



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NO. 98 OF 2018**

**COPANA LIMITED.....APPELLANT**

**VERSUS**

**DAVID OUMA ABANGA.....RESPONDENT**

**[Being an appeal from the Judgment and Decree of Chief Magistrate’s Court at Kisumu**

**(Hon. M. Agutu RM) in Kisumu CMCC NO. 440 OF 2017 delivered on the 27th September 2018]**

**JUDGMENT**

The appeal before me was limited to the issue of the quantum which the trial court awarded as compensation to the Respondent.

1. The Appellant was of the view that the trial court had treated the evidence and the submissions on quantum, superficially, and consequently came to a wrong conclusion.
2. It was the Appellant’s view that the trial court had ignored the principles applicable in awarding damages, as well as the relevant authorities which had been cited.
3. It was asserted that the trial court gave an award which was inordinately high, and that was because the said court failed to apply precedents and tenets of the applicable law.
4. The Appellant’s view was that the trial court’s award was an entirely estimate vis-à-vis the Respondent’s claim.
5. The foregoing constitutes a summary of the Memorandum of Appeal dated 22<sup>nd</sup> October 2018. In effect, the appeal, as earlier indicated, is only as against the sums awarded as compensation. There is no appeal on the issue of liability.
6. The awards which the appeal relates to are set out in the Judgment of the trial court as follows;

***“In summary the judgement of this court is as follows;***

***(a) General Damages for pain and suffering and loss of amenities ..... Kshs  
2,000,000***

**(b) Loss of earning Capacity ..... Kshs 3,000,000**

**(c) Costs of future Medical Expenses ..... Kshs 750,000**

**TOTAL Kshs 5,750,000**

**Less 50% liability Kshs 2,875,000”**

7. Being the first appellate court, I have a duty to re-evaluate all the evidence tendered, and to draw therefrom my own conclusions.
8. However, whilst drawing conclusions from the process of re-evaluation, I am alive to the fact that I did not have the benefit of observing the witnesses when they were testifying.
9. Secondly, when an appellate court was called upon to interfere with the award of compensation, it should venture out with caution, so that it does not simply do that which would amount to usurping the discretion bestowed upon the trial court, by replacing the sums awarded with sums which appear more appealing to it.
10. It is only when the trial court is shown to have either applied irrelevant considerations or to have failed to take into account some relevant factors, that the appellate court would become entitled to interfere.
11. When canvassing the appeal, the Appellant asserted that the trial court had ignored the evidence tendered in court, and it settled on  
***“an inflated multiplicand of Kshs 10,000/= that is not supported by any evidence.”***
12. The Plaintiff testified as **PW1**. With regard to his earnings, he testified that he worked as a “Boda Boda” operator, and that he used to make Kshs 1,500/= everyday.
13. According to the Plaintiff, the motorcycle got lost after the accident.
14. In any event, he said, he could not ride a motorcycle.
15. During cross-examination, the Plaintiff conceded that he did not have any documents to prove that he was earning Kshs 1,500/= daily.
16. In the judgment, the court noted that the Plaintiff did not have any documentation to prove his alleged earnings. In the circumstances, the learned trial magistrate said;  
***“..... I will therefore employ a minimum wage of Kshs 10,000/=.”***
17. The Appellant suggests that the minimum wage adopted by the trial court should have been backed by evidence.
18. In my considered view, evidence ought only to be adduced to prove the assertions set out in pleadings. Evidence is not intended to prove a fact that is not in issue before the court is irrelevant.
19. In this case the Plaintiff had asserted that his daily earnings from the Boda Boda business was Kshs 1,500/=. It is in relation to that factual assertion that he ought to have produced evidence.
20. He would not have been expected to produce evidence to prove something different from his pleadings.
21. Meanwhile, I take judicial notice of the fact that the function of regulation of wages is undertaken by

the Minister (or now, the Cabinet Secretary) who is at the material time in-charge of Labour. The Cabinet Secretary derives such power from **Section 46** of the **Labour Institutions Act**.

22. In the exercise of his mandate, the Cabinet Secretary regularly reviews Wages, and then causes the gazettelement of the **Regulation of Wages Orders**.

23. At the material time the Regulations which were in force were those issued under **Legal Notice No. 197**, and which are cited as “*the Regulation of Wages (General) (Amendment) Order, 2013*”, which came into operation on 1<sup>st</sup> May 2013.

