REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO.27 OF 2014

JAMES KIRIMI MUGO.....1ST APPELLANT

CHAIRPERSON BOARD OF GOVERNORS

NGIRIAMBU GIRLS HIGH SCHOOL.....2ND APPELLANT

NGIRIAMBU GIRLS HIGH SCHOOL .....3RD APPELLANT

VERSUS

JAMES MUREITHI MITHAMO.....RESPONDENT

(An appeal from the Judgement and Decree of the Honourable Court J. A. Kasam in Kerugoya PM CC No.315 of 2011 delivered on the 25th day of August, 2014)

JUDGMENT

1. This appeal arises from a suit which was filed by the Respondent JAMES MUREITHI MITHAMO against the Appellants JAMES KIRIMI MUGO, Chairperson Board of Governors Ngiriambu Girls High School and Ngiriambu Girls High School (to be referred to as the Appellants) seeking damages for injuries sustained in a road traffic accident on 19.3.2011 along Kutus-Kianyaga road. In the suit the Respondent had claimed that he was riding his motor cycle along Kutus Kianyaga road when the 1st appellant drove the motor vehicle KAL 900U negligently causing it to veer off the lane and collide with his motor cycle which was on its lane. As a result of the collision the Respondent sustained bodily injuries and claimed general damages.

2. In its judgment the trial court held the appellants 100% liable and awarded the respondent general damages of Kshs.600,000/=, Kshs.200,000/= for future medical expenses and special damages of Kshs.5,200/=.

3. It is against this judgment that the appellants have appealed mainly on the ground that the issue of liability was not proved and that the trial Magistrate erred by holding that they were 100% liable. They also aver that there was not legal basis for awarding general damages. The appellants had raised seven grounds of appeal which basically raise the issue of liability as the Memorandum of appeal dated 9.9.2014. The appellants pray that the appeal be allowed, the judgment of the lower court be quashed and/or set aside. The urge the court to consider the facts and make its own assessment on liability, quantum and costs.

4. The respondent on the other hand in notice of cross appeal dated 12.11.2014 contending that the decision ought to be varied or reversed as the trial Magistrate proceeded on wrong principles when she awarded general damages and the ward was manifestly so low in the circumstances he further contends that the award of future medical care was so inordinately low that it must be a wholly erroneous estimate of the cost. That in addition the trial Magistrate failed to give adequate consideration to principle relating to loss of future earning and loss of future earning capacity. The respondent prays that the judgment and decree in Kerugoya P.M. CC No.315/2011 in relation to quantum of General damages be set aside.

That this court do re-assess the general damages.

5. The court directed that the appeal be canvassed by way of written submissions. For the appellant's submissions were filed by M. Opondo & Co., Advocates. It is submitted that the appeal is both on quantum of damages and liability. He relies on the case of ***Abok James Odera T/A A. J. Odera & Associates Vs. J. Patrick Muchira T/A Muchira & Co., Advocates, [2013]eKLR*** to state the role of this court. It was stated in the case;

> ***"……This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to***

stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston [Kenya] Limited (2009) 2EA 212 wherein the Court of Appeal held interalia that;

"On the first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

6. On the issue of liability, it is submitted that the trial Magistrate erred by failing to find that on the evidence by the appellant that no accident occurred involving the bus. It is submitted that the trial Magistrate acknowledged at page 44 of the record that there was no dent on the bus but reached a self contradictory finding that the 1st appellant was negligent. It is further submitted that the trial Magistrate ignored the evidence of PW-2- who found that the vehicle had no damages. That the trial Magistrate ignored the fact the 1st appellant was acquitted under ***Section 215 C.P.C*** on a charge of careless driving in a traffic case. That there was no additional evidence which was tendered before the trial Magistrate on which she would have found the appellants 100% liable. He submits that the trial Magistrate erred by relying on the conviction of the 1st appellant for driving a defective motor vehicle as a basis of finding the appellants negligent.

