REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO.112 OF 2017

MOI'S BRIDGE QUARRY LIMITED.....APPELLANT

VERSUS

MARTIN OMUSE EDOAN.....RESPONDENT

(*An Appeal from the Judgment of the Hon. M. Wambani (CM), in Eldoret Chief Magistrate Civil Case No. 112 of 2014)*

JUDGMENT

1. The Appellant was the original Defendant and the Respondent the Plaintiff in the original suit in **Eldoret Chief Magistrate's Court Civil Case No. 583 of 2014**. The Respondent instituted the said suit in the trial court for general and special damages, arising from injuries sustained from an accident that occurred in the Appellant's quarry when a rolling stone hit the Respondent's leg. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants. The Respondent relied, *inter-alia*, on the doctrine of *res ipsa loquitor*.

2. The Respondent therefore believed that he was entitled to compensation and therefore prayed for;

a) General damages for pain and suffering, loss of income, loss of earning capacity and loss of amenities;

b) Damages for loss of future earning capacity;

c) Special damages of Kshs.3,000/=, future medical expenses plus the ones to be proved during the hearing.

d) Costs of this suit.

e) Interest on (a), (b) and (c) above Court rates until payment in full.

f) Any other of further relief this Honourable Court may deem fit and just to grant.

3. The Appellant filed a statement of defence where it admitted that an accident had occurred involving the Respondent but denied that the same was caused by negligence on its part or on the part of any of its servants or agents in the course of duty. The Appellant took as a further defence that it always provides it employees with protective equipment and a safe working environment. That the said accident occurred in the circumstances other than in the ordinary course of the Respondent's employment as driver, and that the same was solely caused by or contributed to by negligence of the Respondent himself.

4. The suit was heard by the learned Chief Magistrate (M. Wambani) who in a judgement dated 15th August, 2017 did not find favour with the Appellant. Being dissatisfied with said judgment the Appellant filed this appeal.

5. There are nine grounds taken in the Memorandum of Appeal filed by the Appellant. In sum the grounds are that the learned trial magistrate erred in law and fact in arriving at a decision that was not supported by evidence on record; that the learned trial magistrate erred in law and in failing to find that negligence and particulars thereof stated by the Plaintiff in his plaint had not been proved in the Plaintiff's testimony in court; that the learned trial magistrate erred in law and in fact, in failing to find negligence or contributory negligence on the part of the Plaintiff, hence blaming the Defendant wholly for the accident instead of apportioning liability; that the learned trial magistrate erred in law and in fact, when in her judgment she failed to consider and or disregarded the Defendant's pleadings and submissions; that the learned trial magistrate erred in law and fact, in failing to find that no disability had been proved and none was proved by the Plaintiff in his evidence and there was no evidence that he will never drive or do a similar job; that the learned trial magistrate erred in law in awarding damages that were excessive and unwarranted; that the learned trial magistrate erred in law and fact, awarding special damages in excess of

those pleaded in the Plaint i.e. that whereas the Plaintiff had in his Plaint sought special damages of only Kshs.3,000/= the trial court went ahead and awarded more; and finally that the trial magistrate erred in law and fact, when in her judgment failed to take into account the monies paid by the Defendant under the Work Injury Benefit Act (WIBA) and those the Defendant spent on the Plaintiff's treatment and medication.

Determination

6. This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

7. This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion whether or not to uphold the decision of the trial court. Further, the Court has jurisdiction to delve into matters of fact and law in determining the appeal. (See **Selle vs Associated Motor Boat Company Ltd [1968] EA 123.)**

8. In the present appeal and cross appeal, the issues for determination are whether the special damages awarded to the Respondent were proved to the required standards in law. Secondly, whether the Respondent is liable to contributory negligence. Thirdly, whether the Respondent was entitled to an award for loss of earnings and earning capacity. Lastly, whether the amount awarded to the Respondent as general damages constituted a fair assessment for purposes of compensation.