24. Pursuant to that Legal Notice, the **Basic Minimum Monthly Wages** was Kshs 9,780/95. I therefore hold that the trial court was, in general terms, right to have rounded-up the figure to Kshs 10,000/=.

#### **General Damages for Pain and Suffering and Loss of Amenities**

25. The Plaintiff testified that he suffered the following injuries;

*(a) Fracture of right fibula;*

*(b) dislocation of the knee joint;*

*(c) Injuries on the head.*

26. He produced the Medical Report of Dr. **L.W. OKOMBO** dated 13<sup>th</sup> February 2015, to support his case. The report showed that the Plaintiff had sustained the following injuries;

*(a) Fracture of right tibia/fibula bone;*

*(b) Amputated right foot at the ankle joint;*

*(c) Scar on left side of right leg;*

*(d) Tenderness on Right leg;*

*(e) Tenderness on right foot;*

*(f) Tenderness on the right knee;*

*(g) Tenderness on the thigh.*

27. The doctor noted that the Plaintiff would require further treatment. And he added that the amputated part would need artificial replacement.

28. According to Dr. Okombo;

***“The treatment he is to receive is estimated to cost a minimum of Kshs 750,000/= annually.”***

29. The trial court awarded Kshs 2,000,000/= as general damages for pain and suffering and loss of amenities. In arriving at that figure, the court said that it was guided by the authorities cited by both parties.

30. However, the judgment did not contain an analysis of the said authorities.

31. A look at the record of appeal reveals that the Plaintiff cited the decision in **SIMON ANO MUA Vs KIOGA MUKWANO & 2 OTHERS HCCC NO. 287 OF 2017**.

32. In that case the Plaintiff's main injury was the amputation of the left leg, four inches below the knee. He was in hospital for a month and underwent surgery 14 times.
33. The learned trial Judge awarded general damages of Kshs 2 Million for pain, suffering and loss of amenities.
34. If compared to the Plaintiff in this case, I do find that the main injury is comparable.
35. Meanwhile, the Defendant had cited the case of **JANE OTIENO Vs MOMBASA LINERS LIMITED & ANOTHER [2005] eKLR**.
36. The Plaintiff in that case suffered a crash fracture of the right leg, leading to its amputation below the knee.
37. The learned trial Judge awarded general damages of Kshs 800,000/= for pain and suffering.
38. The injuries sustained by **Jane Atieno** were also comparable to those sustained by the Plaintiff in the case before me.
39. However, I note that the decision in the case of **Jane Otieno** was made in 2005 whilst **HCCC NO. 287 OF 2007** was determined in 2013.
40. The other case cited by the Defendant was **CHARLES ORIWO ODEYO Vs APOLLO JUSTUS ANDABWA & ANOTHER, CIVIL APPEAL NO. 99 OF 2014**. In that case the Plaintiff's right leg was amputated below the knee.
41. The trial court had awarded general damages of Kshs 450,000/=. On appeal, the High Court set aside that award, and substituted it with Kshs 800,000/=.
42. The decision by the High Court was delivered on 5<sup>th</sup> April 2017.
43. In the event, if this court were to base a decision on how current the authorities were, the position would be that in the year 2017, two different courts gave awards which were very different, yet in respect of injuries that were comparable.
44. In circumstances in which a court is faced with 2 or more precedents which are different, the said court cannot be faulted for choosing to be bound by one or the other such authority.
45. Therefore, as the trial court found guidance from a decision of the High Court, I find that the said award of Kshs 2,000,000/= was founded upon a sound basis.

#### **Loss of Earning Capacity**

46. The trial court awarded Kshs 3,000,000/= for loss of earning capacity.
47. In arriving at that figure, the trial court took into account the fact that the Plaintiff was 27 years old when the accident occurred. The court adopted a multiplier of 25, and used the Basic Minimum Monthly Wage of Kshs 10,000/= to calculate the loss of earning capacity.
48. When canvassing the appeal, the Appellant pointed out that the Plaintiff did not contain any claim for loss of earning capacity.
49. A perusal of the Plaintiff confirms that it did not contain an express claim for loss of earning capacity.
50. However, at paragraph 7 of the Plaintiff, the Plaintiff had asserted that although he had been earning a livelihood from being an active driver, the accident had caused him to lose the same and

*“shall continue to lose the same.*

*The plaintiff prays for compensation for the same.”*

51. In my understanding, the claim above may be described as being one for loss of earnings.

52. The question that then arises is whether the said claim is classified as Special Damages or if it is a part of General Damages.

