



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 160 OF 2018**

**(An appeal arising from the judgment of Hon. F Makoyo, Senior Principal Magistrate,**

**delivered on 25<sup>th</sup> October 2018, in Butere SPMCCC NO. 39 of 2016)**

**MAURICE ANEKEYA CHEWA.....APPELLANT**

**VERSUS**

**ERASTUS M JUMA.....RESPONDENT**

**JUDGMENT**

1. The appellant had sued the respondent, at the primary court, seeking compensation for injuries that he had suffered, following a traffic road accident on 16<sup>th</sup> May 2015 along Ekeru-Ebuyangu Road. He was riding a motorcycle registration mark and number KMCH 786L, when it got involved in a collision with a motor vehicle registration mark and number KBX 769A, said to have belonged to the respondent. The respondent filed a defence, denying that he owned the accident vehicle and denying the accident. In the alternative, he pleaded that if any accident occurred, it must have been due to negligence on the part of the appellant or the rider of the motorcycle. A trial was conducted. The appellant testified and called one witness. The respondent did not offer any evidence, but liability was settled by consent at 30:70. The trial court assessed general damages at Kshs. 1, 000, 000.00 and special damages at Kshs. 86, 718.00.
2. The appellant was aggrieved, hence the appeal. He has only one ground – that the award was low considering the injuries suffered leading to incapacity.
3. Directions were given on 15<sup>th</sup> July 2021, for written submissions. Both sides have filed written submissions.
4. In his written submissions, the appellant argues that an award of Kshs. 2, 000, 000.00 would have been more appropriate. He cites *Bayusuf Freighters Limited vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA), where an award of Kshs. 1, 600, 000.00 was made for a crush injury leading to amputation of the left leg. He also submitted on loss of earning capacity, and asks for Kshs. 2, 214, 000.00, based on the minimum wage of Kshs. 12, 300.00. He also submits on special damages, which he says amount to Kshs. 96, 500.00..
5. The respondent submits that the injuries were not proved, as the doctors who treated and examined the appellant were not called to testify. He has relied on *Grace Wangari Mwangi vs. Woodventure (K) Ltd & 3 others* [2006] eKLR (Koome J.) and *Hassan Noor Mahmoud vs. Tae Youn Aun* [2001] eKLR (Ang'awa J.), where it had been asserted that in highly contested cases, doctors who prepared medical reports on the claimants ought to be called, and where an injury involved bones, an orthopedic ought to be called. It is averred that the injuries were fractures of bones of the femur and pelvis, and an orthopedic did not testify, and x-ray films were not produced. It is submitted that an award between Kshs. 800, 000.00 to Kshs. 1, 000, 000.00 was within reasonable and acceptable range. *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & another* [2017] eKLR (Riechi J), is cited. On dismissal of the claim on loss of earning capacity, it is submitted that for an award to be made under that head there must be documentary evidence. *Kenya Bus Services Ltd vs. Festus S. Kibe* [2004] eKLR (Visram J.) is cited on that. On special damages, it is submitted that the award of Kshs. 186, 718 was not justified, for the law is that special damages must be specifically pleaded and strictly proved. He cites *Francis Muchee Nthiga vs. Daniel N. Waweru* [2014] eKLR (Ngah J.). He also submits that the receipts relied on were not admissible for stamp duty had not been paid, contrary to sections 19 and 20 of the Stamp Duty Act, Cap 480, Laws of Kenya. *Leonard Nyongesa vs. Derrick Ngula Righa* [2013] eKLR (Kasongo J.) is cited. On costs, it is submitted that the appeal is not merited, and he deserved the costs for being needlessly dragged to the appellate court.
6. Both sides submitted on three items, which I believe are the issues for determination. These are clearly captured in the written submissions by the respondent – whether the award of general damages was appropriate, whether there was justification for award of loss of earning capacity, and whether the court properly assessed special damages.

7. On the award of general damages, I note that although the appellant has cited *Bayusuf Freighters Ltd vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA), he has not attached a copy of that decision to his written submissions. The respondent cites *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & another* [2017] eKLR (Riechi J), where there was an amputation of the leg below the knee, and an award of Kshs. 800, 000.00 was made. In *Bayusuf Freighters Ltd vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA), the appellant had sustained fractures of the radius and ulna, severe degloving of the right forearm and hand, and a lacerated wound on the right gluteal region. The High Court awarded Kshs. 1, 600, 000.00 general damages for pain and suffering. The Court of Appeal declined to interfere with the award, holding that it fitted within the nature of the injuries, the cost of living and the depreciation of the shilling. In *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & another* [2017] eKLR (Riechi J), the nature of the injuries that led up to the amputation of the leg were not detailed, the trial court awarded Kshs. 450, 000, which was enhanced on appeal to Kshs. 800, 000.00.

8. In the instant case, the injuries sustained by the appellant are detailed in the plaint as fractures of the right femur and right hand, crush injury leading to amputation of the affected leg, bruises on the right hand, wound on the perineum, and a cut wound on the abdomen and colostomy opening on the left bar region. At the oral hearing, the appellant said that his right leg was broken into pieces and had to be amputated, a metal bar had ruptured his large intestines, and his right hand fingers were broken into pieces. The medical report placed on record is dated 29<sup>th</sup> January 2016, by Dr. Charles M. Andai. The injuries were identified as fractures of the right femur and the pelvis, crush injury to lower distal 1/3, penetrating wound to the perineum, trauma to the gut, and bruises to the right hand. A colostomy was performed to deal with the injury to the gut, which had not closed by the date of the report. The doctor assessed permanent physical impairment at 50%. The production of the medical report was by consent of the parties on 7<sup>th</sup> June 2018. The respondent did not subject the appellant to a second medical opinion.

