



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAJIADO
CIVIL APPEAL NO. 17 OF 2020

JOSEPHINE WANJIKU NGUNJIRI.....APPELLANT

VERSUS

BERNARD KINYANJUI KAMAU..... RESPONDENT

(An appeal from the judgment and decree by Hon. Ruguru N (PM) delivered on 14th May 2020 in SPMCC No.96 of 2019 at the Senior Principal Magistrate's Court, Ngong)

JUDGMENT

1. The respondent filed a suit against the appellant, the owner of motor vehicle registration Number KBV 504F, for injuries she sustained as a result of a road accident that occurred on 3rd November, 2018 along Magadi Road involving the said motor vehicle and motorcycle KMDZ 284D on which he was a pillion passenger. He attributed the accident to the negligence of the driver of the motor vehicle. He sustained a fracture of the right tibia, plateau, and bruises on right arm, deformity and dislocation of right knee with incapacity of 30%. The appellant denied negligence and blamed the motor cycle rider for the accident.

2. Parties consented on liability of 80%:20% in favour of the appellant and respondent respectively. The trial court heard evidence on quantum and awarded damages of Kshs. 600,000; Kshs, 1,555,200 for diminished earnings; Kshs. 700,000 for future medical expenses and Kshs. 89,591 special damages. It also awarded costs of the suit to the respondent.

3. The appellant was aggrieved with the trial court's decision on quantum of damages and filed a memorandum of appeal dated 4th June, 2020, raising two grounds of appeal, thus:

1. The Honourable magistrate erred in fact and law in holding that the plaintiff was earning Kshs. 45,000 per month whereas there was no evidence to prove the same and therefore the learned trial magistrate erred in fact and in law by awarding inordinately high general damages for diminished earning capacity.

2. That the learned trial magistrate erred in fact and law in holding that the medical report prepared by Dr. Ruga was not produced whereas the same was produced by consent together with medical report prepared by Dr. G.K Mwaura.

4. Parties filed written submissions and agreed to dispose of the appeal through those submissions. The appellant argued through her written submissions dated 7th August, 2020 that the trial court was in error in awarding damages on diminished earnings. According to the appellant, although the respondent testified that he was a driver earning Kshs. 45,000 a month, he admitted that he had no contract of employment; that he did not contribute to National Social Security Fund; that he never filed income tax returns with Kenya Revenue Authority and had no bank account.

5. She submitted that PW2, the respondent's employer did not produce documentary evidence on salary payment. According to the appellant, whereas the respondent stated that he would be paid at the end of the month, PW2 stated that he paid the respondent at the end of the day. The appellant argued that someone who had been employed for about 3 years should surely know how either daily or at the end of the month. She termed their evidence unreliable and relied on sections 107, 109 and 112 of the Evidence Act on the burden of proof.

6. The appellant also relied on *Abdul Virji v Mwanaharusi M. Rongola* [2011] eKLR for the proposition that evidential value is not predicted upon the preponderance of numbers but on its quality. She submitted that the respondent's evidence and that of his witness should not have been believed as they failed to prove earnings.

7. The appellant argued that the trial court should have relied on the minimum wage and relied on *Tobias Odoyo Oburu v Jane Kerubo Miruka & Another (Suing as the legal representatives of John Onywoki Sanganyi (Deceased) & Another* [2018] eKLR; *Kimunya*

Abednego alias Abednego Munyao v Zipporah S. Musyoka & Another [2019] eKLR and *Racheal Wambui Nganga & Another v Rahab Wairimu Kamau* [2020] eKLR to support her position.

8. According to the appellant, the Regulation of Wages General (Amendment) Order 2018, LN 2 of 2019 provides for minimum wage of Kshs. 7,240.95 which the trial court should have adopted. The award under this head should have therefore been 7,240.95 x 12412 x 30% which would amount to Kshs. 312,809.04.

9. On future medical expenses, the appellant argued that the trial court was wrong in awarding Kshs. 700,000 under that head. According to the appellant, both parties produced medical reports by Dr. G.K. Mwaura dated 14th May, 2019 for respondent and Dr. Maina Ruga dated 13th August 2019 for appellant. Dr. Ruga examined the respondent on 13th August, 2019 and confirmed that the respondent had undergone a second surgery for the right knee joint replacement which was done after Dr. Mwaura had examined him.

10. The appellant submitted that the respondent pleaded Kshs. 700,000 for future medical expenses and produced a discharge summary dated 12th June, 2019 showing that he had been admitted to Nairobi South Hospital for knee replacement and also produced an invoice showing that removal of the metal implant had been done. In that case, it was argued, the issue of future medical expenses did not arise.

