



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 118 OF 2020

MICHAEL WAFULA MALENYA.....APPELLANT

VERSUS

MATUNDA (FRUITS) BUS SERVICES LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the Honourable J.B. Kalo (CM) at Nakuru delivered on 28th May 2020)

JUDGEMENT

1. This appeal arises from a suit filed by the appellant **Michael Wafula Malenya** against the respondent through plaint dated 4th May 2012 seeking damages for injuries sustained on 20th July 2009 along Eldoret- Nairobi Road near Timboroa area while traveling in Motor Vehicle Registration No. KAW 173D which lost cost and overturned.
2. After trial Judgment was delivered on 28th May 2020 the defendant was found 100% liable and damages assessed as hereunder:-
 - a) General Damages.....Kshs 1,200,000
 - b) Special Damages.....Kshs 196,640
 - c) Costs of the suits and interest
3. Aggrieved by the court's decision the appellant filed the current appeal on the following grounds:
 - a. *The Honourable Magistrate erred in law and in fact for failing to appreciate the nature of the injuries suffered by the Appellant as were pleaded in the Plaint thereby arriving at an erroneous decision that the issue of amputation of the lower limb was not pleaded thereby awarding general damages of Kshs. 1,200,000.00;*
 - b. *The Honourable Magistrate erred in law and in fact by misconceiving and misconstruing the injuries suffered by the Appellant and pleaded in his pleadings thereby arriving at an erroneous decision that such injuries commensurate with an award of general damages of Kshs. 1,200,000.00;*
 - c. *The Honourable Magistrate erred in law and in fact for failing to appreciate that amputation is not by itself an injury capable of being pleaded by the Appellant thereby arriving at an erroneous decision at variance with injuries sustained and pleaded by the Appellant thereby awarding nominal general damages of Kshs. 1,200,000 contrary to the established principles.*
 - d. *The Honourable Magistrate erred in law and in fact for failing to appreciate the exhibits produced by the Appellant in proof of the injuries sustained as a result of the accident and impleaded by the Appellant thereby arriving at an erroneous conclusion that Kshs 1,200,000 was sufficient to an award of general damages,*
 - e. *The Honourable Magistrate erred in law and in fact failing to appreciate the authorities cited by the Appellant on the quantum of damages for similar injuries which bound him thereby reaching an erroneous conclusion that an award of Kshs. 1,200, 000.00 commensurate injuries suffered.*
 - f. *The Honourable Magistrate erred in law and in fact for failing to award special damages of Kshs.707,200.00 as pleaded and proved by the Appellant as by law required but instead award Kshs. 196,400.00 which award has no factual basis,*

- g. The Honourable Magistrate, having found and held that the special damages pleaded were proved by the Appellant and that they were equally unopposed, fell into error by awarding the sum of Kshs.196,400.00 which has no nexus to the parties' pleadings.
- h. The Honourable Magistrate erred in law and in fact for failing to award damages for lost income and damages for future earnings by holding that "...the medical report does not show that the Plaintiff was awarded any permanent disability for the claim to be sustained" against the preponderance of evidence particularly exhibit 8 — report from Mbagathi District Hospital which declared the Appellant to have a permanent disability;
- i. The Honourable Magistrate fell into the error of law and fact for failing to consider the totality of the evidence and the injuries sustained thereby arriving at an erroneous conclusion that the appellant was not entitled to damages for lost income and future earnings;
- j. The Honourable Magistrate erred in law and in fact for failing to find and hold that the report from Mbagathi District Hospital which was produced as exhibit 8 together with the evidence of the monthly salary of Kshs. 10,000 the Appellant had proved his permanent ability and entitled to damages for lost income and future earnings;
- k. The Honourable Magistrate erred in law and in fact for failing to appreciate that even if the appellant had not proved his monthly salary, the multiplier is the minimum wage for determination of damages for future earnings for the Appellant who has suffered permanent injury indicated in the report of Mbagathi District Hospital
- l. The Honourable Magistrate erred in law and in fact for failing to appreciate the injuries m suffered and pleaded by the appellant arising from the accident thereby failing to award those damages for future expenses.
- m. The Honourable Magistrate erred in law and in fact for failing to appreciate the future medical expenses implicit in the medical reports and injuries sustained and impleaded by the Appellant thereby arriving at an erroneous decision,
- n. The Honourable Magistrate erred in law and in fact for failing to award interest on the general damages of Kshs. 1,200,000.00 from the date of judgment until payment in full
- o. The Honourable Magistrate erred in law and in fact for failing to appreciate that the special damages pleaded herein were incurred nearly 10 years ago and failed to award interest on special damages from the date of filing the suit until payment in full.
- p. The Honourable Magistrate exercise of his discretion in awarding damages was capricious injudicious that no reasonable tribunal would have arrived at the same conclusion which gives an inference that he fell into errors of law which ought to be interfered with by this Court; and
- q. The Honourable Magistrate erred in fact and in law by failing to consider in totality, evaluate and give due weight to the Appellant's pleadings, evidence, exhibits, submissions, and binding authorities which contended various aspects of the position advanced by the Appellant on the quantum of damages thereby arriving at an erroneous decision as he did.

