



**Jacaranda Bodaboda Operators & another v Nyasero (Civil Appeal
774 of 2022) [2023] KEHC 23806 (KLR) (Civ) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23806 (KLR)

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

CIVIL

CIVIL APPEAL 774 OF 2022

JN NJAGI, J

OCTOBER 17, 2023

BETWEEN

JACARANDA BODABODA OPERATORS 1ST APPELLANT

GEOFFREY KIRADA 2ND APPELLANT

AND

FRANCIS PATRIS NYASERO RESPONDENT

*(Being an appeal from the judgement and decree of Hon. G. Sogomo, Principal
Magistrate, in Milimani CMCC No. E3502 of 2022 delivered on 27/5/2022)*

JUDGMENT

1. The Respondent herein instituted a suit at the lower court seeking to recover damages against the Appellant herein for injuries sustained in a road traffic accident. The court proceeded to assess and award the respondent Ksh.1,200,000/= in general damages for pain and suffering, Ksh.200,000/- for diminished earning capacity, Ksh.100,000/- for future medical expenses and Ksh.18,550/= in special damages.
2. The Appellant was dissatisfied with the trial court's judgement and filed the appeal herein. The grounds of appeal are that:
 - (a) That the Honourable Learned Magistrate erred in law and in fact in awarding an excessive amount in general damages to the respondent of Ksh.1,200,000/=.
 - (b) That the Honourable Learned Magistrate erred in law and in fact in awarding general damages for diminished capacity to the respondent amount to Ksh.200,000/= which prayer was not pleaded.



- (c) That the Honourable Learned Magistrate erred in law and in fact in awarding a sum of Ksh.100,000/= for future medical expenses, which prayer was not pleaded.
 - (d) That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the respondent due regard had to the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.
3. The appeal was disposed of by way of written submissions.

Appellant's Submissions

- 4. The Appellant submitted that in making an award of Ksh.1,200,000/= for general damages, the trial court disregarded the appellant's submissions that the injuries sustained by the Respondent warranted an award of Ksh.350,000/-. That the trial court did not provide recent decisions to support its award in general damages. That the court ignored the cardinal principle in assessment of damages that comparable injuries should as far as possible be compensated by comparable awards. To support an award of Ksh.350,000/- the Appellants relied on the awards in the following cases: Said *Abdullahi & another vs Alice Wanjira* (2016) eKLR where the High Court set aside the lower court's award of Ksh.600,000/= and substituted it with an award of Ksh.300,000/= for fracture of the right humerus bone with 10% permanent incapacity. *Daniel Otieno Owino & another vs Elizabeth Atieno Owuor* [2020] eKLR where Aburili J. reduced an award of Ksh.600,000/- to Ksh.400,000/- for compound fracture of the tibia and fibula bones of the right leg, deep cut wound and tissue damage of the right leg, head injury with cut wound on the nose, blunt chest injuries and soft tissue injury on the lower left leg. *Maina Onesmus vs Charlse Wanjobi Githome* [2019] eKLR where the Respondent had sustained fractures of the mid shaft humerus, fracture of the condyles and fragment fracture of the shoulder girdle. Matheka J. substituted an award of Ksh.600,000/- with one of Ksh.350,000/- and described the injuries as not serious.
- 5. The Appellants submitted that the award of Ksh.1,200,000/- in general damages was excessive. They urged the court to substitute it with one of Ksh.350,000/=.
- 6. The Appellants further submitted that the Respondent did not make any specific prayer for diminished earning capacity and that the issue only came up during submissions. They submitted that loss of earnings is a special damage claim which must be strictly pleaded and proved. Reliance was placed in the cases of *Cecilia W. Mwangi & another vs Ruth W. Mwangi* [1997] eKLR and *Douglas Kalafa Ombeva vs David Ngama* [2013] eKLR to buttress this position.
- 7. It was also submitted that no prayer was ever made for future medical use and hence should not have been awarded. It was submitted that the appellant had demonstrated a case that would warrant interference of the trial court's awards.

Respondent's submissions.

- 8. In response, the respondent submitted that the award in the Said Abdullahi case (supra) of Ksh.600,000/= was made for a fracture of humerus bone with 10% permanent disability. That the affected bone in that case is not the same as that suffered by the respondent. That unlike in the instant case, the claimant in that case did not undergo surgery to have the fracture fixed with metal implants nor did he require removal of metal implants. That the authority was irrelevant.



