



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 17 OF 2016

CHARLES KIPLANG'AT KOECH.....APPELLANT

VERSUS

BENARD NG'ETICH aka BENARD

KIKIRUI YEGON.....RESPONDENT

JUDGMENT

1. The Respondent (then Plaintiff) was a motor cycle rider. On 22nd February 2015 at around 9:30 am while riding along Silibwet-Litein Road, he was hit by motor vehicle registration number KBK 761 U owned by the Appellant (then Defendant). He sustained fractures on his right leg and was hospitalized at Tenwek hospital where the leg was subsequently amputated. He filed suit for general and special damages. Before the conclusion of the case, the parties filed a consent on liability at the ratio of 80:20 in favour of the Respondent. Subsequently the court awarded damages as follows:-

General damages	– Kshs.1,800,000/=
Loss of earning capacity	– Kshs. 800,000/=
Special Damages	– Kshs. 238,350/=
Total	– Kshs.2,838,350/=
Less 20%	- (Kshs. 567,670/=)
GRAND TOTAL	– Kshs. 2,270,680

2. Dissatisfied with the award, the Appellant filed the present appeal on 9th September 2016 seeking a fresh assessment on damages. He listed 10 grounds of appeal which contend that the award was erroneous, excessive and was based on no evidence. That the Hon. Magistrate departed from precedent and principles governing the award of damages.

3. The appeal was canvassed through written submissions. In their submissions, the Appellants stated the award was inordinately high as to represent an entirely erroneous estimate and further that the same should be set within limits set out by previous cases law. They also stated that the Respondent was not entitled to loss of earning capacity as the same was part of the award under general damages. That pain and suffering had been assessed at 50% and ought to have been awarded based on comparable degrees of disability. They contested the award for loss of earning capacity claiming that the same should have been included as part of the general damages and not a separate item as was determined by the learned Magistrate. They relied on the cases of **Texcal House Service Station Ltd & Another vs. Jappien & Another (Nairobi CA No. 134 of 1998)**, **Stanley Maore vs. Geoffrey Mwenda (Nyeri CA No. 147 of 2002)**, **Frodak Cleaning Services & Another vs. Daniel Meshack Shikanga (2017) eKLR**, **SJ vs. Francesco Di Nello & Another (2015) eKLR**, **Fairly vs. John Thomson Limited (1973) 2 Lloyd's Law Reports 40, at page 14**, **Mumias Sugar Limited vs. Francis Wanalo (2007) eKLR**, **Charles Oriwo Odeyp vs. Appollo Justus Andabwa & Another (2017) eKLR**, and **Jane Wangui Murage vs. Dakianga Distributors Limited (2012) eKLR**.

4. The Respondent on the other hand submitted that he sought damages for pain and suffering separately from damages for loss of amenities but the two were awarded jointly. In his view, the award was not excessive. He further submitted that the separate award for pain and suffering and loss of earning capacity was in order. He relied on the case of **Mumias Sugar Company Limited vs. Francis Wanalo (Kisumu C.A. CA. No. 91 of 2003)** in which the case of **Butler vs. Butler (1984) KLR 225** was cited. He urged the court to dismiss the appeal with costs.

5. From the grounds of appeal and the submissions of the parties, issues for determination are whether the award of 1,800,000/= for general damages for pain and suffering and loss of earning capacity was inordinately high, and; whether the Respondent was entitled to loss of earning capacity as a separate award.

Whether the award of Kshs.1,800,000 as general damages for pain and suffering and loss of earning capacity was inordinately high.

6. The Principles upon which an appellate court may interfere with an award for damages were set out in the case of **Butt vs. Khan [1981] KLR 349 at 356 [Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR]** thus:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

7. This principle was also restated in **Mbogo & Another vs. Shah (1968) 1 E.A. 93** where the court held as follows:-

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

8. The question is not whether the appellate court would award differently, but whether the right legal principles were applied by the lower court as determined in **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi C.A. 142/2003** where the Court of Appeal held that: -

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles as reiterated in Mariga vs. Musila [1984] KLR 257.”

9. From the foregoing authorities, assessment of general damages for personal injury is an exercise in the discretion of the trial court which is governed by the following clear principles: -

- i. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- ii. The award should be commensurable with the injuries sustained.
- iii. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- iv. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- v. The awards should not be inordinately low or high.

10. In the present case, the Respondent suffered injury to his right hand and serious damage to the right leg which was subsequently amputated at the thigh. In awarding damages the trial magistrate noted that though the plaintiff had lost his earning capacity as a result of amputation of his leg due to the accident, the multiplier multiplicand formula was not appropriate and awarded a compound sum of Kshs.800,000/=.

