



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 80 OF 2020**

**CHINA NATIONAL AEROTECHNOLOGY INTERNATIONAL**

**ENGINEERING CORPORATION.....APPELLANT**

**VERSUS**

**LAWRENCE NAIBEI CHEMURUGO.....RESPONDENT**

**(Being an appeal from the Judgement and Decree of Hon. C.A.S. Mutai SPM in Bungoma CMCC No. 252/2019 delivered on 2/6/2020)**

**JUDGEMENT**

The respondent herein (plaintiff in the lower court) instituted suit seeking general damages for pain and suffering and loss of amenities arising from a motor vehicle accident involving motor vehicle Registration No. KCM 236T owned by the appellant, special damages, cost of the suit and interest.

The Plaintiffs claim was that on or about the 19<sup>th</sup> day of November 2018 when the plaintiff was lawfully playing games at Toroso primary school playing ground when the Defendant's agent, servant and or driver so negligently drove off motor vehicle Registration NO. KCM 236T that it ran over the lower limb of the plaintiff thereby causing him to sustain serious bodily injuries.

**PARTICULARS OF NEGLIGENCE ON THE PART OF THE DEFENDANT'S SERVANT , AGENT AND OR DRIVER.**

- (a) Driving off motor vehicle registration NO. KCM 236T without ensuring that it was safe to do so.
- (b) Driving without due care and attention to the people who were present in the playing ground particularly the plaintiff herein.
- (c) Failing to exercise any prudence or proper control of the suit motor vehicle.
- (d) Failing to heed to road traffic rules.
- (e) Driving into the school compound without authority
- (f) Causing the accident.

By reasons of the aforesaid accident the plaintiff sustained serious bodily injuries' loss and damage, and is now confined in a wheel chair with permanent physical incapacitation assessed at 100%, he requires a domestic worker around the clock.

**PARTICULARS OF INJURIES**

- i. Crushed right lower limb amputated above the knee.
- ii. Crushed left lower limb amputated above knee
- iii. Severe abdominal injury leading to peritonitis and septicaemia
- iv. Severe blood loss necessitating multiple blood transfusion.

## **COMPLAINTS**

1. Has lost both lower limbs. He is now confined to a wheel chair. He has a colostomy. Has lost both his lower limbs above the knees thus, confined to a wheel chair.

The defendant filed its statement of defence denying the negligence attributed to its agent and averred that the accident, if any was due to the plaintiff's negligence.

Briefly the evidence before the trial court was that PW1 Dr. Paul Kipkorir Rono produced treatment notes from Moi Teaching and Referral Hospital Eldoret where the plaintiff had been admitted three times. He was first admitted on 9/11/2018 due to crush injuries of both legs, injuries to the intestines, 2 lower limbs were amputated and a colostomy placed on the intestines. That there was infection of the 2 lower limbs thus the 2<sup>nd</sup> admission. He produced a discharge summary dated 9/11/2018 as Pexh1.

**PW2 Dr. Sokobe** from Eldoret Hospital who testified and produced a medical report. His opinion was that the plaintiff lost his lower limbs and assessed the permanent disability at 100%. That the respondent required further treatment at a cost of kshs 1, 700,000/=. He produced the medical report, P3 form and receipt for medical report as Pexh 2,3 and 4 respectively.

Joab Kipngeria attached to the Chesikaki Police Station testified as PW-3 and produced the Police Abstract drafted by one PC David Moi who had since died. He stated that the accident occurred on 19/11/2018 at Toroso Primary School. He did not know who to blame for the accident.

**PW-4 Lawrence Naibei Chemurugo** stated that on 19/11/2018 while playing Volleyball at Toroso Primary School, he saw lorry being driven to the school compound. The ball was punched under the lorry. He rushed to pick it after alerting the driver. In the process of crawling out, he was crushed by the lorry when the driver drove off.

He was rushed to cheptais Sub county Hospital and later the Moi Teaching and Referral Hospital Eldoret where he was hospitalized for 3 months, readmitted in the Month of May for 1 month and later in August for 5 days.