9. There is no dispute that special Damages must be both **pleaded and proved,** before they can be awarded by the Court. Suffice it to quote from the decision of the Court in ***Maritim & Another vs Anjere (1990-1994) EA 312 at 316,*** where court held that:

> ***"In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."***

10. In the present case the Appellant contends that the sum of Kshs. 403,000/= awarded to the Respondent was not specifically pleaded and proved at trial. It is further contended that only Kshs. 3,000/= was supported by evidence on record.

11. I have carefully perused and evaluated the evidence presented in support of special damages by the Respondent. It emerges that, during cross examination, the Respondent conceded to not having receipts in support of the medical expenses clearly indicating that his alleged hospital bill of Kshs.27,000/= was paid by him. He further admitted that the Appellant had paid for his medical expenses to the tune of Kshs.488,885/=. I find therefore that the award of special damages in the sum of Kshs.403,000/= was erroneous and the same is set aside and substituted with an award of Kshs.3,000 which was the only amount proved by evidence in accordance with the standards required in law.

12. On whether the Respondent is liable for contributory negligence. The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In **De Frias v Rodney 1998 BDA LR 15** it was held as follows:

> ***"Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances she made an unsuccessful attempt to avoid the conclusion."***

13. What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by **Alderson B** in **Blyth vs Birmingham Waterworks Co. [1843 – 60] ALL ER 478**

> ***"Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."***

14. In my view negligence and contributory negligence comes in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the Plaintiff has established a prima facie case showing the Defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant. In the instant appeal both the evidence and submissions indicate that the Respondent was employed as track driver to ferry stones from the Appellant's quarry. The Respondent while in the Appellant's quarry, was hit by a rolling stone that injured his leg. This was a clear *prima facie* evidence of the lack of safety measures in place to protect the Respondent from being hit by the rolling stone that injured his leg. It is worth noting that during examination in chief DW1 Alfred Nyongesa testified that the Respondent was given a dustcoat as a lorry driver. One would wonder how a dustcoat would adequately protect a driver whose work is to carry stones from a quarry. In my view a quarry is a dangerous working environment and the Appellant owed the duty of care to its employees. The Appellant should have ensured that safety measures were put in place to prevent such eventualities.

15. Pursuant to the foregoing, this court confirms the finding of the trial court that the appellant was 100% liable for the accident.

16. Loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages, whereas 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. See ***Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR***. That being the case, I note from the record and more specifically the plaint, that the Respondent pleaded loss of income and/or future earnings. In ***Douglas Kalafa Ombeva vs David***

***Ngama** [2013] eKLR*, the Court of Appeal held that:

> ***"Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically"***

17. It is not in doubt that the Respondent pleaded loss of earning. The Respondent used to earn a sum of Kshs.15,000/= per month. However, during cross-examination the Respondent admitted that the Appellant continued to pay him his salary for a period of 18 months and that cumulatively he has received a total of Kshs.270,000/=. It is my finding that the Respondent did not suffer any kind of loss of earning as he still received his salary even after the accident.

18. As for loss of future earning capacity, the Respondent testified that he has not driven after the alleged accident and can no longer drive as his right leg was severely injured. The Court of Appeal in ***S J vs Francessco Di Nello & Another** [2015] eKLR* held that:

> ***"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."***

19. In this case the Respondent was 43 years old at the time of the accident. The trial Court awarded him damages for loss of future earnings using the multiplier of 14 years and multiplicand of Kshs.15,000/= totaling Kshs.2,520,000/=.

