



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

CIVIL APPEAL NO. 5 OF 2019

SOLOMON MURIITHI MANYARAH APPELLANT

-VERSUS-

SMK (Minor suing through her next friend AKK).....RESPONDENT

JUDGMENT

Introduction

1. This is an appeal from the judgment of **Hon. J. M. Njoroge (C.M.)** that was delivered on 30th January 2019 in **Civil Case No. 26 of 2018 (Chuka)**.
2. The Respondent instituted the stated civil case against the Appellant for general and special damages following a road traffic accident that allegedly resulted in the Respondent sustaining injuries and incurring loss and damages.
3. The Respondent claimed that on or about 8th January 2017, she was off the Kathwana-Tunyai road when the accident occurred at Nkarini Market area involving motor vehicle registration number KAY 975A.
4. From the Complaint dated 30th December 2017, the Appellant was the proprietor of the suit motor vehicle and that at the time of the accident, it was in control of one Elijah Muteithia M'Ngai, the Appellant's agent, servant, and/or employee. The Respondent averred that the accident was as a result of negligence on the part of the said Elijah Muteithia M'Ngai.
5. The Appellant admitted that he was the owner of the suit motor vehicle at the material time. He however denied liability alleging that the accident was caused partly by the negligence of the Respondent and partly by the negligence of one Isaac Gichangi Mitambo who was the rider of motorcycle registration number KMD 108G. According to the Appellant's defence statement, the Respondent was a pillion passenger on the aforementioned motorcycle at the time of the accident.
6. On 31st October 2018, liability in this matter was settled by consent in the ratio of 70:30 against the Appellant.
7. As regards quantum of damages, the trial court entered judgment against the Appellant as follows:

a. General damages for pain and suffering	2,500,000/=	
b. Loss of earning capacity	1,500,000/=	
c. Special damages	<u>15,000/=</u>	
		4,015,000/=
Less 30% Contribution	<u>(1,204,500/=)</u>	
Net Total	<u>2,810,500/=</u>	

Plus Costs and Interests

8. This appeal is against the above award on quantum of damages. It is premised on the grounds that the award of general damages for pain and suffering and loss of amenities and the award of general damages for loss of earning capacity were excessive. The Appellant thus prays that the said awards be set aside and substituted with an assessment at a much lower amount that is commensurate with the claim.

Appellant's Submissions

9. The Appellant submitted that the award of general damages was manifestly excessive and not commensurate with the injury suffered. He submitted that an award of Kshs.1,700,000/= would have been ideal and relied on the cases of **Frodak Clearing Services & Another v. Daniel Meshack Shikanga [2017] eKLR** and **Dancan Kinyua & Another Boniface Kigunda [2020] eKLR**.

10. Under the head of loss of future earnings, the Appellant admitted that the Respondent is entitled to this award. He however claimed that the trial court whimsically and capriciously settled on an award of Kshs.1,500,000/= and submitted that the court did not exercise its discretion wisely.

Respondent's Submissions

11. The Respondent submitted that the trial court did not err in awarding the damages. In submitting under the head of general damages for pain and suffering, the Respondent relied on the case of **Crown Bus Services Ltd and 2 Others -vs- BM (Minor suing through his mother and next friend SMA) [2010] eKLR** and on the case of **Cosmas Mutiso Muema -vs- Kenya Road Transporters Ltd and Anor [2014] eKLR** where Kshs.2,500,000/= were awarded under that head. She thus submitted that taking the Respondent's age into account as well as the degree of incapacitation suffered, the trial court did not err in awarding damages of Kshs.1,500,000/= for loss of future earnings.

Issue for determination

12. The main issue for determination in this appeal is whether this court should allow this appeal and interfere with the award of damages by the trial court.

Analysis

13. This being a first appeal, it is trite law that this Court is under a duty to reconsider the evidence adduced in the trial court, re-evaluate the evidence and draw its own conclusions. The principles upon which this Court acts in such an appeal are well settled and were aptly stated in the cases of **Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123** and **Williamson Diamonds Ltd. V. Brown [1970] E.A.L.R.**

14. The award of damages is a matter of judicial discretion. As rightly submitted by counsel for the Respondent, it is a general rule that an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. This is the principle enunciated in **Rook v Rairrie [1941] 1 ALL E.R. 297**. It was echoed with approval by the Court of Appeal for East Africa in **Butt v Khan [1978] eKLR** where it held that:

“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.”

15. The first ground of appeal is that the award of general damages for pain and suffering and loss of amenities was manifestly excessive and not commensurate to injury suffered.

16. It is trite that damages for bodily injuries must be commensurate with the injuries sustained. Both parties agree with the medical evidence availed in court that the Respondent suffered the following injuries as a result of the subject accident:

- a. Crush injury to right femur leading to hip disarticulation.
- b. Cut wound left lower limb over the ankle joint region.
- c. Cut wound right hand dorsal surface.

