**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 170 OF 2018**

**AKHWABA OLUBULIERA NICODEMUS.....APPELLANT**

**VERSUS**

**PATRICK AFUMA WETENDE.....RESPONDENT**

***(from the original judgment and decree of Hon. F. Makoyo, SRM,***

***in Butere SRMC Civil Case No. 58 of 2017 dated 3/12/2018)***

**JUDGMENT**

1. The respondent had sued the appellant at the lower court claiming general and special damages after the respondent was knocked down by the appellant's motor vehicle registration No. KCC 268E Toyota Belta along Sabatia-Butere road while the respondent was travelling as a pillion passenger aboard motor cycle registration No. KMDD 373D as a result of which the respondent sustained injuries. The trial court found the appellant to have been 100% liable for the accident and awarded damages as follows:-

| | | |
|---|---|---|
| General damages | - | Ksh. 2,000,000/= |
| Future medical expenses | - | Ksh. 210,000/= |
| Losss of earning | - | Ksh. 1,008,000/= |
| Special damages | - | Ksh. 6,550/= |
| **T o t a l** | - | **Ksh. 3,224,550/=** |

2. The appellant was aggrieved by the findings of the learned trial magistrate on liability and award on damages and filed the instant appeal. The grounds of appeal are that:-

*(1) The learned trial magistrate erred in fact and law in holding that the respondent had proved his case on a balance of probabilities as against the appellant.*

*(2) The learned trial magistrate erred in law and fact in holding the appellant 100% liable in negligence and/or at all in view of the evidence on record.*

*(3) Without prejudice to the foregoing, the learned trial magistrate erred in law and fact by applying the wrong principles in assessment of damages.*

*(4) The learned trial magistrate erred in law and fact in making an award for loss of earning in favour of the respondent when the same was not proved and against the well laid down principles in law.*

3. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, **Onyinkwa & Co. Advocates**. The appeal was opposed by the respondent through the written submissions of his advocates, **M/s. Mukisu & Co. Advocates**.

4. The case for the respondent was that on the 13/4/2017 at around 4 p.m. he was travelling aboard the above said motor cycle from Sabatia towards Butere. That upon reaching Ekumira area the rider of the motor cycle indicated that he was turning right. The respondent also made

a hand signal that they were turning right. That as soon as they made the turn to the right they were knocked down by the appellant's motor vehicle from behind. The respondent landed in a ditch on the right hand side while facing Butere direction. He sustained injuries. He was rushed to Butere Sub-County Hospital with a fractured leg. He was referred to St. Mary's Hospital where he was admitted for 6 weeks. His right leg was amputated. He later sued the appellant. He blamed the appellant for failing to keep sufficient distance, failure to apply brakes in time and for failing to hoot and thereby occasioning the accident.

5. The appellant in his defence stated that on the material day at 5.30 p.m. he was driving home from Mumias town in the company of a friend. That at the time of the accident he was driving on a straight flat stretch of the road when a rider of a motor cycle with a pillion passenger appeared from the left shoulder of the road and ventured onto the road while crossing to the right without due care. He swerved to the right lane to avoid the cyclist but the cyclist crashed onto the vehicle's near side front tyre and fell on the tarmac. He lost control of the vehicle which plunged into a left shoulder ditch while facing the direction of his approach. He and his passenger were not injured but the occupants of the motor cycle suffered injuries.

6. The respondent however denied that they were crossing the road from a feeder road when they were hit by the motor vehicle.

7. The appeal is on both liability and quantum. This being a first appeal the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while at the same time bearing in mind that the lower court had the advantage of hearing and seeing witnesses testify – **Selle –V- Associated Motor Boat Company Limited (1968) EA 126**.

