



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 570 OF 2017

DICKSON CHOMBA MURIKI.....1ST APPELLANT

BEKO SHOKO.....2ND APPELLANT

VERSUS

STANLEY GIKUNDA aka MUKINDIA.....RESPONDENT

(Being an appeal from the judgment and decree of Mr. P.Muholi Senior Resident Magistrate

delivered on the 19/09/2017 in Milimani CMCC 2044 of 2015)

JUDGMENT

1. The respondent (Stanley Gikunda) sued the appellants (Dickson Wambui Muturi and Beko Shoko) in Nairobi Civil case 2044 of 2015 vide a Plaint dated 4th February 2015 praying and seeking the following:

a. General damages for:

(i) Pain, suffering, and loss of amenities of life.

(ii) Cost of artificial limbs over the years.

(iii) Loss of or diminished earning capacity.

b. Special damages Kshs. 279,478/=

c. Costs and interests

2. The appellants filed a defence dated 4th of June, 2015 denying the claim. The matter proceeded to full hearing with the respondent calling three (3) witnesses. The appellants closed their case without calling any witness. Judgment was finally entered against the appellants as follows:

General damages for pain and suffering.....Kshs. 2,300,000/=

Loss of future earning capacity.....Kshs. 821,599/=

Future medical expenses.....Kshs. 200,000/=

Special damages.....Kshs. 279,478/=

Grand total.....Kshs. 3,601,077/=

On liability the appellants were found to be 100% liable.

3. Aggrieved by the award, the appellants filed this appeal through Kairu & Mc Court advocates raising the following grounds:

a) That, the learned trial magistrate's judgment was unjust, against the weight of evidence and was relied on the wrong principals of law and thereby occasioning a miscarriage of justice upon the appellants.

b) That, the learned magistrate erred in law and in fact in awarding loss of future earning capacity as Kshs.821,599/= 9780.95 minimum wage)*9(multiplier)*12,an award that was excessive and unjust in the circumstances in view of the following:

- **The respondent was aged 57 years at the time of the accident**
- **The trial court used a multiplier of 9 years notwithstanding that the retirement age in Kenya is 60 years.**
- **The trial court awarded Kshs.200,000/= for cost of prosthesis.**
- **The trial court then awarded for loss of future earning up until the respondent turned 65 years notwithstanding that he had also been awarded for prosthesis.**

c) That, the learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on loss of earning.

d) That, the learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the appellants and by instead relying on the authorities cited by the plaintiff which were unrelated to the actual injuries sustained by the respondent.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. The respondent was represented by Nelson Kaburu & Co Advocates.

5. A summary of the adduced before the lower court will suffice.

6. The respondent testified that he owned a kiosk behind homeland Thika road. On 12th June 2014 he was alighting from bus registration number KBR 085D which had stopped at Homeland stage. The said bus took off before he fully disembarked and in the process ran over his leg. He was rushed to Kenyatta National Hospital. The next day he was taken to theatre and his right leg amputated below the knee.

7. Later, he was operated at the pelvic area and a plate was fixed. He uses crutches as he was unable to lift an artificial leg which had been availed. He produced documents to confirm his visits to hospital plus the expenses incurred (PEXB4-12 & 13b). Dr. Washington Wokabi confirmed the respondent's condition and produced a medical report (PEXB13) and receipts (PEXB14).

8. In their filed defence the appellants denied the respondent's claim and insisted that the said accident was solely contributed to by the negligence on his part. They state that the respondent did not bring forth an eye witness to corroborate his evidence hence was unable to prove his case on a balance of probability. Besides their filed defence the appellants gave no oral evidence.

9. Mr. Kimondo for the appellants submitted that the trial court failed to exercise its discretion fairly by not taking into account the respondent's income. It erred in adopting the multiplier method to arrive at the award when there was no evidence on record to support the same.