11. The appellant relied on *Sabina Nyakenya Mwangi v Patrick Kigoro & Another* [2015] eKLR citing *Simon Tarolo v Mercy Mutitu Njeru* [2014] eKLR for the argument that future medication is a special damage that must be pleaded, if evidence is to be led on it and the court is to make an award in respect thereof. She submitted that although the respondent pleaded the claim for future medical expenses, he did not prove it.

12. The respondent filed his written submissions dated 21st August, 2020 on 25th August 2020. He submitted that parties agreed on liability and therefore the only issue before the trial court was on quantum. According to him, there was no dispute on the injuries he suffered.

13. On whether the trial court was wrong on the issue of earnings, he submitted in the negative. He argued that he was a professional driver earning Kshs. 45,000 a month which was paid at the end of the month or at end of each day at the rate of Kshs, 1,500/-. He relied on *Erick Onayngo Ondeng v Republic* [2014] eKLR for the submission that only grave contradictions that have not been explained will affect a case. He contended that the contradictions on the mode of payment were minor and could not affect the outcome of his case and relied on *Twehangane Alfred v Uganda* [2003] UG CA 6. 9 Cr. App. No. 139 of 2001.

14. The respondent distinguished the case of *Tobias Odoyo Oburu v Kerubo Miruka & Another* (Supra) from his case arguing that he adduced evidence and called his employer as a witness to prove his wage. He therefore argued that the decisions relied on by the appellant on minimum wage, did not apply to his case.

15. Regarding future medical expenses, he submitted that such a claim does not mean the medical expenses would be incurred post judgment, but it must be one incurred past the filing of the suit. He contended that the appellant was only blaming him for seeing Dr. Ruga after the operation and not before. He submitted that Dr. Ruga confirmed that he had been readmitted for right knee joint replacement. He maintained that Dr. Mwaura's opinion was that future medication would cost Kshs, 700,000 but Dr. Ruga did not give an opinion on the issue. He therefore urged this court to dismiss the appeal and affirm the trial court's award.

16. I have considered this appeal, submissions and the decisions cited by parties. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reexamine, reconsider and reanalyze the evidence afresh and come to its conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that.

17. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, it was held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

18. Similarly, in *PIL Kenya Limited v Oppong* [2009] KLR 442, the Court of Appeal held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that”.

19. The respondent testified through his witness statement filed with the plaint, that he was employed by PW2 as a driver to drive his motor vehicle KBR 911S at a monthly salary of Kshs. 45,000 per month. On 3rd January, 2018, he was travelling as a pillion passenger on motorcycle registration No. KMDZ 284D along Magadi road when the appellant's motor vehicle KBV 504F rammed onto the motor cycle as a result of which he sustained fracture of the right tibia plateau, knee dislocation and deformity. He was admitted at St. Mary's Hospital for 8 days and underwent surgery for double plating, osteology alignment and other treatment. He was later admitted at Nairobi South Hospital for 10 days for knee joint replacement. He was later examined by Dr. G.K Mwaura who prepared a medical report and assessed future medical expenses at Kshs. 700,000. He assessed the degree of permanent incapacity at 30%. He testified that had not been able to resume duties due to those injuries. He produced P3 form, bundle of receipts and invoices and medical report by Dr. Mwaura as exhibits.

20. James Kaigwa Njonjo, the respondent's employer also testified through his witness statement filed together with the plaint, that the respondent was his driver for about 3 years. He used to drive his lorry registration No. KBR 911S transporting soil and sand to various places and he paid him Kshs.1500 a day, amounting to Kshs. 45,000 a month at the end of the day. He had since 3rd November, 2018, been unable to resume his duties as a driver due to the injuries he sustained. He told the court that their agreement on wages was verbal and he used to

pay the respondent in cash or through M-pesa. The appellant did not lead any evidence.

21. This appeal as I understand it, challenges the awards on diminished earnings and future medical expenses only. The appellant's argument as can be discerned from the grounds of appeal and submissions is that the respondent did not prove income and therefore, the trial court was wrong in awarding damages on diminished earning applying the income of Kshs. 45,000/- as his monthly income. She also faulted the trial court for awarding Kshs.700,000/= future medical expenses which being in the form of special damages, was not proved.

Diminished earnings

22. The appellant argued that the respondent did not prove that he earned Kshs. 45,000 a month at the rate of Kshs. 1,500/ a day because he did not even know how he was paid. She argued that the trial court could not use that amount to determine diminished earnings. She maintained that the trial court should have applied the minimum wage instead.

