



**Ochiel & another v Musyoki (Civil Appeal E42 of 2022)
[2024] KEHC 4943 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E42 OF 2022**

RK LIMO, J

MAY 14, 2024

BETWEEN

JOHN OKOTH OCHIEL 1ST APPELLANT

ABEL MUTUA MUNDU 2ND APPELLANT

AND

**NZENGU MUSYOKI ALIAS JAMES NZENGU MUSYOKA ALIAS MUSYOKI
NJERU ALIAS NZENGU MUSYOKI RESPONDENT**

JUDGMENT

1. This is an appeal against the Judgment of Hon. I.G. Ruhu SRM delivered on 19th December 2019 vide Mwingi CMs Court Civil Suit No. E034 of 2021.
2. In that suit the Respondent sued the appellant on account of a Road Traffic Accident that occurred on 28th July 2019 involving the 1st Appellant's Motor Vehicle Registration No. KCB xxxX and a Motorcycle Registration No. KMER xxxF on which the Respondent was travelling as a pillion passenger. The Respondent blamed the Appellants for negligence blaming that 2nd appellant was negligent in managing the subject motor vehicle and that he caused the accident where he sustained injuries.
3. The Respondent particularized injuries sustained as follows;
 - i. Comminuted fracture to the mid shaft of the right femur
 - ii. Fracture to the distal femur
 - iii. Comminuted fracture to the right tibia
 - iv. Comminuted fracture to the right fibula
 - v. Cut wound on the right leg measuring 5cm by 6cm and



- vi. Sever lower back pains
- vii. Permanent incapacity of 20%
4. The evidence tendered at the trial briefly were that the Respondent was travelling as a pillion passenger on 28.7.2019 along Migwani-Kyome when they encountered the Motor Vehicle Registration No. KCB xxxX which in his estimation was driven at high speed and knocked them down on the road as the rider tried in vain to avoid the accident. He stated that he sustained injuries and was treated at Migwani Sub-County Hospital and later Jaramogi Oginga Odinga Referral Hospital. He stated that he was unable to resume his work in farming and masonry where he claimed he used to earn about Kshs. 50,000/=.
5. The Respondent called a Police Officer CPL Gregory Maingi who tendered a police abstract (P Exb 4) but stated that he was not the investigating officer and though he blamed the 2nd appellant for causing the accident. He stated he did not visit the scene of the accident.
6. The 2nd Respondent (DW1) testified and blamed the rider of the motor cycle for over speeding. He conceded that he was charged for not reporting the accident within 24 hours. He defended himself that he ran away after the accident because he feared that the crowd at the scene would be hostile to him. He stated that he took himself to Migwani Police Station the following day adding that he went to Thika after the accident.
7. The trial court after trial evaluated the evidence tendered and found that the Respondent had proved his case on liability on a balance of probability because of the conduct of the 2nd Respondent after the accident. The trial court found that the 2nd Respondent should have ran to a nearest police station but running away to Thika suggested he was liable. On quantum the trial court awarded the Respondent as follows;
 1. Kshs.1,700,000 as general damages for pain, suffering and loss of amenities.
 2. Kshs 500,000 being general damages for loss of earning capacity.
 3. Kshs 105,000/- being costs for future medical expenses for prosthetic limb.
 4. Kshs 461,550/- being special damages
 - a. Total Kshs 2,766,550/-
 5. The Respondent was also awarded costs of the suit and interest at court rates from the date of filing suit.
8. The Appellants being dissatisfied with the trial court's judgment filed this appeal vide a Memorandum of Appeal dated 21st September 2022 on 23rd September 2022 raising the following grounds;
 - i. The Learned Magistrate erred in law and in fact in entering judgment against the Appellants and finding that the Appellant were 100% liable or to blame for the accident when considering the evidence on record and trial the same had not been proved.
 - ii. The Learned Magistrate erred in law and in fact as the evidence adduced did not support any negligence on the part of the Appellants.
 - iii. The Learned Magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him.