7. The appellants submit that the trial Magistrate erred by shifting the burden of proof from the plaintiff to the defendant. He relies on the case of ***Michael Kariuki Mutu –Vs- Charles Wachira Kariuki & Another [2015] eKLR*** where a similar issue was considered and the court stated;

"……the law is trite that the person who alleges must prove Under Section 107 of the Evidence Act, (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that those facts exists"

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Under Section 108 of the said Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Under Section 109 thereof "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"

8. It is further submitted that the trial Magistrate erred by failing to consider the demeanor of PW4 who had not testified in the traffic case and contradicted the evidence of Pw2. The appellants submits that the trial Magistrate erred by failing to consider that the report on the accident was stated to be unknown Motor vehicle and ignored a report by Factline Insurance Investigators.

9. On the issue of Quantum of damages the appellants rely on ***Sino Hydro Corporation Limited –Vs- Daniela Alela Kamuda [2016] eKLR*** where it was stated;

"As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where the trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence *(see Kemfro Africa Ltd t/a Meru Express & Another V.A.M. Lubia and Another (1982-88) 1KAR 727, Peter M. Kariuki V Attorney General CA Civil Appeal No.79 of 2012 {2014} eKLR and Bashir Ahmed Butt V Uwais Ahmed Khan (1982-88) KAR 5).*

I would further add that in determining whether or not to interfere with the assessment of damages, the court has to bear in mind the following principles;

1) . Damages should not be inordinately high or too low.

2) They are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered.

3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

4) Where past awards are taken into consideration as guides, an element of inflation should be taken inot account as well as the purchasing power of the Kenyan shilling at the time of the judgment".

10. The appellants submits that the trial Magistrate took into consideration erroneous factors, Page 48 of the record to give an award intended to teach 1st appellant a lesson. That the award was excessive and urges this court to reduce it. He relies on ***Akamba Public Road Service -vs- Abdikadir Adan Galgalo (2016) eKLR*** where the court set aside an award of quantum of damages and proceeded to award general damages reducing the award by the trial Magistrate.

11. For the respondent submissions were filed by S.N. Thuku & Associates. The Counsel raised seven issues for determination which can be collapsed into two issues namely;

· Liability

· Quantum

12. Like his learned friend he submits that this court has a duty to revisit the evidence on record, evaluate it and reach its own conclusion. He however cautions that this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of it or court is shown demonstrably to have acted on wrong principles in reaching the findings. On this submission he relies on ***Mwansolloni –Vs- Kenya Bus Services, Ltd [1982 – 88] KAR 278 and Kiruga –V- Kiruga (1980) KLR 348 and Hahn -Vs- Singh (1985) KLR 716*** where it was stated that the appellate court will hardly interfere with conclusions made by the trial Magistrate after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of witnesses is crucial. He submits that based on the evidence tendered before the trial Magistrate, the finding on liability was not in error.

13. On Quantum, the Counsel submits that this court has discretion to interfere with the award of general damages if it based on the wrong principle. He relies on DMM (suing as the administrator and legal representative of the estate of ***LKM) –VS- Stephe Johana Njue & Another (2016) eKLR where F. Gikonyo*** stated:

> ***"….the law is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on the wrong principles of the law, that is to say, it took into account irrelevant factor or failed to take into account, or due to the above reasons or other reason, the award is inordinately low or so inordinately high that must be wholly erroneous estimate of the damages"***

It is submitted that the respondent according to doctor Kane page 6-8 of the record, sustained the following injuries;

a. Fracture deep degloved wound and anteromedial right thigh

b. Dead tissue mid anteromedial right thigh

c. Fracture of right femur

d. Multiple compound fractures of right tibia and fibula

e. Amputation of right leg at the knee

f. Multiple phalangeal fractures

That the trial Magistrate erred by basing the award of damages on erroneous finding that the main injury was amputation of the right knee implying that he only cost a knee despite the fact that he had lost a leg. That the award of Kshs.600,000/= as general damages was inordinately too low considering the grievous nature of the injuries. It is further submitted that the trial Magistrate erred by assessing the permanent disability at 10% as she had no medical knowledge and failed to consider the material evidence adduced in court.