11. A review of several authorities made by the courts provides a clear estimate of damages awarded in respect of similar injuries as sustained by the Respondent in the present case, specifically amputation of the leg above the knee and 50% disability. In **Jackson Mutuku Ndeti vs. A.O. Bayusuf & Sons Ltd (2007) eKLR** the court made an award of Kshs.2,000,000/= for an amputated leg in 2007. In the case of **Samuel Musinga Mwatete vs. Taz Freighters Ltd & Another, Mombasa HCC No. 230 of 2009** the court gave an award of Kshs.1.5 million in 2012 for 50% permanent incapacity and amputation of one leg below the knee together with other injuries. In another case **Cosmas Mutiso Muema vs. Kenya Road Transporters Ltd & Another, Mombasa HCCC No. 285 of 2006** in 2014, the Plaintiff was awarded Kshs.2.5 million for amputation of one leg at the knee level. In yet another case, **Patrick Mbatha Kyengo vs. Bayusuf Freighters Ltd [2013] eKLR**, Kshs.1.6 million was awarded for amputation of the leg and fracture of the right radius and ulna. In **Kurawa Industries Limited vs. Dama Kiti & another [2017] eKLR**, the court made the observation that, *“The scenario given by the above awards show that damages for amputation of one’s leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million.*

12. Taking the above comparable cases into consideration and considering the impact of inflation, I am satisfied that the award of Kshs.1,800,000 was reasonable in this case. In addition, I observe that the learned magistrate gave a combined award for loss of amenities and pain and suffering under general damages, to a total of Kshs.1,800,000 even though the Respondents had separately prayed for loss of amenities as a separate prayer. I see no need to interfere with this award. See **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**.

Whether the Respondent was entitled to loss of earning capacity as a separate award.

13. The Respondent was awarded Kshs.800,000/= for loss of earning capacity. The Appellant contended that this specific award ought to

have been factored in the general damages and not awarded as a separate head. They also contended that the learned Magistrate never considered the evidence or the defense of the Appellants and proceeded to make an award without documentary evidence from the Respondent.

14. I have perused the proceedings. I must dismiss from the outset the Appellant's submission that the trial court did not consider their defence. This is because the parties entered consent on liability with respect to quantum, the Appellant closed their case without calling any witness to rebut the Plaintiff's case and neither did they make any compelling arguments in their brief submissions on the appropriate quantum. Besides, and as stated in **Ntulele Estate Transporters Limited & Another vs. Patrick Omutanyi Mukolwe HCCA. No. 67 of 2011** "*Failure to set out the respective parties submissions and evaluate the authorities relied on in the judgment cannot be said to be the basis of holding that the court has failed to consider the principles applicable...what is significant is that the court has considered the same.*"

15. I must however address the question whether loss of earning capacity should have been considered separately or included in the general damages. This issue has been discussed in several authorities. In the case of **SJ vs. Francesco Di Nello & Another [2015] eKLR** the Court of Appeal made a distinction between loss of earning capacity and loss of future earnings in the following terms:-

"Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley vs. John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:-

"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

16. The principles to be considered in making an award for loss of earning capacity were clearly set out by the Court of Appeal in **Butler vs. Butler [1984] KLR 225**, as follows:-

- a. 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;*
- b. 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;*
- c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;*
- d. Loss of earning capacity can be a claim on its own, as where a 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;*
- e. 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; and*
- f. 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 service, if any.*

17. In the present case, the Respondent pleaded loss of future earning capacity and not loss of earnings. He stated that he was a boda boda rider earning an income of Kshs.500 per day. The court awarded him Kshs.800,000/= for loss of earning capacity. The Appellant has argued that there was no proof that the Respondent actually earned 500/= per day.

18. I have considered the evidence on record. It was not contested that the Respondent was a boda boda rider engaged in boda boda business. It was also demonstrated that his leg was amputated which would make it impossible for him to continue being a rider. I find a composite award of Kshs.500,000/= appropriate in the circumstances. I take guidance from the Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo (2007) eKLR**, where it held thus:-

"...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."

19. In the present appeal, any evaluation of the record shows that the trial court took into consideration the principles set out in the authority above. In the final analysis, the appeal partially succeeds. The award is revised as follows:-

General damages – Kshs.1,800,000/=

Loss of earning capacity - Kshs.500,000/=

Special Damages – Kshs. 238,350/=

Total – Kshs.2,538,350/=

Less 20% - (Kshs. 507,670/=)

GRAND TOTAL – Kshs. 2,030,680

20. The Respondent/Plaintiff shall have the costs of the suit in the lower court and interest at court rates on the award from the date of judgment till payment in full. Each party shall bear their costs in this appeal.

21. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 30TH DAY OF JUNE, 2021.

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R. LAGAT-KORIR

JUDGE

Judgement delivered to the parties electronically as per their consent at the following addresses:-

M/s Mose, Mose & Milimo for Appellant

M/s Khan & Associates for Respondent