- iv. The Learned Magistrate erred in law and in fact in awarding the sum of Kshs 1,700,000/- as general damages which amount was inordinately high taking into account the injuries sustained by the Respondent and relevant case law.
 - v. The Learned Magistrate erred in law and in fact in delivering an inconsistent judgment with respect to the Respondent's claim for loss of earning capacity.
 - vi. The Learned Magistrate erred in law and in fact in awarding the sum of Kshs, 500,000/- for loss of earning capacity which amount was inordinately high considering the same when the evidence adduced did not support such a claim in the circumstances and the same is not supported by legal principles in the award of damages.
 - vii. The Learned Magistrate erred in law and in fact in arriving at an award of Kshs 105,000/- as future medical expenses which amount was not strictly proved as by law required.
 - viii. The Learned Magistrate erred in law and in fact by basing the awards on extraneous considerations and factors.
9. In their written submissions dated 23rd November 2023 done through M/s Archer & Wilcock the appellants have faulted the trial court on the question of quantum. They contend that the awards made was excessive and inordinately high faulting the learned Magistrate for applying wrong principles in assessing damages.
10. The Appellants placed reliance on their authorities cited in the trial court on this head as follows;
- a. *Harun Munyoma Boge v Daniel Otieno Agulo* (2015) eKLR where the High Court on appeal enhanced the award of Ksh 150,000/- to Kshs 300,000/- for the following injuries chest injuries, cut wound on right wrist, deep cut wound on the right foot, fracture of the right tibia and fibula and soft tissue injuries.
 - b. *Mwavita Jonathan v Silivia Onunga* (2017) eKLR where the court set aside an award of Kshs 1,000,000/- and substituted it with an award of 400,000/- for the following injuries left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back, deep wound on the lower leg. Disability was also assessed at 80%.
 - c. *Ibrahim Kalema Lewa v Esteel Company Limited* (2016) eKLR where an award of general damages at Kshs 300,000/- was upheld for an appellant who sustained an intertrochanteric fracture of the left femur and was hospitalized for two months and suffered 25% permanent incapacity.
11. The Respondent has opposed this appeal and though he has submitted on both liability and quantum, the appellant chose to submit only on quantum.
12. The Respondent asks the court to maintain the award of general damages granted by the trial court. He has placed reliance on the following cases;
- a. *Joseph Musee Mua v Julius Mbogo Muigi & 3 Others* (2013) eKLR where the Plaintiff sustained a fracture of the tibia fibular, cuts on the forehead, a broken tooth and pain in his right shoulder and chest. The court awarded Kshs. 1,300,000/- being general damages.
 - b. *Mwaura Muiruri v Suera Flowers Limited & anor* (2014) eKLR multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left submaxillary area), communitated fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of



the right leg upper and lower 1/3rd tibia fibula. the Plaintiff's total permanent disability at 70 % computed as follows; 50% for the loss of the right arm and 20% on the left leg. The court awarded Kshs 1,450,000/- in general damages.

- c. *Michael Maina Gitonga v Serah Njuguna alias Serah Wanjiku Mungai* (2012) eKLR where the plaintiff sustained multiple fractures of the pelvis, dislocation of the right hip with displaced fracture of the right acetabulum, comminuted fracture of the right tibia on the proximal end with fracture of the tibia plateau and soft tissue injuries. She was awarded Kshs. 1,500,000/- in 2012.
 - d. *Michael Njagi Karimi v Gideon Ndungu Ngubiri & anor* (2013) eKLR here the plaintiff sustained compound fractures on both lower limbs and right upper limb, lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises on the left elbow as well as on the back extending to the right side of the lumbar region and blunt trauma to the chest. The court awarded Kshs. 2,000,000/- in 2013.
 - e. *Peace Kemuma Nyang'era v Michael Thuo & anor* (2014) eKLR where the plaintiff suffered around the pelvis as follows, fracture of the sacrum bone – lowest back bone spine, fracture of the right superior pubic ramus of the pubic bone – right hip bone, fracture of the right ischium bone part of the pelvis – lower part as one sits down, haematoma on both thighs, haematoma in the lumbar - sacral – lower part of spine. The court awarded Kshs 2,500,000/- in general damages in 2014.
13. On the award on diminished earning capacity, the Respondent submits that the award was justified as he was incapacitated and could not go back to working as a farmer and brick maker as he did before the accident. It has also been submitted that the award for future medical costs was justified and proved as well as the special damages awarded.
 14. This being a first appeal, the duty of the first appellat court was well stated in *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court of Appeal stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
 15. This appeal is only on quantum and so the only issue for determination is whether the trial court made the correct assessment of damages in relation to the injuries suffered and relevant authorities cited.
 16. The trial court awarded the Respondent Kshs. 170,000/= and awarded him 20% permanent incapacity and awarded him Kshs. 500,000 for loss of earning capacity.
 17. On general damages for pain and suffering and loss of amenities the trial court awarded the Respondent Kshs. 1, 700,000/-. The trial court stated that it relied on authorities cited by the parties in the trial court in consideration of the injuries sustained and the impact the accident had on the Respondent's quality of life. The Appellants were of the view that the amount awarded as general damages were excessive,



- and that the same ought to be reassessed. The Respondent on the other hand, argue that the trial court was not misdirected in assessment of the damages and that the award should not be disturbed.
18. The accident occurred on 28th July 2019, the medical report indicated that the Respondent was admitted at Jaramogi Oginga Odinga Teaching and Referral Hospital between 30th July 2019 and 3rd August 2019 where he underwent open reduction and internal fixation surgery. Injuries sustained by the Respondent are not disputed by the Appellants.
 19. The trial court stated that it relied on authorities cited by the parties. On the question of general damages, the Appellants cited there cases were not the best comparative authorities with regards to the injuries sustained by the Respondent as the plaintiff in those cases mostly suffered single fractures while the Respondent herein sustained multiple fractures on his right lower limb.
 20. The general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* (1982-88) I KAR 727 at page 730, Kneller JA stated:

“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...”
 21. Ngugi J in *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR stated as follows;

“On my part, taking into consideration the nature of the injuries in this case and the global impact on life quality it has had on the Plaintiff while taking into consideration the guiding principle that in assessing damages for pain, suffering and loss of amenities is to both take into consideration the prevailing conditions in Kenya while ensuring that uniformity must be sought in the award of damages”.
 22. In the cases of *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors Agoro Yombe Secondary School* (2018) eKLR and *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR Both plaintiffs sustained fractures of the femur and in both the Plaintiffs were awarded Kshs 800,000/- and Kshs 700,000/- respectively. The distinction between the two cases and the Respondent’s injuries in the present case is that there was no report of any permanent incapacity from their injuries.
 23. In *David Kimathi Kaburu v Dionisius Mburugu Itirai* [2017] eKLR the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Kshs. 630,0000/- in 2017.
 24. In *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR the Plaintiff sustained fractures of the right and left mid-shaft femur, devolving wound on right tibia and amputation of right foot and multiple cuts. She was awarded Kshs. 700,000/- in 2017.
 25. In the case of *David Mutembei v Maurice Ochieng Odoyo* [2019] eKLR, the respondent suffered injuries of a fracture of the right femur and a proximal fracture of the left tibia and was awarded general damages of Kshs. 1, 600, 000/- had the same reduced on appeal to Kshs. Kshs. 800, 000/-
 26. In the case of *Joseph Mwangi Thuita v Joyce Mwole* (2018) eKLR where the plaintiff suffered injuries of fractured right femur, compound fracture (r) tibia and fibula, shortening right led and episodic pain (r) thigh with inability to walk without support and the court awarded Kshs. 700,000 as general damages.



27. In the case of *George William Awuor v Beryl Awuor Ochieng* [2020] eKLR the plaintiff in the matter suffered fractures of the right femur and left tibia fibula. The doctor noted that the tibia fibula fractures were compound while the femur fracture was simple. It was also noted that the respondent's right thigh had surgical scars and some bruising which had since healed but that the nail was still in situ and she would have to undergo surgery to remove the nail. The High Court on appeal set aside the award of general damages in the sum of Kshs 2,000,000 and substituted with an award of Kshs. 1,200,000/=.
28. In light of the above authorities, which in my view shows similar injuries with the ones suffered by the defendant, it is apparent that the trial court award was on the higher side. An award in the region of his 1 million would have been fair taking into consideration all factors.
29. On loss of earning the legal position is that the same is a special damage and the same ought not only to be specifically pleaded but proved. The same also applies to a claim on special damages.
30. The claim for loss of earning capacity is a general damage claim as such it is deemed to flow directly from the claim and need not be pleaded. This was the holding of the Court of Appeal in the case of *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR where it laid down the principles for the award for loss of earning capacity as follows-

“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 the 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.”

31. Going by the evidence tendered by the plaintiff, it is not certain that he was a mason. It is however going by the medical evidence by the doctor that he suffered serious injuries which he assessed at 20% incapacity. It is therefore the finding of this court on award given by the trial court of Kshs. 500,000/= is taken on a token for the serious injuries suffered to take care of loss of his capacity to work. In that content the award of Kshs. 500,000 was justified.
32. The Appellants have raised issue with the award of Kshs 105,000/- for future medical expenses.
33. At paragraph 7 of the Plaint dated 21st April 2021, the Respondent pleaded as follows;

The plaintiff claims costs of future medical expenses for surgery to remove the metal plates in situ of the right leg estimated at Kshs 105,000/-
34. PW1 Dr Kennedy Munyoki in his medical report indicated his opinion and prognosis as follows;

He experiences neurogenic pain which is being managed medically through physiotherapy. He will need to undergo surgery for removal of the plate at an estimated cost of 105,000/-



35. This report was produced in court by consent on 24th March 2022 and the Appellants did not produce any other report to controvert the doctor’s findings.
36. The Court of Appeal in the case of *Tracom Limited & another –v-Hassan Mohamed Adan* [2009] eKLR stated: -

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma* (2004) 1 EA 91, this Court, stated: -

“ And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person’s legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

37. The cost of future medical expenses was pleaded by the Respondent and proved. The same applies to the claim on special damages. The same was also pleaded and proved.

In the end this court partly allows this appeal only to the extent that the award on general damages is revised to Kshs. 1 million. The other awards are upheld. In summary therefore the award is as follows;

1. General damagesKshs. 100,000/=
 2. Loss of earning capacityKshs. 500,000/=
 3. Special damages Kshs. 461,000/=
- TotalKshs. 1,961,000/=

The appellants will get half costs in this appeal but the Respondent will get costs and interests on the above amount.

DATED, SIGNED AND DELIVERED AT KITUI THIS 14TH DAY OF MAY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