9. Going by the medical evidence on record, the injuries sustained by the appellant are closer to those documented in *Bayusuf Freighters Ltd vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA). The injuries in *Charles Oriwo Odeyo vs. Apollo Justus Andabwa & another* [2017] eKLR (Riechi J) were not enumerated in the judgment, and the court appeared to be working with the fact of amputation only. I am persuaded by *Bayusuf Freighters Ltd vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA), and I find that the trial court should have made an award in the region of Kshs. 1, 600, 000.00. *Bayusuf Freighters Ltd vs. Patrick Mbatha Kyengo* [2014] eKLR (Visram, Koome & Odek JJA) was decided in 2014. Taking into account changes in the cost of living and the value of the shilling between now and then, I would enhance that to Kshs. 1, 800, 000.00. I have seen *Kurawa Industries Limited vs. Dama Kiti & another* [2017] eKLR (Chitembwe J), cited at the trial, where the appellate court declined to interfere with an award of Kshs. 2, 000, 000.00 general damages. However, the injuries, in that case, were a lot more serious, for they included a compound comminuted fracture of the femur, which was not the case here.

10. The respondent argues that the injuries were not properly proved, going by the decisions in the cases that he has cited. I note that the medical records were put in evidence by consent of the parties. The respondent, therefore, acquiesced to the placement of that evidence on record. He cannot now turn around and criticize it. He did not ask that the appellant undergo a second medical examination, for a second opinion. He did not insist on the makers of the medical records placed on record to be produced in court to breathe life to their documents, and for cross-examination. He acquiesced to the process, and he cannot now be heard to complain. In any event, the point made in *Grace Wangari Mwangi vs. Woodventure (K) Ltd & 3 others* [2006] eKLR (Koome J) and *Hassan Noor Mahmoud vs. Tae Youn Ann* [2001] eKLR (Ang'awa J) is that in highly contested cases, the parties should comply with the strict rules of evidence, and call makers of the documents that they propose to place on record. The matter before the trial court was not contentious. If it were, the parties would not have placed the medical evidence on record by consent, and the respondent would have insisted on makers of the medical records being called to the witness stand. The respondent did not even call any single witness to counter the evidence presented by the appellant. Furthermore, the respondent has not cross-appealed, and there is, therefore, no foundation for the argument that he is now making.

11. On loss of earning capacity, I note that the appellant has not raised it in his memorandum of appeal, for his appeal is limited to the award of general damages. Loss of earning capacity **is compensated by an award in general damages, once proved. Compensation for diminution in earning capacity is awarded as part of general damages.** There is, therefore, no basis for treating it as a separate item from the general damages. The general damages are inclusive of the loss of earning capacity, but some evidence ought to be tendered to demonstrate loss of earning capacity, to assist the court in the evaluation of the general damages. The appellant did not lead any evidence on loss of earning capacity. Loss or earning capacity ought to be distinguished from loss of earnings. See *SJ vs. Francesco Di Nello & another* [2015] eKLR (Okwengu, Mwilu & Odek JJA), *Nathan Nyambu Maghanga vs. Benard M Wanjala & another* [2016] eKLR (Maraga, Musinga & Gatembu, JJA), *James Mukatui Mavia vs M.A. Bayusuf & Sons Limited* [2013] eKLR (Maraga, Mwilu & Gatembu JJA) and *Board of Governors Ongata Academy vs. Gabriel Ngaiyaiya Rumoi* [2021] eKLR (Jaden J).

12. On special damages, the appellant pleaded Kshs. 4, 000.00 for medical report, Kshs. 1, 500.00 for the P3 Form, and Kshs. 91, 000.00 for treatment. At the oral hearings at the trial court, the appellant did not talk about these expenses at all. However, on 7<sup>th</sup> June 2018, a bunch and bundles of receipts were put in evidence by consent. After going through the receipts, the trial court found that Kshs. 86, 718.00 was sufficiently proved. The appellant, therefore, adduced sufficient documentary proof to support the claim for special damages. On the issue of stamp duty, I note that the respondent acquiesced to the production of the receipts by consent. He should have raised the issue of stamp duty then, and by consenting to their production, he is now estopped from raising any issue relating to an award based on those receipts. In any case, he has not cross-appealed on them.

13. On costs, the principle is that the same follow the event, but are subject to the discretion of the court. See *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR (Mativo J), *Biashara Sacco Society Ltd & 2 others vs. Dickson Miricho Kihagi* [2016] eKLR (Mativo J) and *Peter Muriuki Ngure vs. Equity Bank (K) Ltd* [2018] eKLR (Nzioka J).

14. Overall, I find merit in the appeal. The award of general damages is enhanced to Kshs. 1, 800, 000.00, for the reasons given in paragraphs 8 and 9 of this judgment. The other awards shall remain intact. The appeal is allowed in those terms. The appellant shall have the costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25<sup>th</sup> DAY OF FEBRUARY 2022**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Mr. Namatsi, instructed by Namatsi & Company, Advocates, for the appellant.**

**Mr. Akwala, instructed by Omwenga & Company Advocates, for the respondent.**