14. The respondent urges the court to assess the general damages and relies on ***Kinarwa Industries Limited –Vs- Kiti & Another (2017) eKLR AND Daniel Kosgei Ngelechi –Vs- Catholic Trustee Registered Diocese of Eldoret & Another (2013) eKLR*** where Kshs.2,000,000/= & 2,100,000/= respectively was awarded for injuries similar to those suffered by the respondent. He urges court to award Kshs.2,500,000/=.

15. The respondent faults the trial court for failing to award damages for loss of future earning which was pleaded and proved. He relies on ***Mumias Sugar Company Limited –Vs- Francis Wanalo (2007) eKLR*** where the Court of Appeal laid down the principle for making the award.

> ***"the award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial even when he is not 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 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 the trial, is to compensate the plaintiff for the risk that he will not get employed 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 the case. There is no formula in 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"***

He also relies on ***Zipporah Nangalia Vs. Eldoret Express Limited & 2 Others (2016) eKLR*** where it was held

> ***"a claim for loss of earning capacity is a general damage. It can be awarded as part of general damages for pain and suffering and can be awarded to compensate the party for the risk that he may never get employed if he was not employed or may lose the same if he was employed. As concerns a party who is in business, the incapacitation from the injuries may cause the party not to comfortably manage the business he was engaged or even venture into other businesses"***

16. It is submitted that the respondent who was aged 36 years at the time of the accident and was a businessman and farmer is entitled to

damages based on a minimum wage of Kshs.8,580/= and a multiplier of 20 giving a total of Kshs.2,059,200/=.

17. On the issue of future medical expenses it is submitted the award of Kshs.200,000/= was inordinately too low and urges the court to award Kshs.1,142,330/= based on the following;

i) Cost of artificial leg Kshs.90,000/=

ii) Cost of maintenance of artificial Kshs.303,330/= leg every one and half years for 35 years at Kshs.13,000/=

iii) Cost of refashioning the stump Kshs.119,000/= every 5 years for 35 years at Kshs.17,000/=

iv) Cost of replacing the artificial leg every 5 years for 35 years at

Kshs.90,000/=. Kshs.630,000/=

TOTAL **Kshs.1,142,330/=**

18. I have considered the appeal, the submissions and the proceedings and judgement before the trial Magistrate.

As rightly submitted by the Counsel on record for the parties, this being the first appellate court, it has a duty to consider the facts which were before the trial court and come up with its own findings. In ***Jabane –Vs.- Olenja (1986) KLR 66 where Hancox JA*** (as he then was) stated;

> ***"I accept this proposition so far as it goes and this court does have power to examine and evaluate the evidence and finding of fact of the trial court in order to determine whether the conclusions reached on the evidence should stand (see Peters Vs Surway Post (1968EA 424), more recently the court has held that it will not likely to differ from the finding of fact of the trial Judge who had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did"***

19. I will proceed to consider the evidence which was tendered before the trial Magistrate analyse it and make a finding. The evidence which was tendered before the trial Magistrate was that the material day when the accident occurred the respondent was riding his motor cycle along Kutus – Kianyaga road and when he was near Kutus junction he was overtaken by a Nissan and a bus registration number KAL 900U which was being driven at a high speed and it veered off its lane and knocked him down. He sustained injuries and was treated at Kerugoya hospital and at Nyeri Provincial hospital. His right leg was amputated. It is the evidence of the respondent that the bus was over speeding.

20. PW2 P.C Stanley Kosgey who was attached to Kianyaga police station came across the accident along Kutus Kianyaga road involving motor vehicle KAL 900V Isuzu school bus belonging to Ngiriambu Girls and a motor cycle KMCN 758 G. The bus was moving towards Kutus and the motor cycle towards Kianyaga. The bus was trying to overtake a matatu when it knocked the cyclist. The bus did not stop at the scene. They looked for the bus and found it parked at ACK Kutus. The driver alleged that he feared for his life. After investigations he blamed the driver of the bus. The vehicle was defective. He charged the driver with careless driving and driving a defective motor vehicle.