4. The appeal was canvassed by way of written submissions.

APPELLANT'S SUBMISSIONS

5. In submissions filed on 17th March 2021 the appellant raised 4 issues as follows:
- a. Whether the trial court erred in awarding damages for pain and suffering of Kshs 1,200,000.
 - b. Whether the trial court erred in awarding special damages of Kshs 196,640.
 - c. Whether the trial court erred in dismissing the claim for lost income and loss of future earnings
 - d. Whether the trial court erred in dismissing the claim for future medical expenses.
6. The appellant urged this court to re-evaluate the evidence of the trial court and arrive at its own conclusion. The appellant submitted that the trial court failed to examine the nature and extent of each of the injuries sustained particularized and failed to rely on the medical report and the P3 adduced as evidence.
7. The appellant further submitted that the medical report from Mbagathi Hospital proved that the leg was amputated and the evidence of the amputation of the left lower limb above the knee was unchallenged by the respondent.
8. That appellant's dreams were shattered by the accident and his life is no longer the same. The appellant submitted that he appeared in court with an amputated leg but trial court erroneously alleged the amputation was itself an injury which the appellant ought to have pleaded.
9. The appellant submitted that the trial court misdirected itself on the nature of the injuries sustained by the appellant and failed to appreciate the nature and extent of the injuries sustained and pleaded as follows:

- I. extensive degloving injury left leg,
- II. deep penetrating perineum,
- III. grade IIC fracture-dislocation on the bi-malleolus ankle,
- IV. facial and scalp abrasion and
- V. elbow laceration

10. The appellant submitted that as a result of the injuries, the appellant underwent various surgeries and as per the medical report dated 31st March 2010, he was declared a person with a permanent disability.

11. The appellant further submitted that **Hon. Kalo** did not have the opportunity to see the appellant in court as the evidence was taken by **Hon. Gicheha** and that she erroneously concluded that the amputation of the leg was not pleaded yet both medical reports from AIC Kijabe Hospital, Mbagathi Hospital at page 33 and page 41 of the record of appeal are enough proof of the amputation.

12. The appellant submitted that the award of damages was erroneous and an injustice to the appellant for being too low compared to the injuries suffered and pleaded.

13. The appellant further submitted that the authority relied on by the trial court relate to minor injuries which do not have any similarities to the injuries sustained by the appellant and urged this court to appreciate the injuries sustained in assessing the appropriate quantum of damages on pain and suffering and further consider passage of time and the extensive nature of the injuries sustained and assess the damages at Kshs 10,000,000.

14. On the issue of special damages awarded, the plaintiff submitted that the trial court erroneously awarded damages of kshs 196,640 contrary to kshs 707, 200 pleaded in the plaint and receipts adduced as evidence (at page 29,30,42-57) of the record of appeal; that the trial court held that special damages were proved as pleaded but erred in awarding 196,640 and urged this court to interfere with the award.

15. On loss of income, the appellant submitted that the trial court erred in dismissing the claim for loss of income by failing to appreciate the medical report from Mbagathi Hospital that declared him 100% disabled and he had proved the loss of earnings and future income. That loss of income ought to be calculated from 20th July 2009 to the date of the judgment a period of 10 years and 11 months calculated $10,000 \times 151 \text{ months} = \text{Kshs.}1, 310,000.00$.