The appellant called 3 witnesses who testified;

**DWI, Philip Koro** stated that he was a Clinical Officer stationed at Kapsiro Health Centre. That the plaintiff was brought to their facility on 19/11/2018 both limbs had been crushed below the knee and some parts missing. That the patient was smelling alcohol and was not aware of what was going on. That they fixed a line for fluids and referred him to Moi Teaching and Referral Hospital Eldoret.

**DWII Benard Kipsamii Boiyo** testified that he was the driver of Motor Vehicle Registration Number KCM 236T when the accident occurred. He stated that the plaintiff rushed into the vehicle when he was driving. That he has not been charged with any traffic/criminal case concerning the accident.

The court delivered its judgment and awarded damages as follows:-

<i>Liability</i>	<i>70%</i>
<i>Pain and suffering</i>	<i>Kshs 6,000,000/=</i>
<i>Cost of domestic worker</i>	<i>Kshs 3,000,000/=</i>
<i>loss of income</i>	<i>Kshs 2,000,000/=</i>
<i>Special Damages</i>	<i>Kshs 2, 656,000/=</i>
<b><i>TOTAL</i></b>	<b><i><u>Kshs 13,656,000/=</u></i></b>
<i>LESS 30%</i>	<i>Kshs 4, 096,800</i>
<b><i>Balance</i></b>	<b><i><u>Kshs 9, 559,200/=</u></i></b>

Dissatisfied, the appellant filed its appeal vide the memorandum of appeal dated 26/6/2020 setting out the following grounds

- 1. That the learned trial magistrate erred in fact and in law by apportioning liability at the ratio of 30:70 in favour of the respondent as against the appellant when the evidence on record was categorical that the respondent was drunk at the time of the accident.**
- 2. That the learned magistrate erred in fact and in law by disregarding the evidence of the appellant that the accident was solely occasioned by the respondent herein.**
- 3. That the learned magistrate erred in fact and in law by failing to hold contrary to the overwhelming evidence, that the respondent was to be solely blamed for the accident.**

4. That the learned magistrate erred in fact and in law by disregarding the fact that the respondent herein had exaggerated the injuries.
5. That the learned magistrate erred in fact and in law by awarding the colossal sum of Kshs 6,000,000 for pain and suffering which sum is exorbitantly high and not consistent with the injuries sustained by the respondent.
6. That the learned magistrate erred in fact and in law by awarding Kshs 3,000,000 as cost for domestic worker which award is not supported by any evidence of necessity or any proof of payment thereof.
7. That the learned magistrate erred in fact and in law by awarding kshs 3,000,000 as costs for domestic worker which award is exorbitantly high considering the gazette salary for such domestic worker.
8. That the learned magistrate erred both in fact and in law by failing to show how he arrived at the award of Kshs 2,000,000 as loss of income when there was no proof that the respondent was in gainful employment and earning a salary.
9. That the learned magistrate erred in fact and in law by awarding Kshs 2, 656,000 as special damages when the receipts and expenses produced during the trial was not equivalent to that award.
10. That the learned trial magistrate grossly misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.
11. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellant.
12. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.
13. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high and excessive in the circumstances occasioning miscarriage of justice.
14. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

In its written submissions, the appellant condensed the grounds of appeal into 2 issues thus; -

1. **Whether the learned trial magistrate erred in fact and in law in apportioning liability at the ratio of 70:30 in favour of the plaintiff as against the defendant and;**
2. **Whether the magistrate erred in fact and in law by making awards that are exorbitantly high as to occasion a miscarriage of justice and for making awards that were not proved.**

On the 1<sup>st</sup> issue the appellant relying on the provisions of section 107 (1) and (2) of the Evidence Act submits that the respondent failed to prove that the appellant is to blame for the accident as he did not call any eye witness to testify on how the accident happened. That the respondent was drunk as can be deduced from the evidence of DW-1. The cases of *Dun Onyango Odera vs Aineah Amakuba Mbuyia(2015)eKLR* and *Michael Kariuki Muhu Vs Charles wachira Kariuki & Anor(2015)eKLR* have been cited in support.