**Liability –**

8. On liability the learned trial magistrate held that:-

> ***"On cross-examination the defendant stated that the point of impact was on the right hand side of the road while facing Butere direction but upon re-examination he changed it to the middle of the road. Either way the defendant's version of events gives credence to the plaintiff's claims as had the accident occurred as described by the defendant one would expect the point of impact to be on the left lane while facing Butere. The plaintiff has therefore proved his case against the defendant on a balance of probabilities and I find the defendant 100% liable for the accident."***

9. Mr. Onyinkwa faulted the trial magistrate's findings on liability on the grounds that the respondent and the rider of the motor vehicle did not come out clearly on the circumstances surrounding the occurrence of the accident. That the fact that the point of impact was on the right side of the road made the explanation by the appellant the more believable.

10. Mr. Mukisu on the other hand submitted that the respondent was a pillion passenger. That he was not in control of the motor cycle. Therefore that he could not be blamed for the accident. That neither the respondent nor the cyclist was enjoined as a third party in the suit. That there was no proof of contributory negligence on the part of the respondent. That the appellant gave contradictory evidence as to the point of impact. That he said that the point of impact was on the right hand side of the road but changed his mind in cross-examination to that it was on the middle of the road. That the trial court was correct in holding that the respondent was 100% liable in occasioning the accident.

11. The respondent was not the rider of the motor cycle but a passenger. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in an accident – See **Rosemary Wanjiku Kungu –vs- Francis Futua Mbuvi & Another (2014) eKLR** and **Viviane Anyango Onyango –Vs- Charity Wanjiku (2017) eKLR**. The respondent was therefore not in any way to blame for occasioning the accident. It is either the appellant or the cyclist or both who were to blame for occasioning the accident.

12. If the motor cyclist was the one to blame for occasioning the accident as claimed by the appellant, the appellant should have enjoined the motor cyclist in the case. He did not serve a third party notice on the motor cyclist nor did he file a counterclaim against him.

13. The appellant stated that he had a passenger in his vehicle at the time of the accident. He did not call the said person in court to support his case that it is the motor cycle that was to blame for crossing the road from a feeder road. The person did not even record a statement. In the premises the more believable evidence was that of the respondent that they were knocked down when turning right from the highway. There was no truth in the appellant's defence that the motor cyclist crossed the road from a side road.

14. The respondent stated that the cyclist indicated that he was turning right. That he also gave a hand signal that they were turning right. The appellant did not explain why he hit the motor cycle even after the motor cyclist and his passenger had indicated that they were turning right. I would therefore hold that it is the appellant who was to blame for occasioning the accident. If the motor cyclist in any way contributed to the accident the respondent did not show the manner in which did so. In my view the trial court was right in finding the appellant 100% liable for occasioning the accident.

**Quantum -**

15. The principles applicable when considering an appeal against an award for quantum for damages were stated by the Court of Appeal in in **Kemfro Africa Limited t/a "Meru Express Services (1976)"and Another –Vs- A. M. Lubia & Another No. 2(1985) eKLR** where the Court held that:-

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damage."***

16. A medical report prepared by Dr. Andai indicated that the respondent had suffered the following injuries:-

- Crush injury to the right leg leading to below knee amputation.

- Compound fracture of the right humerus leading to internal fixation of humeral fracture.

The doctor assessed permanent physical disablement at 35%. He opined that the respondent would need an artificial leg at a cost of the Ksh. 150,000/= and removal of internal fixation metals at a cost of about Ksh. 60,000/=.

17. The damages claimed were:-

(1) Pain and suffering.

(2) Future medical expenses.

(3) Loss of earning capacity.

**Pain and Suffering –**

18. Though Mr. Onyinkwa submitted that the award of Ksh. 2 million for amputation of the leg was excessive, he cited the case of **John Kipkemboi & Another –Vs- Morris Kedolo (2019) eKLR** where Musyoka J. reduced an award of Ksh. 3.0 million to Ksh. 2.5 million for amputation of the leg below the knee with 40% permanent incapacity.

