



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 543 OF 2017

PETER KUSIMBA NYONGESA.....1ST APPELLANT

GRACE MURORIA.....2ND APPELLANT

-VERSUS-

WILLY MULI MUSYOKA MAATI.....RESPONDENT

Net total

Kshs.3,484,100.70

7. The aforementioned judgment has precipitated the appeal now before this court. To challenge the assessment of damages, the appellants have put forward the following grounds of appeal in their memorandum of appeal dated 13th December, 2018:

- i. THAT the learned trial magistrate erred in law and fact in making an award on general damages that was inordinately high considering the respondent's injuries.**
- ii. THAT the learned trial magistrate erred in law and fact in making an award on loss of earning capacity which had not been proved and which was inordinately high.**
- iii. THAT the learned trial magistrate erred in law and fact in making an award on loss of earning capacity without taking into consideration that the plaintiff was only partially incapacitated and not rendered 100% incapacitated.**
- iv. THAT the learned trial magistrate erred in law and fact by failing to consider the plaintiff's reduced earning capacity rather than making an award for total incapacity.**
- v. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the loss of earnings is a special damage claim that ought not only to be pleaded but strictly proved.**
- vi. THAT the learned trial magistrate erred in law and fact by failing to appreciate that no evidence was presented in support of earnings to guide the court in assessing the alleged loss of earnings or earning capacity if at all.**
- vii. THAT the learned trial magistrate erred in law and fact by applying the minimum wage thus introducing evidence that was not before the court for consideration and adopting the same to award the alleged loss of earnings.**
- viii. THAT the learned trial magistrate erred in law and fact by adopting a multiplier of 10 years in a case where the plaintiff's earning capacity was only diminished.**
- ix. THAT the learned trial magistrate erred in law and fact by failing to appreciate the law on loss of earning or earning capacity and thus misled herself to arrive at a finding which lacked any or any reasonable backing in law.**
- x. THAT the learned trial magistrate erred in law and fact by failing to find that the alleged loss of earnings or earning capacity had not been established or proved and ought to have been dismissed.**

8. This court directed the parties to file written submissions on the appeal.

9. On the part of the appellants, it is reiterated that the award made on general damages for pain, suffering and loss of amenities is inordinately high and ought to be substituted with a more reasonable award in the sum of Kshs.600,000/=.

10. The appellants also submit that the trial court ought to have taken into account the reduced earning capacity of the respondent as opposed to making an award on the basis of total incapacity.

11. The respondent urges this court to uphold the award made by the trial court and submits that the sum awarded on general damages for pain, suffering and loss of amenities is commensurate to the injuries sustained.

12. The respondent further submits that the award made on diminished earning capacity is reasonable since he had brought evidence to show that as a result of the injuries sustained, he would suffer residual permanent disability.

13. It is also the contention of the respondent that since he was self-employed as a tailor, he had no formal record of proof of earnings and the trial court therefore acted correctly by applying the minimum wage regulations in assessing his earnings.

14. In closing, the respondent submits that the assessment on damages is proper and therefore urges this court to dismiss the appeal with costs, to enable him enjoy the fruits of his judgment, citing the case of **Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR** in which the court decided that as an ordinary legal principle, a successful party is entitled to the fruits of his judgment.

15. I have considered the rival written submissions on appeal. Moreover, I have considered the evidence which the trial court had the opportunity to look at. It is apparent from the grounds set out in the memorandum of appeal that the appeal relates to quantum.

16. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR**:

- a. Where an irrelevant factor was taken into account.**

b. Where a relevant factor was disregarded.

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

17. It is apparent that the appellants are challenging the awards made on general damages and loss of earnings/loss of earning capacity. I will therefore address the damages under the two (2) heads.

a. General damages for pain and suffering and loss of amenities

18. On the one part, the respondent suggested an award in the sum of Kshs.2,500,000/= and cited among others, the case of **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR** where the court awarded the sum of Kshs.1,500,000/= for various injuries including compound comminuted fracture of the right tibia and compound comminuted fracture of the right fibula; and the case of **James Katua Peter v Simon Mutua Muasya [2008] eKLR** in which an award in the sum of Kshs.2,000,000/= was made to a plaintiff with posterior fracture and dislocation of the left hip, fracture of acetabulum roof, comminuted fracture of left tibia and fibula, fracture of medial malleolus and cuts and bruises on the right eyebrow and on the left preaural area of scalp.

19. On the other part, the appellants proposed a sum of Kshs.600,000/= and relied upon the case of **Amos Njagi Emurasi v Augustine Willy Kariuki [2016] eKLR** where the court assessed general damages at a similar sum at the instance of comminuted fractures with permanent disability of 12%.

20. In making her assessment, the learned trial magistrate found the authorities cited by the respondent to constitute more severe injuries in comparison to those sustained in the present instance; while finding the authority cited by the appellants to fall on the lower side.

21. For the foregoing reasons, the learned trial magistrate awarded the sum of Kshs.1,800,000/= under this head, though she did not cite any guiding authorities.

22. Upon my re-examination of the evidence, I observed that the medical evidence is consistent with the injuries particularized in the plaint as follows:

i. Fracture of the right femur

ii. Fracture of the left femur

23. The medical evidence shows that the fractures were treated through the fixing of metal implants which would require removal at a later date.