On the second issue and with regard to special damages, counsel submits that only receipts for Kshs 156,000/= were produced and the trial magistrate therefore erred by awarding Kshs 2, 656,000/=. The medical report (Pexh-2) indicated that a motorized wheel chair and artificial limb replaceable after 20 years are worth Kshs 500,000/= and Kshs 1,000,000/= respectively yet the magistrate found the same to be replaceable twice thus the exorbitantly high award of Kshs 2, 656,000/=. In this regard, counsel cited the case of *Peninah Mboje Mwabili vs Kenya Power and Lighting Company Limited (2016)eKLR*.

As regards pain and suffering, counsel submits that the award of Kshs 6,000,000/= is exorbitantly high as to occasion a miscarriage of justice and not relative to the injuries sustained. The case of *Fridah Mercy Chebii Kiplagat (Minor suing thro' her father and next friend) Julius Kiplagat Tuitoek Vs Chelimo Chebet & Anor (2007) eKLR* has been cited in support.

Under the head of loss of income, counsel submits that the award of Kshs 2,000,000/= was not supported by any evidence and the court ought not to have made any award in this limb for lack of proof. The case of *Peninah Mboje Mwabili (supra)* has been cited in support of this proposition.

On the cost of domestic worker, it is submitted that the award of Kshs 3,000,000/= is not supported by evidence as the respondent did not testify that he needed a domestic worker, he had not employed one as well. That the issue only came up during submissions. That the computation of salary at Kshs 12,000/= and a multiplicand of 25 is also not supported by evidence. Reliance is placed on the case of *Peninah Mboje Mwabili (supra)*.

On liability, the respondent submitted through Mr. Mukisu Counsel that there is no dispute that the accident happened in a playground where ordinarily, people are busy playing and vehicles are not expected to be driven therein. That it was therefore the duty of the driver to be extra cautious. The allegation of the respondent being drunk has not been proved as it was not corroborated and therefore the trial court's

apportionment of liability was justified.

On quantum, under pain and suffering, counsel submits that the award under the limb is reasonable and proportionate. That the award was neither excessive nor unreasonable. The cases of *Samuel Andayi Anganya Vs Lucy Wangeshi & Anor (2019)eKLR*, *Beatrice Anyango Okoth Vs Rift Valley Railways Limited & Anor.(2018)eKLR*, *Peninah Mboje Mwabili (supra)*, *Charles Oriwo Odeyo Vs Appollo Justus Andabwa & Anor (2017)eKLR* and *The Board Of Trustees Anglican Church of Kenya Diocese of Marsabit THW (1983) KLR, 114* have been cited in support.

Under domestic worker./future nursing expenses, the respondent in urging this court to uphold the award of Kshs 3,000,000/= citing the cases of *The Board of Trustees Anglican Church Of Kenya Diocese of Marsabit (supra)*, *Beatrice Anyango Okoth (supra)*

On other special damages, counsel submits that the physical disability was assessed at 100% and the respondent would require assistance of a wheel chair and artificial limbs.

This is a first appeal, the duty of a first appellate court are as enunciated in *Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR*, where the court restated the duty thus;

***“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....*”**

Taking into account the parties submissions and the record, this court of the view that the two issues to be answered in this appeal are; whether the trial court’s finding on liability accords with the evidence presented and whether the award of damages was appropriate and reasonable in the circumstances.

On liability from the record, the respondent stated on cross-examination; ***the ball went under the truck, I asked the driver to allow me remove the ball and he gave me a nod signal.***

In determining whether the respondent is also to blame for the accident the test was stated by Lord Denning in *Jones v Livox Quarries Limited 1952 2 QB 608* where he stated:

***“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of others being careless.”***

Nyakundi J. in *Alfred Chivatsi Chai & another Vs Mercy Zawadi Nyambu [2019] eKLR* propounded the test as follows;

- a) ***The probability that the harm would not have occurred if that other person took care to mitigate the loss and damage.***
- b) ***The likelihood of the harm as a result of breach of the duty of care by the tortfeasor.***
- c) ***The nature of the social activity or legal duty, is risk creating activity in which the person owed the duty of care was engaged in.***

In the instant case, it is a fact that the respondent removed the ball under the truck after had been given a nod by the driver. The respondent knew it was risky for him to remove the ball even though, he had been given a nod by the driver. Clearly both the driver and the respondent are to blame for the accident.

