



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 26 OF 2020

SIMBA PLATINUM LIMITED.....APPELLANT

VERSUS

NICHOLAS AUMA WANDERA.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon R. K Ondieki (SPM) delivered

at Kisumu in Chief Magistrate's Court Case No 459 of 2018 on 5th June 2020)

JUDGMENT

INTRODUCTION

1. In his decision of 5th June 2020, the Learned Trial Magistrate, Hon R.K. Ondieki, Senior Principal Magistrate, entered judgement in favour of the Respondent herein against the Appellant in the following terms:-

- a. A sum of Kenya Shillings Two Million (Kshs 2,000,000/=) as general damages for pain and suffering.**
- b. A sum of One Million Five Hundred Thousand (Kshs 1,500,000/=) as loss of earning capacity.**
- c. A sum of One Hundred and Nine Three, One Hundred and Fifty-Six (Kshs 193,156/=) special damages plus costs and interest.**

2. The interlocutory judgement that had been entered against the Appellant on 3rd December 2018 was set aside by consent of the parties on 12th February 2019. Subsequently on 3rd March 2020, parties recorded a consent on judgement at 90% -10% against the Appellant and the Respondent respectively.

3. Being aggrieved with the decision on quantum, on 11th June 2020, the Appellant filed a Memorandum of Appeal dated 10th June 2020. It relied on seven (7) grounds of appeal.

4. The Appellant's Written Submissions were dated 10th September 2021 while those of the Respondent were dated 21st September 2021 and filed on 22nd September 2021. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein rendered itself as follows:-

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

7. The principle behind this conclusion is that as an appellate court will not have had the advantage of having seen and heard the evidence of witnesses, it should exercise its jurisdiction to review the evidence with caution and it is not enough that the appellate court might have come to a different conclusion.

8. Having looked at the Memorandum of Appeal, Record of Appeal, Appellant's and Respondent's Submissions, it was the considered view of this court that the issues that had been placed before it for determination were as follows:-

a. Whether or not the general damages for pain and suffering that the Learned Trial Magistrate awarded were excessive in the circumstances warranting interference by this court.

b. Whether or not the Learned Trial Magistrate erred in having awarded loss of earning capacity.

9. The court noted that since appointment of liability was not contested in the Appeal herein, the only issue for determination was that of quantum.

10. The court therefore deemed it prudent to address the said issues under the following distinct heads.

I. GENERAL DAMAGES FOR PAIN AND SUFFERING

11. The Appellant submitted that assessment of quantum of damages was a discretionary exercise and an appellate court would interfere with a trial court's decision on quantum if it took into account an irrelevant factor, left out of account a relevant factor and/or if the award was so inordinately low and/or so inordinately high that it must have been a wholly erroneous estimate of the damages, which principles were set out in the case of **Kemro Africa Limited t/a "Meru Express Services (1976)" & Another vs Lubia & Another (No 2) [1985] eKLR**.

12. It further placed reliance on the case of **Cecilia Mwangi & Another vs Ruth Mwangi CA 251/1996** as cited in the case of **Nancy Oseko vs Board of Governors Masai Girls High School [2011] eKLR** where the common thread in the above cases was that there should be consistency and or uniformity in the general method of approach in awarding of general damages and that comparable injuries should be compensated by comparable awards.

13. It was categorical that the award of Kshs 2,000,000/= being general damages for the injuries sustained by the Respondent and Kshs 1,500,000/- being loss of earning capacity was unfair, unjustified and manifestly high. To buttress its point, it relied among other cases, the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd [2013]eKLR** where the court held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

14. It pointed out that the Respondent sustained multiple fractures on the left arm leading to complete amputation of the left arm at the shoulder joint and that in the similar and comparable cases of **Kenya Power & Lighting Company Limited vs Matthew Nambeta Wanjohi (suing thro' his uncle and next friend Peter Wanjohi Keingati) [2019] eKLR** and **Joseph Wang'ethe vs Ew [2019] eKLR**, the courts therein awarded Kshs 900,000/= and Kshs 1,500,000/= respectively for amputation of the right hand. It argued out that an award of Kshs 900,000/= general damages for pain and suffering was adequate compensation in the circumstances of the case herein.

15. On its part, the Respondent argued that the Appellant's Appeal was not merited. He submitted that the Trial Court fully took into account the relevant factors being the pleadings, evidence on record and the submissions by parties and awarded damages that were commensurate with the injuries that he sustained as he pleaded and proved during trial.

16. He was categorical that he proved his case on a balance of probabilities as required in civil cases. In this regard, he relied on the case of **Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR** where the court held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other. He added that this position was also amplified in the case of **Kirugi & Another vs Kabiya & 3 Others [1987] eKLR 347** where the Court of Appeal stated that the burden was always on a balance of probability.

17. He placed reliance on, among other cases, the case of **Bashir Ahmed Butt vs Uwai Ahmed Khan (1982-88) KAR** where the court set out the parameters under which an appellate court will interfere with an award in general damages when it held that an appellate court will not disturb an award for general damages unless it was so inordinately high or so inordinately low as to represent an entirely erroneous estimate.