16. The appellant submitted that he is also entitled to damages for loss of future earnings sustained as a result of the accident rendered incapacitated yet he would have worked to retire at the age of 60 years and urged to adopt a multiplier of 33 years from the year 2009 calculated as $10,000.00 \times 33 \times 12 = \text{Kshs } 3,960,000$

17. The appellant submitted that he produced the receipt for payment for prosthesis of Kshs.7, 000.00 found on page 48 of the Record of Appeal. From the medical report adduced the claim for future medical expenses was proved and prayed for the sum of Kshs.1, 000,000.00 as future medical costs and the cost of hiring a caregiver at Kshs.15, 000.00 per month for a period this court deems fit.

18. In summary, appellant urged this court to allow the appeal and award damages as hereunder:-

- a. Special damages Kshs.707,200.00;
- b. General damages Kshs. 10,000,000.00
- c. Loss of income Kshs. 1,270,000.00
- d. Loss of future earnings Kshs.3,960,000.00; and
- e. Future Medical expenses of Kshs. 1,000,000.00, cost of artificial limb Kshs.924, 000.00, and costs of caregiver per month of Kshs. 15,000.00 for a multiplier of 23 years.
- f. Costs and interest on special damages.

RESPONDENT SUBMISSIONS

19. The respondent submitted that the plaintiff through the plaint pleaded and testified that he suffered the following injuries: -

- a) Extensive degloving injury of the left leg;
- b) Deep penetrating perineum injury;
- c) Left open grade IIC fracture-dislocation bi malleolus ankle;

d) Facial and scalp abrasion;

e) Elbow laceration.

20. The respondent submitted that plaintiff did not specifically plead that his leg was amputated yet his testimony and submissions largely revolve around the same and submitted that parties are bound by their pleadings and unless amended, the evidence adduced shall not deviate from the pleadings.

21. Further, the trial magistrate did not err in their finding and award as it would have been a grievous miscarriage of justice to factor in matters that had not been pleaded. To consider the evidence led by plaintiff regarding an issue not pleaded would equally occasion a gross miscarriage of justice.

22. The respondent submitted that the plaintiff was never awarded any permanent disability hence their claim for lost income could never hold and similarly, the claim for loss of future earnings could also not stand. Further, the plaintiff failed to adduce a medical report that recommended future medical attention.

23. The respondent urged this court to be slow in interfering with the discretion of the trial court in the award of damages unless the trial court acted on a wrong principle and urged this court to find the appeal is unmerited and dismiss it and uphold the judgment of the trial court.

ANALYSIS AND DETERMINATION

24. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and arrive at an independent determination. This position was held in the case of **Selle & Another Vs Associated Motor Boat Co.Ltd & Others (1968) E.A 123** where the court stated as follows:-

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

25. From the foregoing, this court can only interfere with assessment by the trial court where it is satisfied that the court took into account an irrelevant factor or left out a relevant factor or the award was either inordinately high or low as to amount to an erroneous estimate of the damage or that the assessment was not based on evidence.

26. The appellant submitted that the trial court failed to appreciate the nature and extent of the injuries sustained by the appellant and awarded general damages of Kshs 1,200,000 which was too low and taking into consideration the passage of time and the extensive nature of the injuries sustained, the appellant proposes general damages of Kshs 10,000,000.

27. In the case of **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** the court of appeal stated as follows:-

“The assessment of damages in personal injury case by a court is guided by the following principles:

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.**
- 2) The award should be commensurable with the injuries sustained.**
- 3) Previous awards in similar injuries sustained are a mere guide but each case be treated on its own facts.**
- 4) Previous awards to be taken into account to maintain the stability of awards but factors such as inflation should be taken into account.**
- 5) The awards should not be inordinately low or high”**

28. The trial court in arriving at the award of Kshs 1,200,000 was guided by the case of **Sammy Kipkorir Kosgei Vs B.O L (2017) eKLR** and **Gilbert Kiriago Otwori vs Richard Metet (2016) eKLR**. In the current case, the appellant suffered severe injuries as compared to the cited case. He has an amputated leg a fact that has interfered with his normal life.

29. The Appellant cited the case of **Simona Taveta Vs Mercy Mutitu Njeru (2014) eKLR**, where the appellant suffered more serious injuries than the appellant in this case and was awarded kshs. 3,500,000 for pain suffering and loss of amenities.