9. The Respondent submitted that awards in general damages as those suffered by the Respondent would range between from Ksh.800,000/= to Ksh.1,500,000/=. To buttress this position counsel for the Appellant referred the court to the cases of Pestony Limited & another vs Samuel Itonye Kagoko [2022] eKLR where Ksh.800,000/- was awarded for fracture of the femur mid shaft with 4% permanent incapacity and Zachary Kariithi vs Jashon Ochola [2016] eKLR where the plaintiff sustained fracture of the right tibia/fibula and femur bone midshaft and soft tissue injuries and an award of Ksh.1,500/- was upheld on appeal.
10. It was submitted that the Respondent vide its amended plaint dated 10th March 2023 pleaded that he was a construction worker earning an average of Ksh.17,000/- monthly. That he had lost his only source of income and claimed general damages for lost of income and/or diminished earning capacity for 17 months for the entire period of recovery. It was submitted that the claim for future medical expenses of Ksh.100,000/- was pleaded at paragraph 8 of the amended plaint. That both claims were proved by way of medical report by Dr. Wokabi. That the Appellants pleaded to both claims in their amended defence and as such they cannot now be heard to say that the same was not pleaded. The respondent cited the case of Rachael Wambui Ng'ang'a & another vs Rahab Wairimu Kamau [2020] eKLR where the court found that future treatment was before the court both in the pleadings and in evidence.
11. It was submitted that the Appellants had not raised sufficient reason to warrant interference with the decision of the trial court. The Respondent urged this court to dismiss the appeal and uphold the judgment of the trial court.

Analysis & Determination

12. I have perused the pleadings and record of the lower court, the judgement of the trial court as well as the submissions by the respective counsels for the parties. The issues for determination are;
 - (a) Whether the learned magistrate awarded excessive general damages in view of the injuries sustained; and
 - (b) Whether diminished capacity and future medical expenses were pleaded.

Whether the learned magistrate awarded excessive damages in view of the injuries sustained

13. In an appeal against quantum of damages awarded by the trial court, the court should not ordinarily interfere with the findings of a trial court unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect. This was the Court of Appeal's finding in *Kemfro Africa Ltd t/a Meru Express & another v A M Lubia & another (No 2)* [1987] KLR 30 where the court stated:

“ [T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”

14. The same was reiterated 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.’

15. As the first appellate Court in this matter, this court’s role is to revisit the evidence on record, evaluate it and reach its own independent conclusion - see *Selle & Anor. v Associated Motor Boat Co. Ltd* (1968) EA 123).
16. The medical report by Dr. W. Wokabi dated 16/7/2019 showed that the Respondent suffered fractures of the right femur which were operated on and fixed with metal implants. The doctor noted that the Respondent walked on crutches and was not able to work and had difficulties getting around. It was also noted that the Respondent’s right thigh had surgical scars and required between 12-15 months from the date of the examination to fully heal. It was the doctor’s opinion that the Respondent required another surgery to remove the metal implant at Ksh.80,000/=. The doctor assessed permanent disability at 10%.
17. The learned trial Magistrate in making the awards on damages stated as follows:

“The court has anxiously considered the decisions on quantum cited in *pari materia* cases as annexed to the erudite written submissions by the protagonist camps. The court finds that the sum of Ksh.1,200/- in general damages is an adequate compensation for the injury, pain, loss and damage suffered by the plaintiff and awards her the same”.
18. With that statement, the Magistrate proceeded to award Ksh1,200,000/- in general damages. The Magistrate did not state the reason for awarding Ksh.1,200/- nor did he state why he did not agree with the appellant that the injuries sustained in the matter warranted an award of Ksh350,000/-. It was not sufficient for the trial court just to state that it had considered the authorities submitted by the advocates for the parties without even enumerating them and showing the kind of injuries contained in those authorities. Order 21 rule 4 of the Civil Procedure Rules, 2010 requires a court to give reasons for reaching a particular decision. With due respect, the judgment in this case fell short of that.
19. The Respondent herein suffered fracture of the shaft of the right femur. He was operated on and the fracture fixed with a metal implant. At the time of examination by Dr. Wokabi on 16th July 2019, he was walking with aid of clutches and complained of difficulties of getting around and was not able to work. He opined that the injuries would take 12-15 months to heal. At optimum rehabilitation, the doctor assessed permanent disability at 10%.
20. The Respondent at the lower court asked for general damages in the sum of Ksh3,500,000/- and relied on -*Mehali Tewoldge T/A Mehali Transporters Ltd v Muasya Maingi* (2013) eKLR, *Edward Nzambili Katana v Motors Group Ltd and Shah Punja Hira* (2006) eKLR and *Regina Mwikali Wilson v Stephen Gichubu and Peter M. Muinde* (2015) eKLR where awards ranging from Ksh.1,500,000/- to KSh.2,500,000/- were made. In this appeal the Respondent seems to have abandoned the authorities