21. In cross-examination PW2 stated that he never noted any damage on the bus.

22. PW3 C.I.P Fredrick Konya who is incharge of traffic at Kerugoya produced the sketch plan of the scene and testified that the motor vehicle had encroached on the path of the motor cycle. He produced the sketch plan as exhibit 7.

23. PW4 Francis Muthigani Mutembei testified that he boarded a bus KAL 900U to Kutus. On the way the bus which was at a speed started to overtake a Nissan Matatu to avoid hitting it at the rear. In the process of overtaking the bus hit a motor cycle. The bus did not stop. At Kutus he reported to the police. On cross-examination PW4 stated that he was not aware of the traffic case nor was he called as a witness.

24. When PW3 was recalled and was cross-examined he stated that the report of the accident was made on 14.3.2011 through a call made by Balozi of telephone No.0728-101086. He reported an accident between motor cycle and unknown motor vehicle. There was no further report of identification of the motor vehicle. There was no witness by name Balozi. The statement of Francis Mutembei (PW4) was a photocopy though all the other statements were original.

25. The 1st appellant who was charged with careless driving and driving a defective motor vehicle In PM's Court Gichugu **Traffic case No.150/2011 Republic -Vs- James Kirimi Mugo** was acquitted on the charge of careless driving. The trial Magistrate in the traffic case while acquitting the 1st respondent stated page 61 of the supplementary record;

> ***"the point I am driving to is that even if there was an accident PW2 could not establish whether it was the bus or the motor cycle that was at fault. Page 62 from line 22-25 states, from the foregoing on the 2nd issue for determination I find that it was not proven to the required standards that DW1 had carelessly ridden (sic) the bus on 19.3.2012 at the material hour perhaps I should have started by determining the 1st issue, that is whether there had been coming into contact between the bus and motorcycle"***
>
> ***At page 63 line 26-29 the evidence of PW1 & 2 conclusively proves that there was some contact between the motor cycle and the***

bus which had contributed to the motor vehicle being knocked to the ground at the material hour which settles the 3rd issue for determination". Page 64 line 5 –

I reiterate that though there was a coming into contact of the motor cycle and the bus, the evidence was not sufficient to the required standards that DW1 was wholly to blame and liable for the content (sic) and the eventual accident through which PW1 is alleged to have sustained his injuries".

There is no indication as to whether the 1st respondent or the state appealed against the decision by the trial Magistrate in the traffic case.

26. On the other hand the trial Magistrate in the present case held that there was independent evidence of other plaintiff witnesses to show that the 1st defendant was negligent and there was no evidence of contributory negligence.

27. The 1st appellant had denied that he caused the accident. Having considered the evidence the issue which arises is whether the trial Magistrate had a basis for finding the appellant 100%. The determination of liability in a traffic case is based on facts and the circumstances of the case. The court considers the question as to who was at fault or in other words who was to blame. That is to say that the action of the drivers contributed to the cause of the accident. This must be clear from the facts and cannot be presumed. From the facts of the case, there are two issues. The identify of the vehicle and how the accident occurred. On the identity of the vehicle no witness was able to identify the bus. The only witness who gave the registration said it was KAL. When the witness was cross-examined it became apparent that the statement of the witness was amended to include the full registration of the bus page 28 line 17-20 supplementary record. The report which was made to the police was that the vehicle which was involved was unknown? KAL 900 U was found at Kutus ACK Church. PW2 confirmed that the bus had no accident damage. From the proceedings in the traffic case, the motor vehicle inspector who testified as PW6 David Mutua stated that from the body of the bus ***"there were no visible accident damages noted"***

28. Page 44 line 21-27 he was emphatic that based on the damages on the motor cycle and injuries sustained by the cyclist, ***"obviously the bus was expected to have had marks on it".***

29. The evidence by PW4, the only witness called in this civil case, was unreliable. He was not a witness in the traffic case and in his own words he was not aware of it. His evidence was contradicted as he is not the one who reported to the police. I have considered the case of ***Hahu –VS- Singh (1985) KLR 716.*** On the holding that the appellate court will not interfere with conclusions made by a trial court after weighing the credibility of the witness in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial. The first appellate court has a duty to revisit the evidence and evaluate it and reach it's own conclusion. The court will however not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension.