10. Counsel further submitted that the learned magistrate erred by not taking into account the vicissitudes and imponderables of life and applied a multiplier of 7 years thus assuming the respondent would live up to 65 years. That the trial court found that the respondent had a hotel business which was not in the evidence adduced.

11. He relied on the case of **Mumias Sugar Company Ltd vs Francis Wanalo(2007) eKLR** where the court held:

“The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour 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 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.”

12. He has also submitted that the award of Kshs.2, 300, 000/=for general damages was to be taken into account alongside the prosthesis that was already catered for. That the calculation for loss of future earning capacity was awarded without basis and thus not justified and should be set aside. He has cited the case of **Gerald Oyugi v Evans Okeyo Mochere (2019) eKLR** to support that submission.

13. He, on a without prejudice basis proposed a sum of Kshs.100,000/= for loss of earning. He relied on the case of **Mwaura Muiru vs Suera Flowers Limited & another (2014) eKLR** for this proposal. In the said case a 64 year old Plaintiff was a tractor driver and suffered inter alia partial paralysis of the hands and stiffness of the ankle joint and as such chances of getting employed as a truck driver were

diminished by the said injuries. However the learned judge Emukule observed that due to his age, he would not be in the market for much longer period and assessed loss of earning capacity at Kshs.150,000/=as sufficient.

14. Mr. Kaburu for the respondent submitted that the memorandum of appeal is not clear on whether the appellants are appealing against the entire decision or part decision. Further that grounds 1 and 2 should be struck out since they are against Order 42 rule 1(2) requires grounds of appeal to be clearly set out. It states thus:

“.....Concisely and under distinct heads grounds of objection to the decree or order appealed against without any argument or narrative....”

15. He submitted that there was no explicit ground of appeal against the court’s findings on full liability against the appellants, on the award for pain, suffering and loss of amenities of life, special damages as well as the cost of the prosthesis in the total sum of Kshs.2,779,478/=.

16. He further submitted that the complaint that a multiplier of 9 years instead of 7 years was applied should fail since the respondent was 57 years old and was not a civil servant. He added that when it comes to business people like the respondent or professionals they can practice their skills beyond compulsory retirement age of 60 years which is not applicable in this case.

17. He relied on various authorities including **Rahab Wanjiku Gitonga vs Almas Njoroge Mungai & Another Nakuru HCCC No.59 of 1997.**

In the said case the deceased was a farmer aged 64 years. He was in good health. The court applied a multiplier of 8 years ‘having taken into account other contingencies of life.’

(ii) Alice Mboga v Samuel Kiburi Njoroge Nakuru HCCC No.357 of 1999.

In that case the deceased was aged 53 years. He was a printing technician at Egerton University. The court used a multiplier of 10 years holding that “He would have been required to retire in two years’ time. But the nature of his work is such that he would have worked for private firms past 65 years.”

18. Mr. Kaburu urged this court to adopt the approach on assessment of damages as espounded in **H.West & Son Ltd v Shepherd (1964)A.C 326 at 353** which considered the following:

Ø *Assessment of damages is a difficult task*

Ø *Assessment of damages is a matter of opinion of judgment and experience*

Ø *No one can predict with complete assurance that an award made by another is wrong*

Ø *It is natural for an appellate court to pose for itself what award it would have made but an award made is not wrong merely because it does not correspond with the award the appellate court would have made in the first instance had it been the one sitting.*

19. He has submitted that the courts use the statutory minimum wages where there is no concrete/documentary evidence of earnings and that the trial court made a lower award. He argued that had it applied the proved earnings the award would have been much higher.

He therefore urges this court to dismiss this appeal with costs.

Analysis and determination

20. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See **Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968)E.A 123 Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

21. Having considered the grounds of appeal, evidence on record and both submissions and authorities cited and the fact that the appellants are clearly not challenging the finding on liability, I find the issues falling for determination to be as follows:

a) *Whether the learned magistrate made excessive awards.*

b) *Whether the trial magistrate misdirected himself by failing to consider the appellants submissions on loss of earning and assessment of damages.*

I will deal with the two issues simultaneously.

