



REPUBLIC OF KENYA



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**Gathuru v Kamencu (Civil Appeal E160 of 2021)
[2023] KEHC 17331 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E160 OF 2021
EM MURIITHI, J
MAY 12, 2023**

BETWEEN

SOLOMON GATHURU APPELLANT

AND

WILSON MURIUKI KAMENCU RESPONDENT

*(Being an appeal from the Judgment of Hon. P.M Wechuli (SRM)
delivered on 26/10/2021 in Tigania PMCC No. 46 of 2020)*

JUDGMENT

1. The Respondent herein, the Plaintiff in the trial court, sued the Appellant and another vide a further amended plaint dated 29/10/2020 seeking General damages for pain, suffering and loss of amenities, Special damages, damages for loss of earning capacity and costs of the suit plus interest. The Respondent pleaded that on or about 11/8/2015, he was lawfully riding his motor cycle along Miathene-Kianjai Road when the Appellant's driver, agent, servant or employee so negligently, carelessly and recklessly managed, drove and controlled Motor Vehicle Registration No KBQ 168 C Toyota Hilux that it hit him thereby occasioning him excruciating injuries. His leg was amputated as a result of the said accident and he depends on other persons as he lost his earning capacity and he requires a prosthetic leg.
2. The Appellant and the other defendant strongly denied the claim through their amended statement of defence dated 1/12/2020, and prayed for its dismissal with costs.
3. Upon full hearing of the case, the trial court found the Appellant to be 100% liable and awarded the Respondent general damages for pain and suffering of Kshs 3,000,000, damages for loss of earning capacity of Kshs 955,812, future medical expenses of Kshs 1,550,000, special damages of Kshs 301,860 totalling to Kshs 5,807,672 together with costs and interest.



The Appeal

4. On appeal, the Appellant vide his memorandum of appeal filed on 25/11/2021 set out 9 grounds of appeal as follows:
 1. The learned trial magistrate erred in law and fact by holding the defendant 100% liable for causing the accident.
 2. The learned trial magistrate erred in law and fact in awarding the Plaintiff Kshs. 3,000,000/= as general damages for pain and suffering.
 3. The learned trial magistrate erred in law and fact in awarding Kshs. 955,812/= in damages for loss of earning capacity despite the fact that the same was not proved.
 4. The learned trial court erred in law and fact in awarding Kshs 550,000/= as damages for future medical expenses despite the fact that the same was not proved.
 5. The learned trial magistrate erred in law and fact in awarding Kshs 301,860/= special damages by failing to consider that the receipts produced by the Respondent did not bear the mandatory stamp duty revenue stamp.
 6. The learned trial magistrate erred in law and fact by awarding inordinately high general damages to the Respondent.
 7. The learned trial magistrate erred in law and fact by failing to consider the appellant's submissions and authorities on quantum hence arriving at an erroneous decision.
 8. The learned trial magistrate erred in law and fact by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.
 9. The learned trial magistrate's judgment on quantum was wholly not supported in law by evidence tendered in court by the parties.

Duty of the Court

5. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified. (See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).

Evidence

6. PW1, Wilson Muriuki Kamenchu, the Respondent herein, adopted his statement dated 11/6/2020 as his evidence in chief. He produced the demand notice to the insurance, the P3, discharge note, KRA search and receipt, receipt for advocate fees, bundles of receipts for treatment and the medical report by Dr Kihumba as exhibits in court. He further testified that, "I pray for costs and compensation. I was amputated and I need to but a prosthetic which is very expensive. I was a foreman. I cant work. I used to earn around Kshs 2000 per day. I also pray for further medical expenses. I go for medical check up."
7. On cross examination, he stated that, "On the day of accident the insurance of the motor cycle had expired. I had a driving licence. No one told me to bring it to court. I was riding on the left side where