he had relied on at the lower court and relied on the cases of Pestony Limited & another vs Samuel Itonye Kagoko (supra) where Ksh.800,000/- was awarded for fracture of the left femur mid-shaft with 4% permanent incapacitation and Zachary Kariithi vs Jashon Ochola (supra) where the Respondent was on appeal awarded Ksh.1,500,000/= for, inter alia, compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone and fracture of the 3rd, 4th 5th ribs of the right side.

21. The Appellant on the other hand had at the lower court made submissions in support of Ksh.350,000/- and made reliance on the case of Said Abdullahi & another v Alice Wanjira (supra). In this appeal he still made submissions in support of the said sum and relied on authorities where awards of between Ksh.300,000/- and Ksh.400,000/- were made.
22. I have examined the authorities relied on by the parties in this appeal. The injuries in the case of Zachary Kariithi vs Jashon Ochola (supra where an award of Ksh.1,500,000/- was made) that was relied on by the Respondent were far more severe than the injuries suffered by the Respondent in the instant case as they included compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone and fracture of the 3rd, 4th 5th ribs of the right side. These injuries do not compare with the injury suffered by the Respondent herein of a single fracture of the femur. I however find the award in the case of Pestony Limited & another vs Samuel Itonye Kagoko (supra) where Ksh.800,000/- was awarded for fracture of the left femur mid-shaft with 4% permanent incapacitation to compare relatively well with the injury suffered by the Respondent herein.
23. In regard to the authorities submitted by the Appellant, I find the awards in those cases to have been low for bone fractures.
24. I have also considered the awards in the following cases: Kiautha v Ntarangwi (Civil Appeal E050 of 2021) [2022] KEHC 10595 (KLR) (30 June 2022) (Judgment) where Muriithi J. reduced an award of Ksh.2,000,000/- to Ksh.800,000/- where the Respondent had sustained bruises on the right upper arm and right shoulder, tender upper back, bruised left foot, tender and swollen right thigh and a mid shaft femur fracture. I find the injuries therein to be relatively comparable to those sustained by the Respondent in this appeal. David Mutembei v Maurice Ochieng Odoyo [2019] eKLR where the respondent suffered a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Ksh-.1,600,000/= had the same reduced on appeal to Ksh.800,000/=. It is however to be noted the respondent in that case had sustained fractures on both legs and therefore the injuries therein were more severe than those sustained by the Respondent in this matter. Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR where the Appellant sustained blunt injury to the right shoulder and fracture of the right femur. In the opinion of the doctor, the Appellant would suffer from degenerative osteoarthritis at a later stage. It was his opinion that further surgery was necessary to remove the nail. The court (Odunga J.) found the award of Ksh.350,000/- not commensurate with the injuries sustained and substituted the award with one of Ksh.600,000/=. Kihara & another v Mutuku (Civil Appeal 27 of 2018) [2022] KEHC 15626 (KLR) (17 November 2022) (Judgment) where the Respondent sustained blunt injuries to the chest, blunt injuries left thigh which developed into ecchymosis, bruises on forearms and fracture of the right femur. Permanent incapacity was assessed at 12 %. The court (Mwongo J.) upheld the lower court's award of Ksh.700,000/- in general damages. Monyoro Mong'are Shem & another v Rose Kebaki [2021] eKLR where the Respondent sustained displaced fracture of the right femur, soft tissue injuries on the neck, soft tissue injuries of the chest, soft tissues injuries of the shoulder joint and soft tissue injuries of the forearms. On appeal, Maina J. reduced the award from Ksh.1,500,000/- to Ksh.600,000/=.
25. In view of the above, I find the award of Ksh.1,200,000/= to have been a wrong estimate of the award of damages payable to the Respondent. Considering that the Respondent suffered 10% disability, I



find an award of Ksh.750,000/- to be adequate compensation for the injuries suffered. The award of the trial court is therefore set aside and substituted with an award of Ksh.750,000/.