24. In the first medical report dated 1st September, 2015 and prepared by Dr. W. M. Wokabi, permanent incapacity was assessed at 40% at the time of making the report, with a predicted reduction to 20% within 18 to 24 months therefrom. In the second medical report which was prepared by Dr. P.M. Wambugu and dated 1st February, 2017 permanent incapacity was assessed at 12%.

25. Upon considering the authorities referenced by the parties, I support the finding of the learned trial magistrate that those cited by the respondent contained injuries of a more serious nature in comparison to those suffered in this instance, while the authority relied upon by the appellants; though constituting comparable injuries; was decided a few years back.

26. I therefore considered the court's assessment in the case of **John Muli Kasike & another v Samuel Gitau Waweru [2020] eKLR** involving injuries in the nature of fractures to the right and left femur with no permanent incapacity. Here the court substituted an award of Kshs.1,400,000/= with that in the sum of Kshs.800,000/=. I also considered the case of **Hussein Dairy Limited & another v Asha Moteo Athman & 3 others [2021] eKLR** in which the plaintiff who had sustained suffered contusions of the scalp/jaw & chest and a fracture of the lower 1/3rd left femur bone which was operated and fixed with a nail and screws with permanent incapacity of 5% was awarded a sum of Kshs.600,000/= on general damages on appeal.

27. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained, the degree of permanent incapacity and the inflationary trends, I find that the award made by the learned trial magistrate fell on the higher side and ought to be interfered with. In my view, an award of Kshs.1,000,000/= would be reasonable in the circumstances.

b. Loss of earnings/Loss of earning capacity

28. Under this head, the respondent urged the trial court to adopt a multiplier of 10 years given that he was aged 53 years at the time, and a multiplicand of Kshs.15,000/= being the minimum wage for a tailor, to be tabulated as follows: Kshs.15,000 x 10 x 12 = Kshs.1,800,000/=

29. The appellants on their part submitted that the respondent is not entitled to any award under this head since the respondent had not shown that he would not be able to earn an income as a result of the injuries sustained and further, that there was no proof of earnings to support the claim made.

30. The learned trial magistrate awarded the sum of Kshs.1,800,000/= prayed for by the respondent under the head of loss of earning capacity.

31. Upon my further study of the medical evidence, it is indicated in the medical report by Dr. Wokabi that during the 18 to 24 month period where the respondent would suffer 40% permanent disability, he would not be gainfully employed. The second medical report by Dr. Wambugu further indicates that the respondent would be unlikely to fully exert himself using his lower limbs.

32. On the issue of proof of earnings by the respondent, I associate myself with the following reasoning adopted by the court in the case of **Hussein Shariff Ali v Grace Kareya Mutia (Suing as the legal representative of the Estate of John Mutua (Deceased)) [2021] eKLR**:

“This Court agrees with the submissions made by the Respondent that proof of earnings is not limited to production of documents and certificates. See the case of Jacob Ayiga Vs Simon Obayo (Suing as personal representatives of the Estate of Thomas Ndaya Obayo) (2005) eKLR. To hold otherwise would do injustice to a lot of Kenyans who are illiterate and some of who have no records of their employment.”

33. I am therefore convinced that even in the absence of proof of earnings or employment, the respondent had reasonably demonstrated that he worked as a tailor.

34. Concerning the loss of earnings, I concur with the position taken by the appellants that these constitute special damages and therefore ought to be pleaded and proved accordingly. I am guided by the case of **Douglas Kalafa Ombeva v David Ngama [2013] eKLR** where the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically.”

35. Be that as it may, I note from the evidence tendered that the earning capacity of the respondent would be diminished as a result of his injuries.

36. In assessing the same, I will apply a multiplicand of Kshs.18,595.20 being the minimum wage for a tailor pursuant to the **Regulation of Wages (General) (Amendment) Order 2015**. I also find the multiplicand of 10 years which was applied by the learned trial magistrate to be reasonable. I will further consider the degree of incapacity of 20% which was assessed in the first medical report. The same shall be tabulated as follows:

$$\text{Kshs.18,595.20} \times 10 \times 12 \times 20/100 = \text{Kshs.446,284.80}$$

37. Consequently, the appeal succeeds. The trial court’s award of Kshs.1,800,000/= made under the head of general damages for pain, suffering and loss of amenities is hereby set aside and is substituted with an award of Kshs.1,000,000/=:, whereas the award of Kshs.1,800,000/= for loss of earning capacity is hereby set aside and is substituted with an award of Kshs.446,284.80.

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

| | |
|-------------------------------------|---------------------------------|
| i. General damages | Kshs.1,000,000/= |
| ii. Loss of earning capacity | Kshs. 446,284.80 |
| iii. Future medical expenses | Kshs. 100,000/= |
| iv. Special damages | Kshs. 171,223/= |
| Gross total | Kshs.1,717,507.80 |
| Less 10% contribution | <u>Kshs. 171,750.78</u> |
| Net total | <u>Kshs.1,545,757.02</u> |

v. The respondent 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. In the circumstances, I hereby order that each party bears its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants

..... for the Respondent