18. He also cited several cases among them the cases of **Umoja Rubber Products Limited vs Bobson Rimba Lewa Malindi HCCA No 51 of 2015** (eKLR citation given) and **Joshua Oduor vs Kibwari Limited Eldoret HCCA No 54 2011** (eKLR citation given). He submitted that in the said cases, the courts made awards of between Kshs 1,500,000/= and Kshs 2,200,000/= general damages for pain and suffering and loss of amenities for injuries, which he argued were comparable to the injuries that he suffered. He was categorical that taking into account the said injuries and the age of the cited authorities vis-à-vis the effect of inflation of the value of Kenya shilling, the award of Kshs 2,000,000/= by the Trial Court was reasonable.

19. There was no indication in the court records if the Respondent's second medical examination that was to be done at the instance of the Appellant herein had been done by the time the Respondent testified. In the absence of any second medical report by the Appellant and no mention of the same at all, this court found it prudent to limit itself to the Medical Report of Dr Were Okombo.

20. Notably, on 5th August 2017, the Respondent was involved in a road traffic accident in which he sustained injury to the left hand with wounds and fractures leading to amputation at the shoulder joint, injury to the left eye with a cut wound, injuries to the leg, chest and back.

He was examined on 22nd August 2017. This was slightly some days after the accident when the injuries were still healing. He testified on 7th May 2019. This was one (1) year and nine (9) months after he sustained the injuries.

21. Having said so, in his Report, Dr Were Okombo observed that the Respondent had an amputated left-hand stump on the left shoulder itches, scar 2cm on the left angle of the left eye, tenderness on the chest, tenderness on the back, tenderness on the neck, tenderness on the left shoulder amputated stump and tenderness on the outer angle of the left eye. He clustered the injuries as “Grievous Harm” and indicated degree of incapacitation as 100%.

22. Notably, of great significance is the acknowledgment that an appellate court does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though it could have awarded a higher or lesser sum itself.

23. The rationale is both constitutional and statutory; where a judgment has been made by a competent court, an appellate court is estopped from asserting the contrary position unless on the well settled principles as propounded in **Butt vs Khan [1981] KLR 470** and **Kitavi v Coastal Bottlers Ltd [1985] KLR 470** that “...**An appellate court will not disturb an award of 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 a figure which was either inordinately high or low.**” (emphasis court)

24. Notably, an award of damages is not meant to enrich the victim but rather to compensate such victim for the injuries sustained. As correctly submitted by both parties, similar injuries should attract comparable awards. However, in the quest for consistency, courts must also recognize that no case is exactly the same as another and therefore each case must be decided with its own peculiar circumstances in mind but keeping in mind that any monies awarded must be sustainable. Indeed, this court took judicial notice that the higher the awards on quantum, the more likely insurance premiums are likely to rise causing hardship to insurers and insureds.

25. Both parties placed reliance on the case of **Kigaragari vs Aya (1985) KLR, 2730** where the court held that in awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.

26. This court reviewed both parties’ submissions before the Trial Court and case law relating to comparable injuries as those that were sustained by the Respondent herein to satisfy itself if the Learned Trial Magistrate applied the correct principles to award damages in the sum of Kshs 2,000,000/= for general damages and loss of amenities.

27. Taking into account the injuries that the Respondent sustained and the inflationary trends, this court came to the firm conclusion that a sum of Kshs 2,000,000/= was a sufficient and fair compensation as general damages for pain, suffering and loss of amenities.

28. In arriving at the said figure, this court had due regard to the following comparable precedents:

1. Roba Doti Guyo vs. Jiang Zhongemei Engineering Company [2015] eKLR, the plaintiff, therein suffered a crushed hand which was amputated leaving him with an ugly stump. In 2015 the plaintiff was awarded Kshs. 2,500,000/= as general damages for his pain, suffering and loss of amenities.

2. In Umoja Rubber Products Limited vs. Bobson Rimba Lewa [2015] eKLR, the Respondent therein suffered an amputation of the left hand below the elbow. In 2015, he was awarded Kshs 2,200,000/= as general damages for his pain and suffering which sum was upheld on appeal.

29. In the premises foregoing, this court found and held that Ground of Appeal No 1 was not merited and the same be and is hereby dismissed.

II. LOSS OF EARNING CAPACITY

30. The Appellant submitted that loss of earning capacity is a general damage claim as was held in the case of **S J vs Francesco Di Nello & another [2015] eKLR** as quoted in **Mary Wambui Mungai vs Antony Githinji Kihuga [2020] eKLR**.

31. It further relied on the case of **Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR** as quoted in **Hamo Transporters Company Ltd & Another vs Dorcus Wangui Kiriro [2019] eKLR** where the Court held that loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as separate head of damages, as a token, modest or substantial depending on circumstances of each case. The court added that there was no formula for assessing loss of earning capacity.