- the accident occurred. An oxcart was in front of me. I had to slow down. Some vehicles passed on the right side. I put on an indication to overtake the oxcart. In my side mirror I saw a vehicle from behind. It was overspeeding. It knocked me. It knocked me in the middle of the road. The greater injury was the right leg. The motor cycle was completely damaged. It was written off.”
8. On re-examination, he stated that, “The vehicle was from Miathene to Kianjai. I was also from Miathene to Kianjai. Motor cycle was knocked from behind. I was overtaking hand cart. The driver had even put on lights.”
 9. PW2 PC Bethwel Kiptoo of Tigania police station testified that, “On 11/8/15 at 1300 hours at..area Miathene – Kinome road a motorcycle KMCS 291 F met an oxen cart. The rider indicated to overtake. There was a vehicle behind him KBQ 168 C who failed to keep distance. He hit the rider. It was a straight road. Motor vehicle was to blame. I have a police abstract (police abstract – PEX 9).”
 10. On cross examination, he stated that, “The initial investigating officer went on transfer. I could not get the police files but events are on the OB. I don’t have the OB extract. I have not given mere allegations. The investigating officer recorded statements of the driver and rider but I could not get the file. The make was taken for inspection. I cant tell where the initial investigating officer took the file. It seems the file was misplaced. The rider and driver talked and matter was referred to insurance. I blamed the driver. The abstract does not blame any one.”
 11. On re-examination, he stated that, “Its not a must to indicate who is to blame on abstract.”
 12. PW3 Thomas Kimathi, adopted his statement as his evidence in chief.
 13. On cross examination, he stated that, “It was on 11/8/18. I was from Miathene. The vehicle came very fast and passed me. There was a hand cart. A motorbike was trying to overtake the hand cart. The vehicle hit him. The events occurred around 100 metres from me. I saw the person get hit and he fell. I saw the accident not how it happened.”
 14. DW1 Peter Anampiu adopted his statement dated 21/1/2021 as his evidence in chief.
 15. On cross examination, he stated that, “I saw the plaintiff attempt to cross. It was a span of seconds. The accidents occurred at the middle of the road on a straight line. We were driving towards same direction. The motorcycle turned suddenly. The hand cart was on the rough road, not on the tarmac. I did not swerve. I hooted but there was no time for swerving.”
 16. DW2 Mr. Wambugu testified that, “I am giving evidence on matter of Wilson Karuai Kamenchu. Muriuki lost his right leg following accident on 11/8/2015. He gave one tray showing leg was mangled at Tibia and fibula. Part of the right leg had been amputated below right leg. The injuries are consistent to an accident. I awarded him 45% incapacitation. We also have various chart which show loss of leg below the knee at 45. Yes based on that injury the plaintiff can’t do his usual...job or exert himself manually.”
 17. On re-examination, he stated that, “The prosthetic I am referring to is the one given in most hospitals and is the proper one. Once a patient loses a limb under my care he is referred to prosthesis. I have done this for 25 years when I say it is 80,000 that’s fair and recognizable.”

Submissions

18. The Appellant faults the trial court for relying on the evidence of the Respondent alone in finding him 100% liable while totally disregarding the evidence of DW1, and cites *D.T Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati* (2014) eKLR and *Alfred Kioko Mutei v Timothy Mibeso & another* (2015) eKLR. He submits that since the available testimony is wholly unreliable to answer the



question of liability, the same should be apportioned at 50:50. He urges that the trial court's award of compensation was erroneous and excessive, and cites *David Bagine v Martin Bundi* (1997) eKLR. He urges that since the receipts for special damages relied on by the trial court did not match the amount claimed in each expense and they lacked the requisite revenue stamp, the court should set aside the award of Kshs 301,860. He urges the court to substitute the award of general damages of Kshs 3,000,000 with Kshs 700,000 and cites *Jane Wangui Murage v Dakianga Distributors Limited* (2012) eKLR, *Charles Oriwo Odeyo v Appolo Justus Andabwa & another* (2017) eKLR and *Silvanus Ondiek Ochola v Delta Haulage Services Limited & another* (2009) eKLR. He urges that an award of Kshs 80,000 for prosthetic leg as suggested by DW2 would be enough compensation for future medical expenses. He submits that the trial court correctly applied the minimum wage of Kshs 7,241 but failed to subtract the statutory deductions as per the holding in *Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others* (2014) eKLR. He urges the court to allow the appeal with costs, adopt a multiplicand of Kshs 4,827 and a multiplier of 7 years.

19. The Respondent urges that he proved his case on liability against the Appellant on a balance of probabilities, through his testimony which was corroborated by PW2 and PW3. He urges that the trial court correctly considered the evidence and applied the principles applicable in award of damages, and cites *Isaack Kimani Kanyingi & another v Hellena Wanjiru Rukanga* (2020) eKLR. He urges that since the Appellant did not challenge the production of the receipts for special damages in evidence, he cannot challenge their admissibility on appeal, and cites *Ian Chiungu Irungu & another v John Githira Chege* (2015) eKLR. He submits that the trial court considered the submissions by both parties in making the awards and urges the court to dismiss the appeal with costs.

Analysis and Determination

20. The issues for determination are whether the Appellant was 100% liable for the accident, whether the awards made under the distinct heads were excessive and whether the Appellant's submissions and authorities were considered.