19. The advocate for the respondent on the other hand submitted that the award of Ksh. 2 million in damages was supported by authorities. That the award made by the trial court fell within the range of authorities made by superior courts. That the trial court also considered that the respondent moved about with difficulty when he attended court.

20. The trial court considered the following authorities in reaching its award:-

1. **Salome Wakarindi Wachira –Vs- Siginon Freight Limited and 3 Others (2007) eKLR** where Ksh. 1.2 million was awarded as damages for amputation of the right leg above the knee and injury to the chest, ribs, hips and abrasions to both arms.

2. **Patrick Mbatha Kyengo –Vs- Bayusuf Freighters Limited (2013) eKLR** where Ksh. 1.6 million was awarded for a crush injury leading to amputation of left leg and fracture of right radius and ulna.

**3. Samuel Musinga Mwatete –Vs- Taz freighters Ltd & Another, Mombasa HCC No. 230 of 2009** where Ksh. 1.5 million was awarded on 11/4/2012 for 50% permanent incapacity and amputation of one leg below the knee together with other injures.

**4. Savco Stores Limited –Vs- David Mwangi Kimotho, Machakos Civil Appeal No. 12 of 2005** where Ksh. one million was awarded on 29/5/2008 for 20% permanent incapacity and fracture of the left tibia and fibula.

**5. Cosmas Mutiso Muema –Vs- Kenya Road Transporters Ltd & Another, Mombasa HCCC No. 285 of 2006** where Ksh. 2.5 million was awarded on 20/3/2014 for amputation of one leg at the knee level.

**6. Kurawa Industries Ltd –Vs- Dama Kiti & Another, Malindi HCCA No. 37 of 2015** where an award of Ksh. 2,000,000/= was upheld for amputation of the left leg at the knee joint.

21. In **CM (a minor suing through mother and next friend) MN –Vs- Joseph Mwangi Maina (2018) eKLR**, Meoli J. increased an award of Ksh. 1 million to Ksh. 2 million for amputation of the right leg below the knee.

22. The assessment of damages by courts in personal injury cases is guided by the following principles:-

***(1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***

***(2) The award should be commensurable with the injuries sustained.***

***(3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***

***(4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.***

***(5) The awards should not be inordinately low or high (See Boniface Waiti & Another –Vs- Michael Kariuki Kamau (2007) eKLR.***

23. I have considered the above stated comparative authorities and the principles for assessment of damages stated above. It is my considered view that the award of Ksh. 2 million by the trial magistrate in the case under consideration was not excessive. The award was

supported by recent comparative authorities from the High Court. The advocate for the appellant even cited an authority where a higher sum was made for comparative injuries as those sustained by the respondent.

**Future Medical Expenses –**

24. Mr. Onyinkwa submitted that future medical expenses must be specifically pleaded and proved by production of receipts. That since no receipts were produced to prove the same, the trial court made an error in making the awards of Ksh. 150,000/= for cost of artificial leg and Ksh. 60,000/= for future surgery to remove internal fixation metals.

25. Mr. Mukisu on his part submitted that the opinion of the doctor as to the cost of future medical expenses were not controverted. That the award of Ksh. 210,000/= was rightly awarded.

26. The claim under this heading was for future medical expenses. The respondent could therefore not be expected to produce receipts as the expenses had yet been incurred. The estimated cost by the doctor of the artificial limb and cost of surgery were not challenged by the appellant during the hearing. The claim of future medical expenses was therefore rightly awarded.

**Loss of Earning Capacity –**

27. The trial court made an award of Ksh. 1,008,000/= for loss of earning capacity. The court in making the award adopted the minimum wage of Ksh. 6,000/=. It used a multiplier of 14 years on the basis that the respondent was aged 56 years at the time of the accident and would have had a working life of upto 70 years. The award was therefore –

6,000 x 12 x 14 = 1,008,000/=.