53. In the case of NDORO KAKA KAKONDO Vs SALT MANUFACTURERS (K) LIMITED (2016) eKLR, the Court held as follows;

*“Loss of earnings is claimed as special damages. It must be specifically pleaded and strictly proved.”*

54. The Plaintiff’s case was that he used to earn daily, from his job as a Boda Boda rider. However, after the accident, he was no longer able to earn, as he could not ride a motor cycle.

55. The quantum of money that he used to earn was a matter of fact which was known to him. And he asserted that he used to earn Kshs 1,500/= per day.

56. Therefore, the loss which he had suffered was ascertainable through simple arithmetic. In other words, it was claimable as special damages.

57. In the case of CECILIA W. MWANGI & ANOTHER Vs RUTH W. MWANGI, CIVIL APPEAL NO. 251 OF 1996, the Court of Appeal expressed itself thus;

*“In her plaint the respondent had claimed damages for loss of earning capacity. Loss of earnings is a special damage claim. It must be*

*specifically pleaded and strictly proved.*

*The damages under the head of ‘loss of earning capacity can be classified as general damages, but these have also to be proved on a balance of probability.”*

58. To some extent, it appears that the Plaintiff lumped together an aspect of “loss of earnings”, which is a special damage claim, and “loss of future earning capacity.”

59. In the case of DOUGLAS KALAFU OMBEVA Vs DAVID NGANA, CIVIL APPEAL NO. 24 OF 2005, the Court of Appeal quoted the following words of Lord Denning in the case of FAIRLEY Vs JOHN THOMPSON LTD. [1973] 2 LLOYD’S REP 40;

*“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity.*

*Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”*

60. The learned Judges of Appeal noted that the Appellant had provided no evidence to prove that he was employed or that he was earning the salary he claimed. In the circumstances, the Court said;

*“Even though the Appellant claims that the sum was reasonable, and the court ought to allow it, we find no basis to do so.”*

61. Similarly, in this case, the Plaintiff failed to lead any evidence to prove the income he was allegedly

earning from his job as a Boda Boda rider.

62. Accordingly, I find that there was no basis upon which the court could award loss of earning capacity. Therefore, the award of Kshs 3,000,000/= is set aside.

### **Costs of Future Medical Expenses**

63. The trial court awarded Kshs 750,000/= based on the Medical Report of Dr. Okombo.

64. In his report, Dr. Okombo stated as follows;

*Ø He therefore needs further treatment (physiotherapy, Analgesics, Reconstructive Surgeon and attention of orthopedic surgery to follow up and attend to the fractured bones).*

*Ø The amputated part will need artificial replacement.*

*Ø The treatment he is to receive is estimated to cost a minimum of Kshs 750,000/= annually.”*

65. The report is dated 13<sup>th</sup> February 2015. Therefore, by the time when the Plaintiff was filed in court (in August 2017), the Plaintiff had information concerning the alleged costs of future medical expenses.

66. However, in the Plaintiff, he mentioned the sum of Kshs 450,000/= for the purchase of an artificial limb: He did not mention the sum of Kshs 750,000/=.

67. And when he was testifying, the Plaintiff said that the artificial limb would cost Kshs 35,000/=. The evidence tendered in court did not support either the sum claimed in the Plaintiff or the sum estimated by Dr. Okombo.

68. There is no basis for the award of the estimated future medical expenses in this case: the same is therefore set aside.

69. In the result, the appeal is largely successful, as the awards amounting to Kshs 3,750,000/= have been set aside.

70. Accordingly, the judgment of the trial court is set aside, and it is substituted with a judgment in the sum of Kshs 2,000,000/=. The said amount will be discounted by 50%, on account of the contributory negligence of the Plaintiff.

71. Costs of the suit are to be paid by the Defendant to the Plaintiff.

72. Whilst the Defendant is awarded 50% of the costs of the appeal, because the appeal succeeded only in part.

**DATED, SIGNED AND DELIVERED AT KISUMU**

This 21<sup>st</sup> day of April 2021

**FRED A. OCHIENG**

**JUDGE**