Liability

21. It is conceded that both the Appellant and the Respondent were driving and riding towards the same direction. According to the statement by the Respondent dated 11/6/2020, he was lawfully riding his motor cycle when the Appellant's driver carelessly drove the accident motor vehicle that it hit him. On cross examination, he stated that, "...I was riding on the left side where the accident occurred. An oxcart was in front of me. I had to slow down...I put on an indication to overtake the oxcart. In my side mirror I saw a vehicle from behind. It was overspeeding...It knocked me in the middle of the road. The greater injury was the right leg."
22. His evidence was buttressed by PW2 who testified that, "The rider indicated to overtake. There was a vehicle behind him KBQ 168 C who failed to keep distance. He hit the rider. It was a straight road. Motor vehicle was to blame."
23. The events of the fateful day were further recounted by PW3, an eye witness, vide his statement dated 17/12/2020 which he adopted as his evidence in chief that on the material day, he was walking along Miathene-Kianjai road when he, "saw Motor Vehicle Reg. No KBQ 168 C Toyota Hilux hit the plaintiff and his motor cycle, thereby occasioning excruciating injuries to him. That the said motor vehicle was driven by its' driver so negligently and at a high speed that the driver was totally unable to control it permitting it to veer off the road and hit the plaintiff who was lawfully riding his Motor Cycle along the said road."



24. DW1 recorded in his statement that he was driving in the same direction as the Respondent, when the rider suddenly made a U-turn in an attempt to cross to the right side of the road without indicating. He hooted continuously, applied emergency brakes and swerved to avoiding hitting the rider but due to the close proximity and abrupt action of the rider, the motorcycle and the accident motor vehicle collided at the middle of the road. However, when he was cross examined, he stated that he only hooted but he did not swerve as there was no time to do so.
25. From the synopsis of the evidence as outlined hereinabove, this court finds that it was more probable than not that the Appellant was wholly to blame for the accident, for driving dangerously at high speed thus losing control of the accident vehicle.

General damages for pain and suffering

26. This court has previously considered the principles for appellate interference with an award of damages by a trial court in *Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA* [2020] eKLR as follows:

“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in *Nance v British Columbia Electric Railway Co. Ltd.* (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in *Henry H. Ilanga v M. Manyoka* [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking inot some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell*, [1935] 1 K.B.), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601.”

27. The Respondent testified that as a result of the accident, his right leg was amputated. The Respondent was treated at St. Theresa Kiirua Mission Hospital from 19/10/2015 to 26/10/2015 and thereafter hospitalized at PCEA Chogoria Hospital between 17/6/2019 and 24/6/2019. PW3 recorded in his statement that, “we rushed at the scene to help the plaintiff who had sustained limb injuries and was losing a lot of blood.”
28. Both DW2 Dr Wambugu and Dr J.W Kihumba are in agreement that the Respondent’s right leg was amputated as a result of the accident.
29. The injuries sustained by the Respondent are listed by Dr J. W Kihumba in his medical report dated 23/10/2020 to be right mangled leg with comminution and tibial bone loss, multiple bruises on the scalp and both hands, severe blood loss approx. 3 litres, left ankle cut wound and tender abdominal wall. In awarding general damages of Kshs 3,000,000, the trial court relied on the case of *Catherine Njoroge v Bernard Njeru* (2016) eKLR where the claimant sustained an avulsion injury to the right femoral artery with resultant a vascular necrosis of the right femur and total amputation of the right lower limb at the hip, a fracture of the right femur and a compound fracture of the superior and inferior pubic ramus of the right bone. Here, the Respondent’s right leg was completely crushed and it had to be amputated at the knee. Dr J. W Kihumba approximated the degree of permanent incapacity to be 80%, but in the absence of any evidence to support the said conclusion, this court must find that the



Respondent suffered permanent incapacity of 45% as assessed by DW2 whose testimony was tested on cross examination.

30. In *John Kinyua Murage & 2 others v Joseph Onyango Obura* (2018) eKLR, the court (J. K. Serگون J) assessed general damages at Kshs 2,500,000/= for compound fractures of the right tibia, compound fractures of the right fibula, skin and muscle loss of the right leg behind the knee with permanent disability of 45%.
31. Taking into account the principle that comparable injuries should attract comparable awards, and the permanent incapacity of 45% as well as the inflation rate, this court finds that the award of Kshs 3,000,000 as general damages for pain and suffering was justified in the circumstances.