32. It argued that during cross-examination, the Respondent testified that he was a farmer and pastor and that he used his right hand to write but did not state or explain whether his earning capacity had reduced. It added that it was upon the Respondent to have demonstrated that the injuries he sustained diminished his earning capacity. He did not prove how the injuries he sustained diminished his ability to work as a farmer and pastor. It argued that the amputated arm was on the left yet he was right-handed.

33. To buttress its point, it relied on the case of **Catherine Gatwiri vs Peter Mwenda Karaai [2018] eKLR** where the court held that in arriving at an award for diminished earning capacity, the court will consider the disadvantage the respondent will suffer in future for not working because of the injuries and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others. The said case cited the case of **Paul Njoroge vs Abdu Saburi Sabonyo [2015] eKLR** where the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his

employment was affected.

34. The Appellant pointed out that the Respondent had not proven to the required standard that his earning capacity had been affected by the injuries and therefore the award under this head should be dismissed.

35. On its part, the Respondent submitted that the Learned Trial Magistrate made an award of Kshs 1,500,000/= in general damages for loss of earning capacity and not loss of earnings. He was categorical that this award was pursuant to prayer(ii) of his plaint. In this regard, he relied on the case of **Butler vs Butler [1984] KLR 225** where the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

- 1. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury**
- 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.**
- 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now qualified separately and no interest is recoverable on them.**
- 4. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and / or at the date of the trial.**
- 5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and**
- 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service if any.**

36. He pointed out that he testified that he was a pastor and a farmer by trade and as a result of the accident he would never be able to continue effectively with his ministry and trade since he could not use only his right hand effectively causing him to suffer loss of earning capacity. It was his contention therefore that the award of Kshs 1,500,000/= by the Trial Court was reasonable. In this regard, he relied on the cases of **Nelson Rintari vs CMC Group Ltd [2015] eKLR** and that of **Ayiga Maruja & Another vs Simeone Obayo [2005] eKLR** where the common thread was that it was not necessary for one to avail documentary evidence to prove earnings in a claim for loss of earning capacity.

37. Having said so, this court keenly considered the authorities cited by the parties under this head but had due regard to the case of **Alpharama Limited vs. Joseph Kariuki Cebron [2017] eKLR** where the court stated:-

“The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors.”

38. Notably, in the instant case, the Respondent had been rendered less one hand for life. His age at the time of accident and therefore the period he had been consigned to live with reduced hand-activities, his qualification at the time and that he might not effectively fit back into the trade of work he was doing before were relevant factors to be taken into account.

39. In his Plaint dated 20th September 2018, the Respondent pleaded for general damages for loss of earning capacity and loss of earnings. The Learned Trial Magistrate correctly observed that the Respondent did not adduce any evidence of the income that he used to earn and thus adopted the global award approach which has no particular formula. He recognised that loss of earning capacity was different from loss of earnings and acted correctly in not having award general damaged for loss of earnings.

40. Notably, the Respondent's permanent incapacitation was assessed at hundred (100%) per cent. He would never be able to work as a farmer. There was also a possibility that his vibrancy as a pastor who earn an income could also be diminished. This court therefore found the global sum of Kshs 1, 500,000/= awarded herein to have been reasonable in the circumstances, the said claim having been pleaded in the Plaint.

41. In arriving at the said conclusion, this court had due regard to the following comparable cases:-

- 1. John Kipkemboi & Another vs Morris Kedolo [2019] eKLR** where the Respondent suffered amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/= for loss of earning capacity.
- 2. Beatrice Anyango Okoth vs Rift Valley Railways (Kenya) Limited & Another [2018] eKLR** where the plaintiff lost both lower limbs and the court awarded Kshs 2, 500,000/= for diminished earning capacity.

42. In the premises foregoing, this court found and held that Grounds of Appeal Nos 2,3,4,5,6 and 7 were not merited and the same be and are hereby dismissed.

III. COSTS

43. The Appellant prayed for costs of the Appeal and urged the court to set aside the Trial's court Judgment and reassess the award on quantum.

44. The Respondent argued that he was awarded costs at the Trial Court and which was not a ground of appeal herein and therefore ought not be interfered. He relied on the Halsbury's Law of England and among other cases, the case of **Impressa Ing Fortunato Federice vs Nabwire Supreme Court of Uganda** where the court held that the effect of Section 27 of the Civil Procedure Act was that the court dealing with the issue of costs in any suit, action, cause or matter had absolute discretion to determine by whom and to what extent such costs are to be paid.

45. Like in all judicial discretions, the discretion on costs must be exercised judiciously and how a court exercises that discretion depends on the facts of each case. Unless there are exceptional circumstance, costs follow events. In other words, costs will always be awarded to a successful party unless there was sufficient reason or cause to deny such party costs.

46. As the Appellant did not succeed in the Appeal herein, there was no justification to depart from the well set out principle that costs follow the event.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 11th June 2020 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondent's costs of this Appeal.

48. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2021

J. KAMAU

JUDGE