23. Respondent testified that he is a driver and was employed by PW2 as a driver. He used to transport soil and sand and was paid Kshs. 1500/= daily which translated to Kshs. 45,000/= per month. This evidence was supported by that of PW2. According to PW2, the respondent would be paid at the end of each day either by cash or through M-pesa. The respondent had been driving the lorry for about three and half years by the time he was involved in the accident. He has since not been able to resume work due to the injuries he sustained.

24. I do not understand the appellant to be challenging the injuries the appellant suffered nor even the permanent incapacity assessed by the doctor. The appellant's main grievance is that the respondent did not prove that he was earning Kshs. 1,500/= per day or Kshs. 45000/= per month to have been the basis of assessing the award on diminished earning.

25. The respondent admitted, and so did PW2, that their agreement on wages was verbal. He did not pay contributions to NSSF and had no bank account. The appellant's take was that in the absence of documentary proof of earnings, the trial court should have used minimum wage as the basis for the award on diminished earning.

26. It has been stated, not once, that in the absence of proof of earning, the court should fall back to guidelines on minimum wage as the basis for determining earning. (See **Jacob Agiya Maruja & another v Simeon Obayo** [2005] eKLR)

27. In the present appeal, the respondent only stated that he was paid Kshs 1,500/= daily which was confirmed by his employer, PW2). The accident occurred in November 2018 and as correctly submitted by the appellant, the trial court should have applied the Regulation on Minimum Wages General (Amendment) Order, 2018 as the basis for determining the respondent's earnings for purposes of award on the diminished earning. In that respect, I agree with the appellant that the trial court was in error when it accepted Kshs. 45, 000/= as the respondent's monthly earning and proceeded to assess loss of diminished earning on that basis.

28. The Minimum Wage Order gives the general category a minimum wage (for general labourers) of **Kshs.7, 240.95**. Applying this figure, the award should have worked out thus; **7,240.95 x12x12x30% = Kshs. 312,809.04**.

29. The Appellant also argued that the trial court was wrong in awarding Kshs. 700,000/- for future medical expenses when this being special damages claim, was not proved. The respondent countered that he pleaded the claim for future medical expenses and indeed underwent surgery to replace the knee joint.

30. I have considered respective parties' arguments on this issue. There is no doubt that the respondent sustained the injuries as diagnosed. There is also no dispute that Dr. G.K Mwaura saw the respondent and prepared a medical report dated 14th May 2019. In that report, he was of the opinion that the respondent would require removal of implants and total knee replacement at a cost of Kshs. 700,000/-. The suit was filed after this report and the appellant pleaded this amount in his plaint.

31. The respondent was subsequently seen by the Appellant's doctor, Dr. Main Ruga who made a report on 13th August 2019. He confirmed that the respondent had indeed undergone surgery for knee replacement. He also assessed permanent incapacity at 30% which was in agreement with the assessment by Dr. Mwaura. Dr. Maina Ruga did not however give an opinion on the likely cost of the surgery for total knee replacement.

32. There is no doubt from the evidence on record, that the respondent pleaded the amount for future medical expenses. It is equally true that at the time of filing the suit before the trial court, the respondent had not undergone surgery for knee replacement. The appellant's doctor confirmed that the respondent had had surgery for knee replacement subsequent to the first medical report but did not ascribe any opinion on the cost of such an operation.

33. In that regard, future medical expenses meant expenses to be incurred after the medical opinion. At the time the respondent instituted the suit he had not undergone the foreseen surgery and that was why he pleaded that claim in his plaint. The fact that he had surgery before the suit was determined did not change the claim from being a future medical expense simply because the suit was still pending. I am therefore unable to agree with the appellant that since by the time the respondent was seen by Dr. Maina Ruga in August 2019 he had been operated on but the suit had not been determined, meant the claim was no longer a future medical expense.

34. The appellant's doctor did not disagree with the respondent's doctor that such an operation would cost the amount pleaded. The appellant did not suggest that the hospital could perform the surgery without payment. More importantly, according to Dr. Mwura the amount was for **removal of implants** and **total knee replacement**. In the circumstances, I find no reason to interfere with the trial court's award on future medical expenses.

35. Having come to the conclusions I have on the twin issues that were the subject of this appeal, this appeal succeeds to the extent only that

the trial court's award on diminished earning of Kshs. 1,555,200/= is set aside. In place therefor, the respondent is awarded Kshs. **Kshs. 312,809.04**. The rest of the awards by the trial court remain as per the trial court's judgment.

36. Since the appellant has substantially succeeded, each party shall bear their costs of this appeal.

Dated, signed and delivered at Kajiado this 12th day of February, 2021.

E.C. MWITA

JUDGE