



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 9 OF 2020**

**ROBERT JERLOT.....APPELLANT**

**=VRS=**

**GEOFFREY NYAKUNDI ABERE.....RESPONDENT**

*{Being an appeal against the Judgement of Hon. M. O. Wambani (Mrs.) – CM Nyamira dated and delivered on the 17<sup>th</sup> day of March 2020 in the original Nyamira Chief Magistrate’s Court Civil Case No. 24 of 2016}*

**JUDGEMENT**

By a plaint dated 18<sup>th</sup> January 2016 the respondent sued the appellant for compensation for personal injuries he sustained in a road traffic accident that occurred on 19<sup>th</sup> November 2015 involving motor cycle Registration No. KMCJ 605T of which he was a rider and the appellant’s motor vehicle Registration No. KBB 533T.

Initially the matter was heard ex parte by way of formal proof but the judgement delivered on 11<sup>th</sup> April 2017 was set aside by a consent of Counsel for the parties dated 23<sup>rd</sup> November 2017 but filed in court on 10<sup>th</sup> January 2018. Thereafter on 19<sup>th</sup> November 2019 Counsel for the parties recorded a consent on liability in the ratio 80%:20% in favour of the respondent against the appellant but left the assessment of damages to the trial Magistrate. By a judgement delivered on 17<sup>th</sup> March 2020 the trial Magistrate assessed and awarded the respondent damages as follows: -

**(a) General Damages for pain, suffering and loss of**

**Amenities – Kshs. 1,500,000/=**

**(b) Loss of Earning Capacity from the time of the**

**accident till the day of giving testimony in**

**Court – Kshs. 480,000/=**

**(c) Future loss of Earnings – Kshs. 500,000/=**

**(d) Special Damages – Kshs. 105,200/=**

**Sub-total – Kshs. 2,585,200/=**

**Less 20% contribution – Kshs. 517,040/=**

**Net sum = Kshs. 2,068,160/=**

Being aggrieved the appellant preferred this appeal. The Memorandum of Appeal cites grounds that: -

**“1. The learned magistrate erred in law in making a finding of excessive damages against the defendant.**

**2. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby**

arriving at a wrong and erroneous conclusion condemning the defendant to General Damages of Kshs. 1,500,000/= without concrete documentary evidence in support thereof bearing in mind that the Respondent's medical examination report assessed permanent disability at 20% whereas the 2<sup>nd</sup> medical examination report assessed permanent disability at 8%.

3. The learned magistrate erred in law and fact in awarding the Respondent for loss of earnings which was not proved in the sum Kshs. 480,000/= and thereby arriving at a wrong and erroneous conclusion without concrete documentary evidence.

4. The learned magistrate erred in law and fact in awarding the Respondent for loss of future earnings which was not proved in the sum Kshs. 500,000/= and thereby arriving at a wrong and erroneous conclusion without concrete documentary evidence.

5. The learned magistrate erred in law and fact in awarding the Respondent for loss of future medical expenses which was not proved and/or supported by any tangible evidence and thereby arriving at a wrong and erroneous conclusion.

6. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 1,985,895.00/=.

7. The learned magistrate erred in law and fact in failing to appreciate the long established principle of *stare decisis*, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

8. The learned magistrate erred in law and fact in failing to appreciate as follows: -

(i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

9. The learned magistrate erred in law and fact in entering judgement in favour of the plaintiff against the defendant in spite of the plaintiff's miserable failure to establish his case more especially on quantum.

10. The learned magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances."

The appeal proceeded by way of written submissions. I have considered the grounds of appeal, the rival submissions and the evidence in the trial court. As submitted by Counsel for the respondent it is trite law that an appellate court can only interfere with the trial court's assessment of damages 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 (*see Kemfro Africa Ltd v A M Lubia & another (1982 – 88) 1 KAR*). It is also trite that as much as possible comparable injuries should attract comparable awards so as to maintain consistency hence the reason courts ought to consider past awards –*see Stanely Maore v Geoffrey Mwenda [2004] eKLR* where the Court of Appeal stated: -

***“Having said so, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”***

The other factor which the court must also take into consideration is inflation (*see Jabane v Olenja [1986] KLR 661* and *Ugenya Bus Service v Gachoki [1982] eKLR*). In the instant case it was proved through medical evidence that the respondent sustained the following injuries: -

**“1. Head injury accompanied with loss of consciousness for one hour.**

**2. Fracture of the right pelvic bone.**

**3. Fracture of the right acetabular bone.**

**4. Fracture of the right radius.**

**5. Fracture of the left radius.**

**6. Deep extensive cut wound on the anterior neck.**

**7. Contusion on both shoulders.”**

These were severe injuries which took a long time to heal. A second medical examination done almost three years after the accident by Dr. James Obondi Otieno on 15<sup>th</sup> July 2018 indicates that the respondent was still walking with a crutch and although the injuries had been successfully managed the left wrist had radial deviation deformity. Even then the doctor opined that the respondent was likely to suffer a permanent disability of 8%. In assessing the general damages for pain, suffering and loss of amenities the Learned Magistrate correctly laid down the factors she took into consideration and cited several cases where the plaintiffs had sustained similar injuries and I am not persuaded

that the award she arrived at was excessive and as I see no justification to interfere it shall remain undisturbed at Kshs. 1,500,000/=.

The special damages of Kshs. 105,200/= were specifically pleaded and proved and shall also remain undisturbed.

I do not however find that the same position should apply in regard to the damages awarded for loss of earning capacity and future loss of earnings. In the case of **Butler v Butler [1984] KLR 225** the Court of Appeal stated as follows in regard to these two heads of damages: -

**“1. A person’s loss of earning capacity occurs where as a result of 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.**

**2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.**

**3. Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.**

**4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.**

**5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not improper to award it under its own heading.**

**6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous services, if any.....”**

The trial Magistrate did not give any reasons for awarding damages under the two heads and it is my finding that the damages were not based on any evidence for the following reasons. The respondent testified that at the time of the accident he was riding a motor cycle a fact which was not disputed. However, he did not tell the court whether he was riding the motor cycle as a means of livelihood and whether he was the owner or an employee. If he was an owner, he ought to have stated what his earnings were and if he was an employee then he ought to have stated what his wages were. It was contended by Counsel for the respondent that the trial Magistrate resorted to the minimum wage to calculate the damages but it is my finding that in the circumstances of this case that approach was erroneous. In the absence of cogent evidence that the respondent lost an income as a result of the accident there was no basis upon which damages for loss of earning capacity could be awarded. As for loss of future earnings the same can only be awarded for real assessable loss proved by evidence which in this case was lacking. The amount sought should also have been specifically pleaded as it was known.

In the premises the damages assessed under the two heads shall be set aside leaving only damages for pain, suffering and loss of amenities Kshs. 1,500,000/= and the special damages assessed of Kshs. 105,200/=. The damages shall be subject to the agreed ratio of liability. This appeal succeeds to that extent only and as costs follow the event, the appellant shall get half the costs of this appeal. It is so ordered.

**Signed, dated and delivered electronically at Nyamira this 28<sup>th</sup> day of January 2021.**

**E. N. MAINA**

**JUDGE**