20. In such matters however as appreciated by **Ringera, J** (as he then was) In **Hannah Wagaturi Moche & Another vs Nelson Ndomo Muya Nairobi HCCC No. 4533 0f 1993:**

> ***"In determining the right multiplier the right approach is to consider the age…the balance of earnings life… the vicissitudes of life, and the factor of accelerated payment in lump sum."***

21. In this case, there is no guarantee that the Respondent was going to work as a driver for 14 years. Moreso during cross-examination the Respondent testified that he can do any other job and would require some training before he can drive again. In my view 10 years would be more appropriate. In the circumstances his award for loss of earning capacity works out as follows:

Kshs.15,000 x 12 x 10 = 1,800,000.00

22. The said is to be discounted by Kshs. 270,000/= being payment that was made to the Respondent after the accident leaving a balance of Kshs. 1,530,000/=

23. On general damages, the trial court awarded the Respondent Kshs. 3,000,000/= for pain and suffering. The Appellants were of the view that the amount awarded as general damages were excessive. The Respondent on the other hand, argued that the trial court was not misdirected in assessment of the damages and that the award should not therefore be disturbed.

24. The Respondent pleaded the following injuries;

a) Dislocation of the right clavicle, at the sterno- clavicular joint.

b) Bruises on the right shoulder and back.

c) Deep cut wound on the lateral aspect of the right elbow joint.

d) Fracture of the right femur lower one third.

e) Degloving injury of the left thigh mid medially.

f) Degloving injury to the right popliteal area (Back of the knee)

g) Cut wound on the anterior aspect of the left leg.

h) Crushed injury to the right calcaneal area (heal)

i) Right sciatic nerve injury resulting to weakness and numbness of the right leg.

25. It has been stated and restated from time to time that in assessment of damages, the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases. The medical report by PW1 doctor Joseph Sakobe indicates that the Respondent sustained several soft tissue injuries with the following complications;

a. Persistent dislocation of the right stern-clavicular joint affecting the use of upper limb that will need an open reduction

and internal fixation at approximate cost of Kshs.100.000/=

b. Chronic Osteomyelitis injected implant that will need to be managed at an approximate cost of Kshs.300,000/=

c. Shortening of the lower limb by 3cm which will predispose the Plaintiff to early Osteomyelitis of the limb and the knee joints due to contractures of popliteal area and general weakness due to sciatic nerve injury giving him a permanent disability of 30%.

26. The Court of Appeal in **Alfarus Muli vs Lucy M Lavuta & Another Civil Appeal No. 47 of 1997** held that:

> ***"The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding…Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."***

27. The Appellants have urged this court to reduce the award of general damages on account that the Respondent was awarded damages that were not only excessive but also unreasonable and unwarranted.

28. **In Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730,** Kneller J.A. 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. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."***

29. Having considered the pleadings as filed on injuries before the trial court, reassessed the evidence as adduced in support of the pleaded injuries and submissions together with judicial authorities cited by both parties' counsel in their respective submissions on appeal, the trial court no doubt awarded inordinately excessive damages and this court is persuaded that there is merit and justification in interfering with the award.

30. In this case, the trial magistrate did not consider the fact that comparable injuries should be compensated by similar awards of general damages. Being guided by the findings of the medical report by doctor Joseph Sakobe which was presented as evidence in court, it is clear that the amount in question is inordinately high. The trial learned magistrate also failed to take into account that the Respondent herein had received a total of Kshs.469,320/= from the Appellant under the Work Injury Benefit Act (WIBA). Accordingly, I allow this appeal on quantum, set aside the award of Kshs.3,000,000/= general damages awarded to the Plaintiff/Respondent by the trial court and substitute it with an award of Kshs.1,300,000/= less Kshs.469,320/= which the Respondent had received under the (WIBA) leaving a balance of Kshs.830,680/=. Interest shall be paid on the awarded sum from the date of the judgment by the trial court.

31. In the end, this court enters judgment for the plaintiff against the 3rd and the 4th Defendants jointly and severally as follows;

1. Liability	**100%**
2. General damages for pain and suffering	**kshs.830,680/=**
3. Loss of future earning capacity	**kshs.1,530,000/=**
4. Special damages	**kshs. 3,000/=**
5. Total	**kshs.2,363,680/-**

32. Each party to bear own costs of the appeal.

Dated, Signed and Delivered at Eldoret this 31st January, 2022.

E. K. OGOLA

JUDGE