30. The finding by the trial Magistrate that PW4 was a passenger was based on no evidence as the 1st appellant and his witness (DW2) gave consistent evidence in the traffic case and in this case that they were the ones in the bus.

The evidence of PW4 was that the bus he boarded had a driver and a conductor. Based on the evidence of the 1st appellant and his witness, evidence of PW4 ought to have been treated with caution. He was not a reliable witness.

31. The witnesses talked of a Nissan. Others denied that there was a Nissan Matatu. The narrative that the bus was trying to overtake a Nissan is shrouded in doubts and if indeed there was a Nissan it raises the question whether it was the culprit or the unknown vehicle as the bus had no accident damages. Page 44 of the record the trial Magistrate noted that the bus had no noticeable dent.

32. Based on the above analysis I find that it was not proved that the bus KAL 900U was the one involved in the accident nor was there any prove on how the accident occurred. No negligence and no liability can be attributed to a party where there is insufficient evidence to establish negligence. In the case of **Treadsetters Tyres Liited –v- John Wekesa Wepukulu(2010) eKLR**, Justice Ibrahim as he then was stated:-

" In an action for negligence as in every other action the burden of proof falls upon the plaintiff alleging it to establish each element of tort. Hence it is for the plaintiff to adduce evidence of the facts on which he basis his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise:-

i) Whether on that evidence negligence maybe reasonably inferior and,

ii) Whether assuming it maybe reasonably inferior, negligence is infact, inferred."

I find that the trial Magistrate had no basis to apportion liability at 100% since the 1st appellant and his witness testified that no accident occurred involving the bus and this was confirmed by the Motor Inspector that the bus had no accident damage. There can be no basis for finding liability on the 1st appellant in the absence of clear facts to prove negligence. The Court of Appeal in ***MICHAEL HUBERT KLOSS & ANOTHER V DAVID SERONEY & 5 OTHERS [2009] eKLR***

On the issue of determination of liability in road traffic accident, the Court of Appeal proceeded to state;

The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *STAPLEY V GYPSUM MINES LTD (2) (1953) A.C. 663 AT P. 681* as follows**:**

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any

valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it……

"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

33. What was proved in this case was the fact of the accident but there was no prove on a balance of probabilities that the bus was involved. I am in agreement with the submissions by the appellant's Counsel that the trial Magistrate ignored material evidence which exonerated the 1st appellant and shifted the burden of proof from the respondent to the appellants. Section ***107 of the Evidence Act*** is clear as stated in the case filed, ***KARIUKI MUHU –VS- CHARLES WACHIRA KARIUKI & ANOTHER,*** he who alleges must prove. The alleged coming into contact is not sufficient to find liability. There can be no liability without fault. Where it is not clear as to who was at fault, liability must be apportioned. The trial Magistrate appreciated that the 1st appellant was acquitted of the charge of careless driving. Of course, am minded of the fact that the burden of proof in a traffic case, being criminal in nature, is high as it must be beyond any reasonable unlike in civil cases where it is on a balance of probabilities, the fact of acquittal should lead to apportionment of liability in a subsequent civil suit or no liability at all depending on the circumstances of the case. There is a pertinent question on the issue of liability as it was not proved that the respondent was competent to ride a motor cycle. He never produced his driving licence. When he was cross examined by the respondent stated that he did not come with his driving licence. The police abstract which was produced as exhibit showed that the motor cycle was uninsured and did not produce the insurance of the motor cycle, page 14 of the record line 20-21.

