



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 552 OF 2018

PETER ODUOR SHIKUKU.....APPELLANT

VERSUS

MAGNUM ENGINEERING & GENERAL CONTRACTORS LIMITED.....1ST RESPONDENT

EAST AFRICAN BREWERIES LIMITED.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Honourable D.W. Mburu (Mr.))

(Principal Magistrate) delivered on 11th November, 2016 in Milimani

CMCC no. 1541 of 2012)

JUDGMENT

1. At the onset, the appellant herein lodged a suit against the 1st and 2nd respondents vide the plaint dated 23rd March, 2012 and prayed for reliefs in the nature of general and special damages in the sum of Kshs.10,000/= together with costs of the suit and interest on the same.
2. In his plaint the appellant pleaded that he was at all material times an employee of the 1st respondent working as a technician and that sometime on or about the 10th day of July, 2010 while in the lawful course of his employment at the 2nd respondent's plant, a pipe transporting corrosive soda disengaged and burst behind the appellant, causing him to sustain severe burnS which are particularized in the plaint.
3. The appellant attributed his injuries to negligence on the part of the respondents by setting out their particulars under paragraph 5 of the plaint.
4. The respondents entered appearance on being served with summons and filed their statements of defence on 30th May, 2012 and 7th June, 2012 respectively to deny the appellant's claim.
5. At the hearing of the suit, the appellant testified while the 1st and 2nd respondents each summoned one (1) witness.
6. Upon close of submissions, the trial court entered judgment in favour of the appellant and against the respondents jointly and severally in the following manner:

Liability **100%**

a) General damages for pain,

suffering and loss of amenities **Kshs.1,200,000/=**

b) Damages for actual loss of earnings **Kshs.90,000/=**

c) Diminished earning capacity **NIL**

d) Special damages	<u>Kshs.3,000/=</u>
Total	Kshs.1,293,000/=

7. Being aggrieved by the trial court's assessment of damages, the appellant has now lodged an appeal against the same by filing the memorandum of appeal dated 20th November, 2018 featuring the following grounds:

i. THAT the learned trial magistrate erred in law and fact in awarding a very low sum of Kshs.1,200,000/ in general damages against very serious injuries which led to the total loss of sight in the plaintiff's left eye hence occasioning 50% blindness with attendant effects on other diverse aspects of the plaintiff's life.

ii. THAT the learned trial magistrate erred in law and fact failing to bring his award within the ambit of awards for such injuries and even failed to be bound by the High Court and Court of Appeal authorities on quantum for such injuries.

iii. THAT the learned trial magistrate erred in law and fact failing to make an award for loss of future income and/or reduced earning capacity resultant from the plaintiff's injuries and its effects.

8. Following the directions of the court, the parties filed and exchanged written submissions on the appeal. In his submissions, the appellant argues that the award on general damages for pain, suffering and loss of amenities made by the trial court is not commensurate to the injuries suffered, further arguing that the same is inordinately low and therefore ought to be interfered with.

9. The appellant also contends that damages ought to have been awarded under the head of loss of future earnings and/or reduced earning capacity.

10. In response, the 1st respondent by way of its submissions dated 2nd June, 2021 argues that the assessment made by the trial court on general damages is reasonable and cites *inter alia*, the case of **Fred Ben Okoth v Equator Bottlers Limited [2015] eKLR** where the Court of Appeal upheld an award in the sum of Kshs.650,000/= made to a plaintiff with total loss of the left eye and the case of **KPP Plant Production GHBH & Co. Kg Ltd v Jackline Moraa Magangi [2018] eKLR** in which a plaintiff who had suffered complete loss of sight to both eyes was awarded a sum of Kshs.800,000/= and which award was upheld by the High Court sitting on appeal.

11. The 1st respondent equally argues that the appellant is not entitled to an award for loss of future earnings and/or reduced earning capacity in the absence of proof of such loss. Consequently, the 1st respondent supports the decision by the trial court to decline to make such an award.

12. The 2nd respondent on its part equally supported the assessment made by the trial court and urges this court not to interfere with the same, while citing the case of **Bonface Mugendi & another v Emilio Murimi Njue [2019] eKLR** where the High Court sitting on appeal reasoned that the trial court had applied the proper principles, thereby arriving at a reasonable award.

13. I have considered the rival submissions and authorities cited on appeal. This being a first appeal, I am required to re-evaluate the evidence placed before the trial court.

14. It is noted that the appeal lies purely against quantum, specifically the awards made under the heads of general damages for pain, suffering and loss of amenities; and loss of future earnings/reduced earning capacity. I will therefore address the grounds of appeal under the two (2) heads.

15. The legal position on assessment of damages is that a court sitting on appeal can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

16. The foregoing principles were laid out by the Court of Appeal in the case of **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** cited in the submissions by the appellant and the 1st respondent, and reaffirmed in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** also decided by the Court of Appeal.

17. Under the head of general damages for pain, suffering and loss of amenities, the appellant proposed an award in the sum of Kshs.3,000,000/= and relied among others, on the case of **Peter Gichuru Mwangi v James Kabathi Mwangi [2001] eKLR** in which the court assessed general damages in the sum of Kshs.600,000/= for various injuries including head, facial and eye injuries leading to complete loss of vision to the right eye and the case of **Laban Buyole Mamboleo v Rift Valley Textiles [1998] eKLR** where the sum of Kshs.650,000/= was awarded for various reported injuries including neumatic injury to the left eye.