17. After the accident, the Respondent was rushed to and treated at Consolata Hospital - Nkubu where she was admitted for a period of 3 months between the dates of 8th January 2017 to 20th March 2017 and 29th March 2017 to 24th April 2017. As per the medical report of Dr. Njiru G. N. dated 9th November 2017, the Respondent suffered 100% incapacitation of her right lower limb.

18. In the **Cosmas Mutiso Muema's case (supra)** cited by the Respondent, the Plaintiff sustained: Crushed left leg leading to amputation below the knee; Fracture of cervical spine C1; Fracture of lateral 1/3 of the right clavical; Fracture of ribs 2,3,4; Fracture of the skull with hairline fracture of the zygomatic arch; Dislocated right knee with torn lateral collateral ligament; Dislocation of cervical vertebra C6; Multiple deep ugly cut wounds on the face measuring about 30 cm and which have healed with severe scarring; Several cut wounds on the back which have healed with severe keloid formation; Several cut wounds on the left upper arm which have healed with keloid formation; and 15 cm deep cut wounds on the right leg. The damages for pain, suffering and loss of amenities was assessed at **Kshs. 2,500,000. I note however that the said injuries were more severe compared to those suffered by the Respondent herein.**

19. In the case of **Frodak Clearing Services & another** (*supra*) cited by the Appellant, the left leg of the Respondent therein was amputated above the knee leaving a permanent feature with 50% permanent disability. The court awarded the Respondent Kshs.1,500,000/= as general damages for pain and suffering and loss amenities. In the instant case, the Respondent's permanent incapacity was assessed at 100%.

20. In **Edwina Adhiambo Ogol v James Kariuki [2020] eKLR** the Plaintiff Edwina Ogol was injured following road accident and sustained: Fracture of left humerus; Compound(open) fractures of the left tibia and fibular; Amputation of the left leg above the knee; and Intra uterine fetal death at 32 weeks (as per ultra sound). The degree of incapacity on her amputated leg was assessed at 50%. The trial court awarded her general damages of Kshs.1,500,000/= which award was reversed by the High Court on appeal and substituted it with an award of Kshs.2,200,000/=.

21. Impartiality demands that like compensation be given to like injury. In this case, the trial court relied on the cases of **Evans Odhiambo v. Samson Wawire Ogena [2010] eKLR** and **David Kigotho Iribe v. John Wambugu and Anor [2008] eKLR** where the awards granted under this heading were Kshs.1,000,000/= and Kshs.1,300,000/= respectively. The trial court took into consideration the time, type and inflation rates in our country. It also noted that the said decisions were about 10 years old and found that the sum of Kshs.2,500,000 was reasonable under that head. In view of the facts and circumstances of this case, it is my opinion that the award of Kshs.2,500,000/= was reasonable and not inordinately high.

22. The second ground of appeal is that the award of general damages for loss of earning is inordinately excessive. The Appellant alleges that the trial court did not use its discretion judicially in awarding Kshs. 1,500,000/= for loss of earning capacity. He submitted that the same should be reduced to a substantially lower amount. On the other hand, the Respondent submitted that the award under the said heading was reasonable as the Respondent suffered a permanent injury at a young age which she will have to live with for the rest of her life.

23. In **SJ vs Francesco Di Nello & Another [2015] Eklr**, the Court of Appeal held: -

“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 V 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.’

24. In the case of **CECILIA MWANGI & ANOTHER V RUTH W. MWANGI CA No. 251 of 1996**, the Court of Appeal restated the position in the **FAIRLEY** case (*supra*) and held that:

“The damages under the head of “loss of earning capacity” can be classified as proved on a balance of probability.”

25. At the time of the accident, the Respondent was a minor aged 16 years old and was attending school. The trial court again relied on the case of **Evans Odhiambo** (*supra*) and the case of **David Kigotho Iribe** (*supra*) where the awards granted for loss of future earning capacity were **Kshs.1,800,000/=** and **Kshs.1,440,000/=** respectively. In the circumstances, it is my considered view that the learned trial magistrate neither applied wrong principles nor made an award that is too exorbitant in the circumstances.

Conclusion

26. In light of the foregoing, I find that the reasoning by the learned trial magistrate was proper and sound. The award of **Kshs.2,500,000/=** and **Kshs.1,500,000/=** as general damages for the pain suffered by the Respondent and loss of earning capacity respectively was reasonable. I therefore find that the appeal is without merits and is dismissed with costs.

Dated, signed and delivered at Chuka this 24th day of June 2021.

L.W. GITARI

JUDGE

24/6/2021

The Judgment has been read out.

L.W. GITARI

JUDGE

24/6/2021