Loss of earning capacity

32. It is clear from the evidence on record that the Respondent's ability to earn a living was completely diminished as a result of the accident. That was duly admitted by DW2 when he stated in cross examination that, "Yes based on that injury the plaintiff can't do his usual job or exert himself manually." Although the Appellant concurs with the trial court's adoption of the minimum wage of Kshs 7241 as the multiplicand, he feels that the same ought to have been subjected to the statutory deductions.
33. It is not lost to this court that the trial court adopted the minimum wage as the multiplicand, not because the Respondent was not gainfully engaged, but because he could not prove his earnings. This court therefore rejects the Appellant's invitation to subject the multiplicand of Kshs 7241, being the minimum wage to any deductions. Surely, some of the people who are self-employed make more than Kshs 7241 per month. Moreover, if the Respondent had proved his earnings by way of receipts, the same would not have been subject to any statutory deductions.
34. As for the multiplier of 11 years, it is agreed that the Respondent was 49 years old and he would have been expected to work until the age of official government service retirement, but taking into account the vicissitudes of life, the court finds that a multiplier of 10 years would be appropriate.
35. The tabulation under this head would thus be $7241 \times 12 \times 10 =$ Kshs 868,920/-.

Future medical expenses

36. The Respondent recorded in his statement that, "My leg was amputated as a result of the said accident and that he depends on other persons and cannot do any meaningful job as I used to. That I am a family man and that I was a bread winner for my family prior to the said but I can no longer provide for the said family. Due to the said accident I have suffered loss, serious injuries from which I was hospitalized I have suffered damage."
37. The 2 doctors acknowledge that the Respondent would require the aid of a prosthetic leg, in order to continue with his day to day life. Dr Wambugu opined that, "Muriuki lost his right leg below the knee joint and I do not hesitate to award him 45% as the degree of permanent incapacitation. He will benefit from a functional leg prosthesis whose estimated cost including fitting and training is Kshs 80,000/=."
38. At the time of examination by Dr J. W Kihumba, the Respondent's current complaints were, "Stump is well healed, but he has phantom pain intermittently especially in cold weather. Ambulates on prosthesis and walking staff. However, due to the poor quality of the prosthesis, he's able to stand or walk for a brief moment and often endures pain at the stump. Having been a mason, he's not able to work as before. An abdominal wall mass developed post trauma and requires further investigation and



management.” Flowing from the above complaints, the doctor was of the view that, “A myoelectric prosthesis is recommended to allow him to move freely and resume his occupation.”

39. In support of his claim for future medical expenses and loss of earnings, the Respondent testified that, “...I was amputated and I need to buy a prosthetic which is very expensive. I was a foreman. I cant work. I used to earn around Kshs 2000 per day. I also pray for further medical expenses. I go for medical check up.”
40. This court finds that the Respondent’s life would be more comfortable and as nearly normal as possible with the aid of not just any prosthetic leg but a myoelectric one, as suggested by Dr J. W Kihumba. In fact, Dr J. W Kihumba noted that the prosthetic leg the Respondent was using at the time of examination was of poor quality and thereby causing him pain during movement. This court feels that the amount of Kshs 1,000,000 awarded by the trial court was on the higher side. No cost estimate of such prosthetic leg was given but the court accepts that on account of the inflationary trend since the testimony of the appellant’s doctor on the cost of the prosthetic at 80,000/- must be increased to Kshs 100,000/-. This court finds that an amount of Kshs 20,000 for maintenance during the period of rest of his working life of 10 years would be reasonable.
41. The tabulation for the myoelectric prosthetic leg would thus be Kshs 100,000 at a maintenance cost of Kshs 20,000 for 10 years = Kshs 300,0000.

Special damages

42. The receipts in support of special damages, which the Appellant now contends did not either match the amount claimed or bear the mandatory revenue stamp, were produced without any objection whatsoever. Besides, section 19 of the *Stamp Duty Act* does not forbid production of unstamped receipts but postpones such production till the date the duty shall have been paid.

Consideration of the Appellant’s submissions and authorities

43. The Appellant faults the trial court for failing to consider his submissions and authorities thereby arriving at an erroneous conclusion. Having perused the entire record, the court finds that the trial court properly analyzed the submissions and authorities cited by both parties before reaching the decision it did.

Orders

44. Accordingly, for the reasons set out above, this court finds the appeal to be merited and makes the following orders:
1. The trial court’s award of general damages for pain and suffering of Kshs 3,000,000/- is upheld.
 2. The award of special damages of Kshs 301,860/- is upheld.
 3. The award of damages for loss of earning capacity of Kshs 955,812 is set aside and substituted with an award of Kshs 868920/-.
 4. The award of future medical expenses of Kshs 1,550,000 is hereby set aside and substituted with an award of Kshs 300,000/-.
- Total: Kshs 4,470,780/-.
45. As both patties have partially succeeded in their respective contentions the court does not make order any as to costs.



46 Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mungai Advocate for Appellant.

Ms. Mbogo Advocate for the Respondent.