30. In **Daniel Kosgei Ngelechei Vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR** the plaintiff suffered far worse than the instant plaintiff, however, there were some similarities as he suffered traumatic amputation of left lower limb above the knee, loss of two central incisors with lacerations of the lower lip, multiple abrasion dorsum of both hands, bruises and abrasions right leg and laceration right leg above the ankle, he was awarded the sum of Kshs. 2,100,000/= for pain, suffering, and loss of amenities.

31. Further, in **John Kipkemboi & another v Morris Kedolo [2019] eKLR** the respondent sustained Injuries including amputation of the

left leg below the knee, chest injury, bruises on the shoulder, back injury, and crush injury. The Court awarded him Kshs 2,500,000.00 as sufficient compensation for pain and suffering.

32. I have compared the injuries sustained by victims in the cited authorities with injuries suffered by the appellant and also taking consideration the inflation factor and find that an award of kshs 3,000,000/= sufficient to compensate the appellant under pain and suffering.

33. In respect to special damages of kshs 196,640 as opposed to the pleaded proved kshs.707, 200.00, he produced treatment notes from Eldama Ravine, Kijabe Mission Hospital, Mbagathi Hospital.

34. In **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, the court of appeal held as follows:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

35. A party claiming special damages must produce evidence of receipts showing money was paid or the injury was suffered. I do note the appellant produced the following receipts

- a. From Kijabe mission hospital - Kshs 400,000
- b. From Mercy Light hospital - Kshs 30,870
- c. Kikuyu Hospital - Kshs 5,650
- d. Kenyatta National hospital - Kshs 1,250

Total Kshs 437,770

36. From the forgoing, the appellant pleaded a higher amount of kshs.707,200.00 but proved kshs 437,770 as per the receipts produced. I find the trial court erred in finding the amount of Kshs.196,400 is awarded as pleaded and proved and hereby set aside special damages of Kshs.196,400 and replace it with an award of Kshs.437,770.

37. On the issue of future medical expenses, the trial magistrate found that the same had not been pleaded and proved as the medical report on record did not recommend future medication. He relied on the case of **Tracom Ltd & Anor vs Hassan Mohammed Adan (2009) eKLR** where the court held that future medical expenses ought to be proved and pleaded.

38. The Appellant did not plead and prove the future medical expenses and I, therefore, find no basis in interfering with the trial court findings in the award of future medical expenses.

39. In respect to lost income, appellant argues that he lost income as a result of the injuries suffered from accident. Prior to the accident, he was employed at Mumbi Pharmacy earning a salary of Kshs. 10,000 and has not resumed work. He prayed for it to be calculated from 20th July 2009 to the date of the judgment. From 20 July to date (28th May 2020) which is 10 years and 11 months. And calculate the loss of income as follows $10,000 \times 151 \text{ months} = \text{Kshs.}1, 310,000.00$ urged the court to award kshs. 1,310,000 for loss of income.

40. On loss of earning capacity, the court of appeal in **Mumias Sugar Company Limited Vs. Francis Wanalo (2007) eKLR** stated 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 to either losing his job in the future or in case he loses the job, his diminution of chances of getting an alternative job in the labor 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 the 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.”

41. From the record, the appellant has not adduced evidence to prove that he was earning 10,000 per month but he produced a medical report from Mbagathi Hospital that indicating that he suffered permanent disability as a result of amputated left leg. There is no doubt that before artificial foot being fixed, the appellant was unable to work. It was necessary for the report to indicate period of inability to work. In my view it would be fair to award a global figure for loss of earning capacity for the period before protestestice and also reduced earning capacity in the remainder of his working period. A sum of kshs 300,000 will be sufficient in my view.

42. The appellant having been a passenger in a vehicle which was self involved in the road traffic accident, the respondent is 100% liable for the accident. From the foregoing I find the appeal merited.

43. FINAL ORDERS

1) **The respondent to should 100% liability as held by trial court**

2) **Damages assessed as hereunder:-**

i. **Pain and Suffering.....Kshs. 3,000,000.00**

ii. **Loss of earning capacity.....Kshs. 300,000**

iii. **Special damages..... Kshs. 437,770**

iv. **GRAND TOTAL.....Kshs3,737,770**

3) **Costs of the appeal to the appellant.**

JUDGMENT dated, signed and delivered virtually at **Nakuru** This **30th** day of **March**, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

No appearance by parties