34. Having found that the bus KAL 900U was not identified as the one involved in the accident, there would be no basis for apportioning liability. It is trite law that the two components for assessing liability are causation and blame worthiness, refer to ***BAKER –VS. WILLOUGHBY (1970) E.A.A.C 467***. The respondent failed to discharge the burden to prove that the 1st respondent caused the accident.

35. Though I have found that the 1st respondent was not liable, I nevertheless have to consider the 2nd issue which is quantum of damages. The respondent in his cross-appeal has stated that the trial Magistrate misdirected herself on the issue of award of general damages. It is trite law that the court exercises discretion when awarding general damages and the appellate court will not interfere with the exercise of that discretion unless it is proved that the trial Magistrate took into account an irrelevant factor or left out of account a relevant factor. The court also considers whether the amount is so inordinately low or high that is wholly erroneous estimate of damages.

36. In the celebrated case of ***KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE GATHOGO KANINI –VS- A M LUBIA & OLIVE LUBIA*** **[1982-88] KLR 727** the Court of Appeal held:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.

Refer to ***POWER LIGHTING COMP. LTD & ANOTHER V ZAKAYO SAITOTI NAINGOLA & ANOTHER*** **[2008] eKLR**

The court held;

On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages.

(1) ***Damages should not be inordinately too high or too low.***

(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment……..

This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others.

- ***The award is inordinately too high or too low.***

- ***It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses.***

- ***Calling for proof of the same by visual observation if pointed out and medical records.***

- ***By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident on the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum.***

37. There was no dispute that the respondent had sustained severe injuries as a result of the accident. Evidence was adduced by PW1 Dr. Kane that the plaintiff sustained the injuries which I noted in his report which he produced as exhibit 19.

GENERAL DAMAGES

PW 1 stated that the documented injuries sustained by the respondent were as follows;

- Dead tissues in the middle right thigh
- Fractured right femur
- Compound fracture of the right fibia and tibula
- Amputation of the right leg at the knee level
- Fracture of phalangeal bone
- Wiring of right index, middle and 4th fingers

He stated that he made the diagnosis, soft tissue injuries, loss of right lower limb up to mid-thigh, lumbar spine podylosis, right hip joint osteoarthritis, left knee osteoarthritis. He suffered the following disabilities, 5 % spine, 5% right hip joint – permanent, 5% left knee joint – permanent.

There is no doubt that the injuries were severe, the plaintiff has to walk on crutches and be on physiotherapy and various for an indefinite period. His ability to earn a living was diminished. The trial Magistrate awarded him Kshs.600,000/= as general damages for pain and suffering and loss of amenities.

Considering the injuries sustained the award of Kshs.600,000/= was too low. Since the trial Magistrate did not make an award of loss of future earning or future earning capacity, it means the global award of 600,000/= encompassed loss of future earning. The trial Magistrate failed to take into account relevant factors which are, that the injuries sustained were very severe and the respondent suffered loss of his earning capacity. The global award was manifestly low and was not commensurate with the injuries suffered in the accident. The trial Magistrate in failing to award loss of earning and loss of future earning stated that these are matters of special damages which ought to have been strictly pleaded and proved. The approach was wrong as these are general damages which can be included in the award of general damages for pain and suffering and loss of amenities. This was laid out by the Court of Appeal in the case of ***MUMIAS SUGAR COMPANY –VS- FRANCIS WAMATO*** which I have quoted above where the Court quoted with approval. ***LORD DEMMING M.R. IN FAIREY –VS- JOHN THOMPSON LIMITED (1973) 2 LOYD'S REPUBLIC*** at page 41 –

> ***"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for dimunition in earning capacity is awarded as part of general damages"***

The court of appeal stated that;

> ***" the award for loss of earning capacity can be made both when the plaintiff is employed at the time of trial and even when he is not so employed……..justification for award where plaintiff is not employed at date of trail, is to compensate the plaintiff for the risk that he will not get employment…….***
>
> ***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".***

38. To the damages for loss of earning capacity are not special damages which need to be specifically pleaded and proved. They are to be awarded upon prove that owing to the injuries suffered the ability of the plaintiff to earn a living has been diminished. The plaintiff lost his earning capacity owing to the injuries. The trial Magistrate erred by failing to assess the damages for loss of earning capacity as a separate head or a global sum of the general damages.

