of criteria to quantify loss of earning capacity;

- (i) If the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low.
- (ii) 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 a high probability that the claimant will have difficulty finding 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 influenced by the time at which the risk may materialize.
- (iii) If the claimant is a high income earner the multiplier/multiplicand method may be more appropriate.
- (iv) The lump sum is not arrived by reference to any comparison with previous cases.
- (v) If the claimant is not working at the time of the trial and the unemployment is a result of the loss of earning capacity, then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment.

29. It is not disputed that the Respondent was worked as a long-distance truck driver with Multiple Hauliers. At the trial Court, the Respondent submitted that he used to earn a monthly salary of Kshs.33,000/=. The Respondent further told Court that he could no longer work as driver due to the injuries that he had sustained on his legs and left hand as a result of the said accident. There is no dispute in this appeal that the respondent was made medically redundant following the injuries suffered as a result of the negligence of the appellants. Given the targeted part of the body injured during the accident he has lost his employment which he had acquired skills and experience over time. The alternative



employment on the labour market may take a long time to secure so as to restore his earning capacity. In considering this question as it pertains to this appeal I rely on the comparative jurisprudence in *Chan Wai Tong and Another v Li Ping Sum* [1985] AC 446, a decision of the Privy Council. Lord Fraser of

Tullybelton delivering the judgment of the court said at page 460 ■

“ A claim for loss of future earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The court has to evaluate the present value of that future risk: see *MoelikervA Reyroe & co. Ltd.* [1977] 1 WLR. 132, 140 where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years t in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimants age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant. In the present case there is no evidence at all on these matters....”(emphasis supplied)

30. On cross-examination, the Respondent however conceded that he did not have any documentation to show that he used to earn Kshs.33,000/=. The Respondent told the Court that he used to be paid in cash. The Respondent was 38 years old at the time of the accident.
31. In my view on income earnings I am guided by the dictum of *Jacob Ayiga Maruja & another v Simeon Obayo* 2005 eKLR. Applying the principles in *Jacob Ayiga Maruja case* to the present appeal, there is no guarantee that the Respondent being a long-distance truck driver would have worked up to the age of 60. Having said so, I hereby adopt 12 years as the number of years that the Respondent would have worked were it not for accident. There is a medical report indicating his disability. It appears to me in fulfilling his employment terms and obligations by virtual of the accident he has been deprived the key component of his body which facilitates the performance of the expected contract. On this issue at the end of the respondent’s case he had established a *prima facie* case which warranted the appellant to adduce tactical evidence to rebut the aspect of the respondent not being in active occupation of a driver. What is disturbing on the same pertinent matter is the failure by the learned trial magistrate to hear, elaborate on the issue of the *prima facie* case by giving it a maximum evaluation on loss of earning capacity. The issue of a lump sum quantum of four million (ksh 4,000,000/) in favour of the respondent should not have arisen. By perusing the authorities, I am satisfied that the impugned judgment ought to be reviewed in the interests of justice.
32. As a consequence, the Respondent’s loss of income will be calculated as follows; Kshs.33,000 x12 x 12 = Kshs.4,752,000/=
34. The Respondent also pleaded for future medical expenses but the trial Magistrate did not quantify the same in awarding general damages. From the medical report adduced the claim for future medical expenses was proved and prayed for the sum of Kshs.300,000/= as future medical costs.
35. I further note that in awarding general damages the trial Magistrate did not quantify the award for pain and suffering and loss of amenities. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In light of the injuries sustained by the Respondent



and having regard to issues of inflation this Court awards the Respondent Kshs.1,500,000/= for pain and suffering.

36. In the circumstances of this appeal and considering all the factors I have enumerated in this judgment, taking into account issues of inflation, I will therefore, interfere with the judgment in respect of the award of general damages. I set aside the award of Kshs.4,000,000/= general damages and substitute thereof a sum of Kshs.6,583,335/= The amount of damages awarded is subject to the liability as recorded by the trial court.
 37. On special damages the Court finds that Kshs.31,335/= was pleaded and the same was strictly proved as evidenced by copies of receipts on record.
 38. The award of Kshs.6,583,335/= general damages shall attract interest at court rates from September 29, 2020 being the date of judgment of the trial Court.
 39. Taking into account the injuries sustained by the Respondent and considering that this appeal has partially succeeded in reducing the award of the lower Court, I hereby order that the Appellant shall bear the costs of proceedings in the lower court and each party shall bear the costs of this appeal.
 40. In the circumstances foregoing, this court hereby sets aside and/or vacates the judgment of Kshs.4,000,000/= that had been entered in favour of the Respondent against the Appellants and in its place hereby enters judgment in his favour against the Appellants for Kshs.6,583,335/= made up as follows: -
 - a. Liability 100% in favour of the Respondent
 - b. Pain and suffering- Kshs.1,500,000/=
 - c. Loss of Income- Kshs.4,752,000/=
 - d. Future medical expenses – Kshs.300,000/=
 - e. Special damages – Kshs.31,335/=Total – Kshs.6,583,335/=
- Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 7TH DAY OF NOVEMBER, 2022.

.....

R. NYAKUNDI
JUDGE