Whether diminished capacity and future medical expenses were pleaded

Diminished Earning Capacity

26. The Appellant faulted the trial court for awarding the Respondent damages for diminished earning capacity despite this prayer missing in the plaint. The Respondent pleaded at paragraph 7 that “prior to the said accident, the plaintiff was a construction worker earning an average of Kshs. 17,000/= monthly. He has lost his only source of income and claims general damages for lost income and/or diminished earning capacity for 17 months which is the entire period of recovery.” The Respondent asserted that he had suffered permanent disability of 10%, affecting his performance.
27. The doctor in his medical report assessed the Respondent’s permanent disability of 10% and stated that the same will always persist.
28. In *Kihara & another v Mutuku* (Civil Appeal 27 of 2018) [2022] KEHC 15626 (KLR), the Court held that:

“Loss of earning capacity is in the nature of general damages and need not be pleaded though it has to be proved on a balance of probability..”
29. In *Butler v Butler* [1984] KLR 225 the Court of Appeal held as follows:

“A plaintiff’s loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. ... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of the general damages. ...”
30. Diminished earning capacity is decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved.
31. In case of *Alpharama Limited vs. Joseph Kariuki Cebron* [2017] eKLR it was stated as follows on the method of awarding diminished earning capacity.: -

“The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors.”
32. In his amended Plaint dated 10th March 2021, the Respondent pleaded for damages for loss of income for 17 months when he was out of work. This was a claim for loss of income during the recovery period. It was not a claim for diminished earning capacity. Being a claim for loss of income during the recovery period the claim had to be proved through tendering of evidence. The Respondent claimed that he was a construction worker and that his monthly earnings was Ksh.17,000/. He did not produce evidence to prove that. The claim for loss of income during the recovery period was not proved.



33. The trial court made an award of diminished earning capacity because the Respondent had suffered 10% permanent incapacity. In my view, there was no basis to award diminished earning capacity as the same was not supported by the medical report and the evidence of the doctor who examined the Respondent. The doctor in his evidence said that after recovery the Respondent would be able to resume some work. The doctor was not asked whether the injury had any lifelong effect on the Respondent's capacity to do construction work. More so, the Respondent was not examined after the recovery period to determine whether his capacity to do construction work was affected by the injury. The award of diminished earning capacity was therefore not supported by evidence. It is therefore my view that the award of Ksh.200,000/= for diminished earning capacity was wrongly awarded and the same is set aside.

Future Medical Expenses

34. On this limb, the plaintiff pleaded at paragraph 8 of the amended plaint for Ksh.100,000/-.

35. As already stated the medical report of Dr Wokabi clearly stated that:

“... he was operated on and the fractures were fixed with metal implants...

...He will require another surgery to remove the metal implant which is further pain and suffering at Ksh.80,000/=”

36. In *Bhachu Industries Limited v Peter Kariuki Mutura*, NRB HCCA No.503 of 2009 [2015] eKLR, the Plaintiff suffered an injury on the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- including 50,000/- for removal of K-Nail.

37. In the instant case, the Respondent has satisfied the requirement of pleading the future medical cost, and the doctor's report having estimated the cost of removal, satisfied the requirement of award of future medical costs. I therefore allow the award of Ksh.100,000/- under this head.

38. In conclusion, the award of general damages is reduced to Ksh.750,000/- and the award of loss of diminished earning capacity is set aside. The final award is calculated as follows:

General damages.....Ksh. 750,000/-

Future medical expensesKsh. 100,000/-

Total Ksh. 850,000/-

39. As the appeal has partially succeeded, I order each party to bear its own costs of the Appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH OCTOBER 2023

J. N. NJAGI

JUDGE

In the presence of:

Miss Moraa for Appellants

Miss Konanga holding brief Mr Orange

for Respondent



Court Assistant – Amina

30 days Right of Appeal.

