



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 55 OF 2017

BENARD MUINDE KILONZO.....APPELLANT

-VERSUS-

ANDREA M. MAIKO MOGI.....1ST RESPONDENT

ONYANCHA JAMES NYABUTO.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable I. Gichobi (Mrs.) (Senior Resident Magistrate) delivered on 3rd February, 2017 in CMCC NO. 4215 OF 2013)

JUDGEMENT

1. The appellant lodged Civil Suit No. 4215 of 2013 before the Chief Magistrate's Court at Milimani Commercial Courts by way of the plaint dated 26th March, 2013 and amended on 21st August, 2015 seeking general and special damages, and diminished earnings against the 1st and 2nd respondents under the tort of negligence arising out of a road traffic accident which occurred on or about the 3rd day of August, 2010 and involving the motor vehicle registration number KBA 960Z ("the subject motor vehicle") being at all material registered in the name of the 1st respondent and driven by the 2nd respondent.

2. The respondents entered appearance and filed their joint statement of defence on 23rd October, 2013 to deny the averments made in the plaint.

3. At the trial, the parties recorded a consent on liability in the ratio of 80:20 in favour of the appellant. Resultantly, the matter proceeded on quantum with the appellant's testimony, whereas the respondents did not call any witnesses.

4. Upon filing of submissions, the trial court rendered judgment in favour of the appellant against the respondents by awarding the sums of Kshs.500,000/=, Kshs.2,500/= and Kshs.150,000/= on general damages for pain and suffering and loss of amenities, special damages and future medical expenses respectively, subject to 20% contribution, giving rise to a sum of Kshs.522,000/=.

5. The aforesaid decision precipitated the appeal currently before this court. The memorandum of appeal dated 16th February, 2017 constitutes a total of six (6) grounds touching on quantum.

6. The appeal was argued by way of written submissions. In his submissions, the appellant contends that the award on general damages for pain, suffering and loss of amenities was inordinately low considering the nature of injuries sustained. The appellant urges this court to substitute it with an award of Kshs.1,000,000/= with reliance to the case of **Samwel Kebati Osoro v Mohamed Antuly & another [2019] eKLR** where a plaintiff with head injury left, fracture of the left radius, fractures of the right femur and left patella and a permanent disability arising from the incident is put at 60% was awarded a sum of Kshs.4,000,000/= under this head.

7. The appellant also faulted the trial court for declining to grant damages for diminished earnings in spite of evidence being adduced to support such claim. It is his submission that, though he did not have any documentary evidence to show the nature of his work or his earnings, he testified that he was working as a security guard and earning a monthly salary of Kshs.10,000/= and that following the accident, his employment was terminated. The appellant therefore urges this court to apply the minimum wage for a guard being the sum of Kshs.9,000/= together with a multiplier of 15 years and degree of permanent incapacity of 20% to be tabulated as follows:

$$9,000 \times 15 \times 12 \times 20/100 = \text{Kshs.324,000/=}$$

8. On their part, the respondents support the awards made by the trial court and urge this court not to disturb the same. On general damages

for pain, suffering and loss of amenities, the respondents have cited *inter alia*, the case of **Maina Onesmus v Charles Wanjohi Githome [2019] eKLR** where an award of Kshs.600,000/= made under a similar head was reviewed downwards to one of Kshs.350,000/= in the instance of a plaintiff who had suffered fractures of the mid shaft humerus, and condyles, and fragment fracture of the shoulder girdle; and the case of **Said Abdullahi & another v Alice Wanjira [2016] eKLR** in which an award of Kshs.300,000/= was made on appeal to a plaintiff with a fracture of the right humerus bone and degree of permanent incapacity at 10%.

9. Concerning damages for diminished earnings, it is the contention of the respondents that the same were not proved and hence the trial court acted correctly in declining to award any damages under this head.

10. I have carefully considered the rival submissions on record alongside the relevant authorities cited. I have as well re-evaluated the evidence placed before the trial court and considered the judgment in question. It is clear that the appeal lies only against quantum. I will therefore address the appeal under the two (2) heads of pain, suffering and loss of amenities; and diminished earnings, both of which are being challenged.

11. The law is well settled that in deliberating on whether to interfere with the award of a trial court, an appellate court ought to take into account the following principles portrayed in **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR**:

a) Whether the trial court took into account an irrelevant factor, or

b) Whether the trial court left out of account a relevant factor, or

c) Whether the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

12. In respect to the award made on damages for pain and suffering and loss of amenities, the appellant proposed a sum of Kshs.1,200,000/= and relied on the case of **Philip Kipkorir Cheruiyot v Nebco K Ltd & Another [2006] eKLR** where a plaintiff who had sustained fracture of the right humerus, injury to the right radial nerve due to compressed fracture of the right humerus resulting into radial nerve palsy and fracture of the head of the right humerus with dislocation of the right shoulder joint with 30% permanent disability was awarded a sum of Kshs.600,000/= whereas the respondents suggested an award of Kshs.300,000/= with reference to the case of **Said Abdullahi & another v Alice Wanjira** (supra).

13. The learned trial magistrate awarded a sum of Kshs.500,000/= under this head.

14. Upon my re-examination of the pleadings and medical evidence tendered at the suit trial, I note that they are consistent as to the nature of injuries sustained by the appellant, these being: fracture of the right humerus. In his medical report dated 12th March, 2013, Dr. W.M. Wokabi assessed the permanent incapacity at 20%. In a second medical report by Dr. Jenipher Kahuthu dated 25th September, 2016 physical disability was assessed at 18% whereas the extent of disability was assessed at 20%.

15. Upon considering the authorities cited by the parties in their submissions which were placed before the learned trial magistrate, I find that the authority relied upon by the appellant constituted injuries of a more severe nature in comparison to those sustained in this instance. The authority cited by the respondents featured comparable injuries.

16. I also considered the recent case of **Nguku Joseph & another v Gerald Kihui Maina [2020] eKLR** in which the court revised a sum of Kshs.2,500,000/= downwards to a sum of Kshs.500,000/= in the case of a plaintiff who had sustained fracture of the right humerus and other minor injuries. I am therefore satisfied that the learned trial magistrate's award under this head is not inordinately low.

17. On damages for diminished earnings, the appellant gave evidence that he was unemployed at the time of his testimony and that he had previously worked as a security guard but ceased doing so a short while following the accident. The appellant therefore sought for the sum of Kshs.324,000/= as tabulated above, whereas the respondents argued that no sums should be awarded under this head in the absence of any proof of earnings. The learned trial magistrate dismissed this claim for want of proof.

18. Upon my re-examination of the material and evidence tendered at the trial, there is nothing in the medical reports or other evidence to show that as a result of the injuries sustained, the earnings or earning capacity of the appellant diminished. I therefore support the decision by the learned trial magistrate to decline to make any awards under this head.

19. Consequently, and for all the foregoing reasons, the judgment of the trial court is hereby upheld and the appeal dismissed.

20. Given the circumstances of the matter, I order each party shall bear their own costs.

Dated and signed at Nairobi this 27th day of July, 2021.

A. MBOGHOLI MSAGHA

JUDGE

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 29th day of July 2021.

J. K. SERGON

JUDGE

In the presence of:

Ms. Wanjiru holding brief for Ms. Kabute for the Respondent

Mrs. Ongeru for appellant