The contention by the appellant that the respondent was drunk does not hold water since no medical/clinical evidence was adduced in proof. This falls short of the provisions of Section 107 and 108 of the Evidence Act. The trial court in apportioning liability correctly found that the appellant owed the respondent a duty of care as he was driving through the field.

This court finds no fault in the trial court’s apportionment of liability the way it did.

As regards special damages, the law is quite clear on the head of Special Damages. The same must both be **pleaded and proved**, before they can be awarded. The Court of Appeal in *Hahn V. Singh, [1985] KLR 716*, held:

***Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.***

The respondent in the plaint sought Kshs 150,000/= for medical expenses, 25,000/=for medical report and a motorized wheel chair. The bulk of the award was in the form of a motorized wheel chair and artificial limbs replaceable once in 20 years.

The court notes that at the time of the accident, the respondent was 35 years. Taking into consideration that he would be 55 years when the 20 year period lapses and the current life expectancy is 60 years, the wheel chair and the limbs is renewable only once.

The other issue for consideration is the fact that the respondent would not need both the motorized wheel chair as well as the artificial limbs at the same time. That would amount to double compensation and the respondent would have to choose what he really wants. In the circumstances, this court awards as follows;

Treatment costs	Kshs	150,000/=
Artificial limbs	Kshs	1,000,000/=
Further treatment	Kshs	200,000/=
Doctor's attendance to court	Kshs	20,000/=
Medical report	Kshs	6,000/=
Motor vehicle search	Kshs	550/=
<u>TOTAL</u>	Kshs	<u>1, 376, 550/=</u>

It is trite law that the amount of money to be awarded under this head should be commensurate with the injuries sustained. It is common ground that the respondent's liability was assessed at 100%. He spent a considerable time in hospital and had to undergo a number of surgeries.

He sustained the following injuries; crushed right lower limb leading to its amputation above the knee, crushed left lower limb leading to its amputation above the knee, severe abdominal injury leading to peritonitis and septicaemia and severe blood loss necessitating multiple blood transfusion.

The general principles on award of damages were settled in *Catholic Diocese of Kisumu Vs Tete (2004) eKLR* where the court held:

***It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.***

In *A.A. M.V Justus Gisairo Ndarera & Another (2010) e KLR* it was held;

***“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”***

In *Alex Otieno Amolo & Another -vs- Hayer Bisham Sing & Another (2016)*

*included, it is not improper to award it under its own heading.*

In his statement dated 11<sup>th</sup> March, 2019 which was adopted as evidence in chief, the respondent stated that he is a farmer and a volleyball player. No other evidence of his earning was adduced.

Makau J. in *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) (2018) eKLR* held;

*That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor are they issued with salary slips or sign payment vouchers as regards their earnings but it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind none production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings will be insisted on.*

It is common knowledge that a farmer's income is not fixed. There may be time that the produce fetches a high price and sometimes when it is low. Farmers also rarely keep ledgers and or records of their income. This court has also considered that the respondent was a 35 year old man.

In the circumstances, this court finds the award of Kshs 2, 000,000/= reasonable and within limits and same is upheld.

In the result this court sets aside the award by the trial magistrate, and awards the Respondent the award as follows:

Special damages	Kshs 1, 376, 550/=
Pain and suffering	Kshs 6,000,000/=
Loss of income	<u>Kshs 2,000,000/=</u>
<b>TOTAL</b>	<u>Kshs 9, 376, 550/=</u>
Less 30%	Kshs <u>2, 812, 965/=</u>
<b>GRAND TOTAL</b>	<b><u>Kshs 6, 563, 585/=</u></b>

The respondent shall have interest on the award. On costs, since there is partial success on the appeal, each party shall bear his own costs of the appeal.

Orders accordingly.

**DATED and SIGNED at BUNGOMA this 30<sup>th</sup> day July, 2021.**

**S N RIECHI**

**JUDGE**