



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO 61 OF 2020**

**JOSEPH NYABOKE NYANCHARI *alias* JOSEPHINE NYACHAE.....APPELLANT**

**VERSUS**

**STANLEY NYABUTO MOSE.....RESPONDENT**

*(Being an appeal from the judgment delivered by Honourable D.P Mac'Andere, RM,*

*delivered on 30<sup>th</sup> April 2020 in Kisii CMCC No 42 of 2019)*

**JUDGEMENT**

1. This judgment determines the appellant's appeal filed through Memorandum of Appeal dated 2<sup>nd</sup> October 2020. The impugned judgment and decree was delivered on 30<sup>th</sup> April 2020 in Kisii **CMCC No 42 of 2019** by Hon. D.P Mac'Andere, RM.
2. The Respondent herein **STANLEY NYABUTO MOSE** was the Plaintiff in the subordinate court while the appellant **JOSEPH NYABOKE NYANCHARI *alias* JOSEPHINE NYACHAE** was the Defendant.
3. The suit filed vide Amended Complaint dated 15<sup>th</sup> August 2019 arose out of a Road traffic accident involving the Respondent's motor cycle registration **No. KMDN 382Z** and the appellant's motor vehicle registration **No. KBJ 081L**. The respondent averred that the appellant's vehicle was negligently, carelessly and or recklessly driven by the appellant causing it to lose control and as a consequence it veered off the road hitting the respondent. As a result of the accident the respondent suffered a chest contusion, right posterior acetabulum fracture, foot drop and peroneal nerve injury.
4. The trial magistrate found the appellant to be 100% liable for the accident. The appellant however in his appeal is solely challenging the award of damages on the following grounds:
  1. That the learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.
  2. That the learned trial magistrate erred in law and in fact by awarding Kshs 1,551,580/- as general damages for pain and suffering, which amount was inordinately high, unjustified and contrary to the evidence on record.
  3. That the learned trial magistrate erred in law and in fact by awarding Kshs 21,330/- as special damages, an amount which was not specifically pleaded in the plaint and strictly proved as provided by the law.
  4. That the trial magistrate erred in law and fact by failing to consider that appellant's evidence on record together with the submissions and authorities in support thereof thereby arriving at an excessive award.
5. When the appeal came up for hearing, this court gave directions to have the same disposed of by written submissions.
6. The appellant submitted that the respondent sustained injuries as enumerated in the initial discharge summary from Kisii Teaching and Referral Hospital. He cited the cases of **Timsales Limited v Wilson Libuya Nakuru HCCA No 135 of 2016**, **Fadna Issa Omar vs Malne Sirengo Chipso & 3 Others [2016] eKLR** and **Ndungu Dennis v Ann Wangari Ndirangu & another [2018]** in aid of its argument.
7. On general damages they proposed an award of Kshs 400,000/- arguing that the respondent sustained right posterior acetabulum fracture.

8. On loss of future earning capacity the appellant submitted that the respondent did not lead any evidence to show that his earnings were in any way affected by his injuries. He advanced that there was no evidence of his termination or a reduction in his salary. The appellant submitted that the respondent did not prove to the required standard that his earning capacity had been affected because of the injuries he sustained.

9. The respondent who opposed the appeal submitted that the trial magistrate's award was reasonable taking into consideration the injuries sustained by the Respondent and bearing in mind the awards that have been previously made in cases bearing almost similar injuries like in the instant case.

10. On the award of loss of earning capacity the respondent argue that since his retirement was to be in 2021, the magistrate was not at fault for awarding the amount of Sh.551,580 as she did because the respondent had 5 years to retire from the date of the accident.

### **ANALYSIS AND DETERMINATION**

11. I have considered the rival arguments made by the parties to this appeal. The only issue for determination is whether the trial court awarded the appropriate damages.

12. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** as follows:

**“An appellate court will not disturb an award for general 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...”**

13. According to the discharge summary from Kisii Teaching and Referral Hospital the respondent sustained a right posterior acetabulum fracture. The P3 form and the medical report filed by Dr. Morebu had similar injuries consistent with the injuries in the discharge summary.

14. However it was the respondent's case that he was taken ill in the month of June of 2018, eight (8) months after the accident and incurred Kshs 14,740/- for further treatment. He thereafter amended his pleadings to include injuries of the foot drop and peroneal nerve injury following his second visit to the hospital. It is not clear whether the said injuries were as a result of the accident or were injuries that he sustained in an unrelated incident.