18. The 1st respondent proposed the sum of Kshs.400,000/= under this head and cited the case of **Charles Ochola v Mumias Sugar Company Ltd [2014] eKLR** and the case of **Chesumot Limited v Richard Kipkurui Maritim [2014] eKLR** where the separate courts awarded the sums of Kshs.300,000/= and Kshs.200,000/= respectively for injuries resulting in eye loss.

19. On its part, the 2nd respondent suggested the sum of Kshs.300,000/= placing reliance on the case of **Francis Simiyu Waiswa v Samwel Kairo Magadi [2007] eKLR** in which the High Court sitting on appeal enhanced an award of Kshs.60,000/= to one of Kshs.110,000/= for injuries to the left eye, left wrist and left infra orbital margin.

20. The learned trial magistrate in his judgment settled for an award of Kshs.1,200,000/=.

21. It is upon this court to determine whether the aforementioned award is inordinately low.

22. Having re-evaluated the pleadings, material and evidence tendered at the trial, I note that the injuries sustained by the respondent as pleaded and supported by the medical evidence are as follows:

i. Chemical burns to both eyes

ii. Complete visual loss of the left eye

iii. Superficial chemical burns to the left gluteal region

iv. Superficial chemical burns to the right thigh

23. In his undated medical report, Dr. Theophilus Wangata assessed permanent incapacity of the appellant at 30%.

24. Upon my perusal of the authorities cited by the respective parties, I note that those of the appellant constituted more serious injuries. In addition, the parties cited authorities that had been decided many years ago.

25. I equally note that the learned trial magistrate did not cite any authorities that guided his award.

26. I therefore considered the case of **Pioneer Holdings (Africa) Limited v Francis Shitsukane Abakala & another [2017] eKLR** in which this court upheld an award of Kshs.2,500,000/= made at the instance of a plaintiff who sustained chemical burns to the eyes resulting in total blindness, unlike in this case where the appellant lost vision to the left eye.

27. Suffice it to say that it is clear that the appellant herein sustained chemical burns to other parts of his body in addition.

28. Upon taking the above factors into consideration, I am satisfied that the award made by the learned trial magistrate fell on the lower side and there is need to have it disturbed.

29. Upon taking into account the foregoing and the inflationary trends, I will enhance the award of Kshs.1,200,000/= upwards to an award in the sum of Kshs.2,000,000/= under this head.

30. Under the head of loss of future earnings/diminished earning capacity, the appellant testified that following his injuries, he worked for the 1st respondent briefly before joining IMS Limited where he received a lesser pay.

31. In cross-examination, the appellant testified that he was earning a monthly salary of Kshs.20,000/= while working for the 1st respondent but that the succeeding job earned him a salary of Kshs.200/= per hour, and that the injuries have prevented him from obtaining another job.

32. In his submissions, the appellant proposed that a monthly salary of Kshs.16,000/= be applied together with permanent incapacity of 30% and a multiplier of 30 years to be tabulated as follows:

$$16,000 \times 100/70 \times 30/100 \times 30 \times 12 = \text{Kshs.2,468,556/=}$$

33. The 1st respondent on its part submitted that the appellant was not entitled to any award under this head since he had not demonstrated that following the injuries, his earnings had either reduced or been lost altogether. The 2nd respondent did not address this court on this issue.

34. In his judgment, the learned trial magistrate declined to award any sums under this head while reasoning that the claim had not been proved.

35. Upon my re-examination of the pleadings and evidence, I am in agreement with the reasoning of the learned trial magistrate that the appellant did not bring any credible evidence in support of his claim for future earnings.

36. However, upon my re-examination of the medical evidence, in particular the report prepared by Dr. Theophilus Wangata, I note that the same states that the visual loss to the appellant's left eye has reduced the quality of his life and future career prospects, which I am convinced would negatively impact his earning capacity in the future.

37. The evidence tendered bears varying salary amounts and hence I am unable to rely on it in determining a multiplicand. In the premises, I am convinced that it would be appropriate to apply a global sum in awarding damages for reduced earning capacity in the future.

38. I find the case of **John Kipkemboi & another v Morris Kedolo [2019] eKLR** where the court entered a global award of Kshs.1,500,000/= for loss of future/diminished earning capacity to be relevant to this case. I find this to be a reasonable sum and will enter a similar award of Kshs.1,500,000/= under this head.

39. The upshot is that the appeal succeeds to the extent of the award on general damages for pain, suffering and loss of amenities, and

damages for loss of future earning capacity. The awards made by the trial magistrate are hereby set aside and substituted with the respective awards of Kshs.2,000,000/= and Kshs.1,500,000/=.

40. For the avoidance of doubt, judgment on appeal is as follows:

i. General damages for pain,	
suffering and loss of amenities	Kshs.2,000,000/=
ii. Actual loss of earnings	Kshs. 90,000/=
iii. Reduced earning capacity	Kshs.1,500,000/=
iv. Special damages	<u>Kshs. 3,000/=</u>
Total	<u>Kshs.3,593,000/=</u>

v. The appellant shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

vi. Parties to bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE APPELLANT**

..... **FOR THE 1ST RESPONDENT**

..... **FOR THE 2ND RESPONDENT**