28. Mr. Onyinkwa submitted that the medical report by Dr. Andia indicated that the respondent was aged 61 years at the time of the accident. That there was no basis for the holding by the trial magistrate that the respondent was aged 56 years. That considering that the respondent was aged 61 years a multiplier of 5 years would be more reasonable with a multiplicand of Ksh. 6,000/= to translate to –

6,000 x 5 x 12 = 360,000/=.

29. Mr. Mukisu on the other hand submitted that the trial magistrate applied well laid down principles of law in his application of a multiplier of 14 years. That there is no basis to interfere with the award.

30. Both advocates cited the case of **Mumias Sugar Company Limited –Vs- Francis Wanalo (2007) eKLR** where the basis of an award for loss of earning capacity was stated as follows:-

> ***"…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 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 approximate financial loss that the plaintiff has suffered as a result of disability."***

31. In **Butler –Vs- Butler (1984) KLR 226** the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:-

> ***"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.***
>
> ***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.***
>
> ***Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.***
>
> ***Loss of earning capacity can be a claim on its own, as where the 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.***
>
> ***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."***

32. In **Alpharama Limited –Vs- Joseph Kariuki Cebron (2017) eKLR**, the court held the following on the issue:-

> ***"…To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired. According to the bank statements produced, the plaintiff indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. 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 loss or diminished earning capacity provided the judge takes into account relevant factors. In this matter, the fact that the plaintiff has been rendered legless for life, her age at the time of accident and therefore the period she has been consigned to live with reduced mobility, her qualification at the time and that she might not effectively fit back into the job of a port clerk, are relevant factors to be taken into account."***

33. The medical report indicates that the respondent was aged 61 years at the time of the accident. The respondent stated in his written statement that was filed with the suit that he was a mason and a farmer earning around Ksh. 1,200/= per day. In his evidence in court he stated that he was a carpenter. It is then not clear whether the respondent was a mason or a carpenter. At the age of 61 the working life of the respondent was inevitably reduced. His capacity to earn was, no doubt, diminished by the amputation of the leg. Since there is no formula for assessing loss of earning capacity and the career of the respondent was not clear, I am of the view that in the circumstances of this case it was not proper for the trial court to use the multiplier method in assessing the damages. A global method would have been more appropriate.

34. The doctor assessed the permanent incapacity on the respondent at 35%. In the *Mumias Sugar Company case* (supra) the Court of Appeal awarded Ksh. 500,000/= for loss of earning capacity for 15% disability. In **CM (a minor suing through mother and next friend) MN –Vs- Joseph Mwangi Maina** (supra), the court increased an award of Ksh. 500,000/= to Ksh. 900,000/= for loss of earning capacity to a minor aged 7 years whose existing epileptic condition was aggravated by amputation of the leg leading to 40% permanent disability. In **John Kipkemboi & Another –Vs- Morris Kedolo (2019) eKLR** a sum of Ksh. 1.5 million was made for loss of earning capacity for 24 year old boda boda operator for amputation of the leg.

35. Considering the age of the respondent and disability of 35%, I award Ksh. 800,000/= for loss of earning capacity. The award of Ksh. 1,008,000 for loss of earning capacity is therefore set aside and substituted with one of Ksh. 800,000/=.

36. The upshot is that the finding of the trial court on liability is upheld. The court enters judgment for the respondent as follows:-

| | | |
|---|---|---|
| General damages | - | Ksh. 2,000,000/= |
| Future medical expenses | - | Ksh. 210,000/= |
| Losss of earning | - | Ksh. 800,000/= |
| Special damages | - | Ksh. 6,550/= |
| **T o t a l** | **-** | **Ksh. 3,016,550/=** |

Orders accordingly. The respondent to have the costs of the appeal.

**Delivered, dated and signed in open court at Kakamega this 30th day of January, 2020.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Ondieki holding brief for Onyinkwa for appellant

Mr. Mbaka holding brief for Mukisu for respondent

Appellant - absent

Respondent  - absent

Court Assistant - Polycap

30 days right of appeal.