22. It has been submitted that at the time of the accident the respondent was 57 years old and he was not a civil servant whose retirement age is 60 years.

In **Sokoro Plywood Limited & Another –Vs- Njenga Wainaina (2007) eKLR**, the High Court, while sitting on appeal, upheld the

decision of the lower court to adopt a multiplier of 10 years in a case where the deceased was 60 years old. It stated that:-

“Regarding the multiplier of 10 years, the deceased was 60 years at the time of her death. In the case of Rahab Wanjiku Gitonga –vs- Almas Njoroge Mungai (supra) which was cited by the deceased was aged 64 years and the court adopted a multiplier of 8 years. In the circumstances of this case the multiplier of 10 years was reasonable”

The courts do take into consideration that businessmen or professionals can practice their skills beyond the required retirement age for those who work for the government.

23. Further, on the issue of proof of income, in Siyaram enterprises & another –vs- Samuel Nyachani Nyachani (2015) eKLR the plaintiff did not adduce evidence of earnings, the High Court upheld the decision of the lower court where it had adopted a monthly salary of Kshs.9,000/= and took that amount to be the minimum government wage. The court went further in the above case to say:-

“With regard to the issue of proof of income, a majority of Kenyans are not in formal employment. To have expected the Respondent to produce receipts or pay slips to prove income would have been unreasonable.”

24. In the instant suit, the trial magistrate awarded Kshs 3,601,077.20/= as damages for pain and suffering, future medical expenses and cost of prosthesis and loss of future earnings.

25. The respondent herein sustained an injury on his right leg below the knee which was amputated. The doctor assessed incapacitation at 58% due to the amputation. In Kurawa Industries Limited vs. Dama Kiti & Another [2017] eKLR which was relied on by the respondent the court held that:

“The scenario given by the above awards shows that damages for amputation of one’s leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries. There is the case of Samuel Musinga Mwatete (supra) where Kshs.1.5 million was awarded in 2012. The case of Patrick Mbatha Kyengo was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of Cosmas Mutiso Mwema (supra).”

26. The Court of Appeal in Mumias Sugar Company Limited vs. Francis Wanalo (2007) eKLR stated that

“...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 plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour 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 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.”

27. A reading of the impugned judgment shows that the learned trial magistrate considered the evidence adduced, the law and decided cases before arriving at the decision he made. The appellants have no issue with the authorities relied on by the court. I am convinced that the trial court considered the authorities submitted on. I however do not find a satisfactory explanation for the award of Kshs 2,300,000/= after considering the authorities cited whose awards range from Kshs 1,600,000/-1,900,000/-. Further, on considering that a separate award has been made for loss of future earning capacity I find an award of Kshs 1,800,000/= to be reasonable for pain and suffering.

28. On loss of future earnings the respondent was aged 57 years at the time of accident. Since no earnings were proved the trial was right in applying the minimum wage of an unskilled labourer. A multiplier of 5 years is sufficient as its not very certain for how long he would have worked. The loss will therefore be:

$$9,780.95 \times 5 \times 12 = 586,857$$

29. The upshot is that the lower court judgment is set aside and I make the following awards:

- General damages for pain and suffering Kshs 1,800,000/=
- Loss of future earning capacity.....Kshs 586,857/=
- Future medical expenses and costs of prosthesis...Kshs 200,000/=
- Special damages..... Kshs 279,478/=

TOTAL – Kshs 2,866,335/=

30. I therefore enter judgment in favour of the respondent for Kshs 2,866,335/= (*Kshs Three million, sixty-six thousand, three hundred and thirty-five only*) plus interest and costs.

The appellants get ½ of the costs of the appeal.

Orders accordingly.

Delivered, signed and dated this 19th day of May 2021.

H. I. ONG'UDI

JUDGE