15. The respondent provided no evidence connecting the injuries to the accident that occurred on 10<sup>th</sup> September 2018. The trial court was alive to this fact and indeed clearly stated in its judgement that those injuries did not form part of the court's consideration in the assessment of damages.

16. I now turn to consider the award of Kshs 1,000,000/- awarded by the trial magistrate as general damages. In this case, I have already found above that the respondent sustained a fracture of the right posterior acetabulum. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that—

**“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”**

17. The appellant advanced that Kshs 400,000 was appropriate award for the injuries sustained. He cited that case of **Faith Mumbua Kiio vs Patel Devika [2018] eKLR** where the plaintiff therein was awarded Kshs 300,000/- after sustaining the following injuries: loss of consciousness, blunt pelvic trauma with pelvic ring fracture-acetabulum, ischium, fracture of left clavicle and blunt hip trauma. In the case of **Civicon Limited vs Richard Njomo Omwancha & 2 Others [2019] eKLR** the court set aside an award of Kshs 1,000,000/- and substituted it with Kshs 450,000/-. The plaintiff had a swollen lacerated iliac region, bruises on the left knee joint, swollen and tender knee, bruised and tender left ankle joint, bruises on the left foot and pelvic fractures.

18. The respondent relied on the case of **Sofia Yusuf Kanyare vs Ali Abdi Sabre & Another (2008) eKLR** where the court made an award of Kshs 2,170,000/- and the case of **James Joseph Rughendo vs Kenya Power & Lighting Co. Ltd (2011) eKLR** where the court made an award of Kshs 3,742,200/-. These cases are rather misleading since in **Sofia Yusuf Kanyare (supra)** the court made the award of Kshs 2,170,000 for the cost of prosthesis. The plaintiff had sustained multiple soft tissue injuries and, loss of 10 teeth and right upper hand. The authorities cited by the respondent do not therefore reflect the injuries that were sustained by the respondent.

19. I have reevaluated the nature of injuries suffered by the respondent and the case law cited by the parties both at the trial court and before this court. Guided by the decision in Simon Taveta case (supra), and putting into account in all relevant factors including inflation, am satisfied that good ground exists to disturb the award made by the trial court. An award of Ksh 650,000 in general damages would suffice in the circumstances.

20. On special damages, I note the trial court awarded special damages based on a misapprehension of the evidence and specifically, by relying on evidence on injuries introduced into the suit later without the backing of a second medical report to connect the said injuries to the accident in question. Thus the award of Ksh 21,330 in special damages was erroneous in that it included an amount of Kshs 14,740/- as part of special damages to cover costs for the treatment of the footdrop and peroneal nerve injuries without evidence connecting the same to the accident in question.

21. I shall now consider whether the respondent proved that he was entitled to the award of loss of earning capacity. The respondent cited the Court of Appeal decision in **Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR** where the court stated:

“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 the 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 appropriate financial loss that the plaintiff has suffered as a result of the disability.

151. In *Butler V Butler* [1984] KLR 225 at 232 Kneller JA stated:

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in *Fairely vs John Thompson ( Design & Contracting Division)Ltd*[1973]2Lloyd’s Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

22. Damages under the head of loss of earning capacity can be classified as general damages but these have also to be proved on a balance of probability. (See *Cecilia W. Mwangi & another vs Ruth W. Mwangi* [1997] eKLR).

23. Disability as a result of the accident on the part of the respondent was assessed at 75%. No doubt the respondent’s capacity to earn was greatly diminished. At the time of trial he had not resumed duties at his place of work. The respondent was earning Kshs 9,193/- per month and had 5 years to retire. Based on the principles enunciated in the authorities I have set forth above, am persuaded that the assessment of damages by the trial court on this head was spot on.

24. In the end, the appeal is meritorious to the extent of the award on general damages for injuries sustained and the special damages. I hereby set aside the finding of the trial court and substitute it with the following award:

General damages Kshs 650,000/-

Loss of earning capacity Kshs 551,580/-

Special Damages Kshs 6,590/-

**Total Kshs 1,208,170/-**

**DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.**

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**A. K. NDUNG’U**

**JUDGE**