39. The Court of Appeal in ***JACKSON MUTUKU NDETEI –VS- A.O. BAYUSUF & SONS LTD (2007) eKLR*** held that where the appellant had sustained similar injuries to those sustained by the plaintiff in this case, an award of Kshs.450,000/= was manifestly low and not commensurate with the injuries suffered in the accident. The Court proceeded to award Kshs.2,000,000/= as general damages and Kshs.1,350,000/= as damages for loss of future earning capacity.

40. It is trite that when awarding damages the cardinal principle is that awards should as far as possible not evidently depart from other awards which have been made by the courts in similar cases. The Court of Appeal in the case of JACKSON MUTUKU NDETEI (Supra) considered various cases where the plaintiff had sustained similar injuries and the awards made which ranged from Kshs.1,300,000/= - 2,890,000/=.

41. The plaintiff in this case was awarded Kshs.600,000/= which I find was inordinately too low and ought to be enhanced. The respondent urged the court to award him Kshs.2,500,000/=. I have considered the submissions, based on the case of ***JACKSON NDETEI VS. A.O. BAYUSUF & SONS***, which is a decision made in 2007 and considering the decline in the value of money since the award was made, I find that an award of Kshs.2,200,000/= is reasonable.

42. On damages for loss of earning capacity I am persuaded by the Counsel for the respondent's proposal that it be based on the government's gazetted minimum wage and adopt a multiplier. The respondent was 36 years old at the time of the accident as indicated on the medical report. I find that a multiplier of fifteen (15) years is reasonable. The minimum wage at the time was Kshs.8,580/=. The award on this head would be computed as Kshs.8,580.00 x 15x12 = Kshs.1,544,400.00.

43. Lastly on the issue of the future medical care. This was not in dispute but the respondents contends that it was not adequate.

PW 1 testified that the respondent will require continuous physiotherapy and will be on various drugs for an indefinite period. He assessed the costs of artificial limb at Kshs.90,000/=, the shoes costs Kshs.13,000/= and will be replaced after 1 ½ years, cost of refashioning stump Kshs.17,000/= and will be done after every 5 years.

The appellants' medical report confirmed that the respondent suffered 60% disability. That he would require artificial leg fitted which will costs Kshs.75,000/= and the same will need repair at Kshs.12,000/= at 1 ½ years and about Kshs.15,000/= at 5 years.

The trial court held that the respondent had 10% permanent disability and would require artificial leg and refashioning of the stump before proceeding to award Kshs.200,000/=.

The respondent was aged 37 years at the time of the accident. Only the respondent addressed the life expectancy and estimated it at 35 years while the appellant never addressed the court on the same. Therefore if one was to take the average of the estimates from both doctors and estimate the life expectancy at 35 years, the costs would be calculated as hereunder;

Respondent	Appellants	**Average**
Artificial leg	90,000/=	75,000/=	**82,500/=**
Replacement	13,000/=	12,000/=	**12,500/= x 23 =**
after 1 ½ years			**287,500/=**
Refashioning after 5 years	17,000/=	15,000/=	**16,000/=x7=**
			112,000/=
Total:			**482,000/=**

I would have interfered with the award of damages and award damages as I have stated above. I however come to the conclusion that the appeal has merits. Liability on the appellants was not proved. I allow the appeal. I set aside the Judgment of the trial Magistrate and substitute it with an order dismissing the plaintiff's suit with costs.

Costs of the appeal to the appellant.

Dated at Kerugoya this 30th day of January 2020.

L. W. GITARI

JUDGE