



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 450 OF 2014

KHAN HUSSEIN.....1ST APPELLANT

PETER NGANGA KARIUKI.....2ND APPELLANT

VERSUS

HUDSON MUDENYO CHERSUGE.....RESPONDENT

(Being an appeal against the judgment and decree of Hon. A. Lorot (Mr.) (Ag. Senior Principal Magistrate) delivered on 15th September, 2014 in MILIMANI CMCC NO. 2228 OF 2012)

JUDGMENT

1. Hudson Mudeny Chersuge, the respondent in this instance, instituted a suit vide the plaint dated 27th April, 2012 in which he prayed for general damages and special damages in the sum of Kshs.89,590/ against the 1st and 2nd appellants plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that sometime on or about 1st of September, 2010 he was lawfully walking inside Oil Libya petrol station along Limuru Road when the 2nd appellant while negligently/recklessly driving motor vehicle registration number KAV 313T Nissan Matatu (“*the subject vehicle*”) belonging to the 1st appellant, caused the subject vehicle to knock down the respondent, leaving him with serious injuries.
3. The respondent set out the particulars of negligence and the particulars of his injuries in his plaint.
4. The 1st and 2nd appellants entered appearance and put in their joint statement of defence dated 7th August, 2012 to deny the respondent’s claim.
5. When the suit came up before the trial court for hearing on 26th March, 2014 the parties recorded a consent on liability in the ratio 90:10 in favour of the respondent and the suit proceeded for assessment of damages, at which point the respondent testified as the sole plaintiff witness whereas the appellants closed their case without calling any evidence. Subsequently, the parties filed and exchanged written submissions.
6. The trial court finally entered judgment in favour of the respondent as follows:

| | |
|-----------------------------------|------------------------|
| a) General damages | Kshs.2,000,000/ |
| b) Lost earnings | Kshs.2,184,240/ |
| c) Future medical expenses | Kshs.320,000/ |
| d) Special damages | Kshs.89,590/ |
| TOTAL | Kshs.4,593,830/ |

Less 10% contribution (459,383) **Kshs.4,134,447/**

7. The aforesaid judgment now constitutes the subject of the appeal, with the appellants putting forward the following grounds in their memorandum of appeal dated 6th October, 2014:

(i) *THAT the learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants' submissions on both points of law and fact.*

(ii) *THAT the learned trial magistrate's decision was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.*

(iii) *THAT the learned trial magistrate erred in law and misdirected himself when he failed to consider that compensation for loss of future earning capacity is to be awarded as part of general damages.*

(iv) *THAT the learned trial magistrate did not apply the correct principles of law in determining the suit and his award represents a totally erroneous estimate.*

(v) *THAT the learned trial magistrate erred in fact and in law in awarding an excessive sum of lost earnings.*

(vi) *THAT the learned trial magistrate erred in fact and in law in finding that the respondent will be out of work for his entire life.*

(vii) *THAT the learned trial magistrate erred in law and in fact by adopting the respondent's submissions stating that he used to earn Kshs.600/ per day which income was not proved.*

(viii) *THAT the learned trial magistrate erred in assessing awards which were inordinately high and a wholly erroneous estimate of the loss and damage suffered by the respondent.*

(ix) *THAT the learned trial magistrate erred in awarding an excessive sum for the injuries sustained in the face of the evidence adduced and submissions made by the appellants on liability and quantum.*

8. This court invited the parties to file written submissions on the appeal. The appellants first submitted that in making his finding, the learned trial magistrate did not consider comparable awards made in respect to injuries similar to those sustained by the respondent and in not doing so, arrived at a manifestly high award on general damages.

9. In this regard, the appellants invited this court to consider awards on general damages made in a variety of authorities constituting injuries of close proximity to those of the respondent in the present instance. I will cite a few of those authorities. In the case of **Haron Kipchumba Cheron v Eastern Produce (K) Limited [2014] eKLR** the High Court upheld an award of Kshs.350,000/ where a plaintiff had sustained various fractures; in **Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] eKLR** an award of Kshs.800,000/ was substituted with that of Kshs.400,000/ on appeal at the instance of a plaintiff who had suffered fractures of the left tibia and fibula; and **Sammy Mugo Kinyanjui & another v Kairo Thuo [2017] eKLR** in which the High Court on appeal set aside an award of Kshs.1,000,000/ and substituted it with an award of Kshs.600,000/ for a plaintiff who had sustained multiple fractures among other injuries.

10. The appellants therefore urged this court to substitute the award of Kshs.2,000,000/ with a fair award of Kshs.350,000/ on general damages.

11. It was also the appellants' argument that the trial court erred in making an award for lost earnings whereas the respondent had sought damages for loss of earning capacity, adding that in any case, the respondent did not prove such loss as required pursuant to the holding in **Cecilia W Mwangi & another v Ruth W Mwangi [1997] eKLR** thus:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”

12. The appellants also referred this court to the Court of Appeal authority of **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** in which the court offered a clear distinction between loss of earnings and loss of future earning capacity in the following manner:

“As Lord Denning MR said in Fairley v John Thompson Ltd [1973] 2 Lloyd's Rep. 40 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 diminution in earning capacity is awarded as part of general damages.””

13. The appellants further contended that the trial court fell into error when it held that the respondent will not be able to work again despite the existence of medical evidence to the contrary.

14. For the foregoing reasons, the appellants were of the view that the trial court's assessment of damages ought to be interfered with.

15. On his part, the respondent in choosing to support the trial court's assessment argued that given the nature of his injuries, he is unable to work.

16. More specifically, the respondent contended that in the case of **Mahmoud Mbara Maka Mzee v Tsavo Tours Safaris Limited-Mombasa High Court Civil Suit No. 68 of 1999** constituting comparable injuries, the court awarded Kshs.3,000,000/ on general damages

and urged this court to enhance the award of Kshs.2,000,000/ to Kshs.5,000,000/.

17. While concurring that an award of damages for loss of earning capacity falls within the ambit of general damages, the respondent argued that the trial court acted properly in awarding damages under this head since given the nature of the respondent's employment, he could not have produced any documentation to prove his earnings.

18. On the same note, it was the respondent's submission that the multiplier and multiplicand applied by the trial court in assessing damages for lost earnings should be upheld for the reason that they were reasonable and in line with comparable authorities. Ultimately, the respondent took the position that the appeal is deserving of dismissal.

19. I have considered the rival submissions on appeal alongside the vast array of authorities cited. I have further re-evaluated the evidence placed before the trial court. It is clear that the appeal lies against the assessment of damages, more specifically the general damages, lost earnings and future medical expenses. The award on special damages was not challenged on appeal.

20. Courts have on previous occasions determined that an appellate court can only interfere with an award of damages made by a trial court in the following instances, as laid out in **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** and reaffirmed by the Court of Appeal in **Catholic Diocese of Kisumu v Sophia Achieng Tete-Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**:

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.

21. I will therefore address the nine (9) grounds of appeal under the heads hereunder.

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

22. Both the medical reports dated 20th April, 2012 by Dr. Moses Kinuthia and the one dated 16th July, 2012 prepared by Dr. D.K. Wairoto produced as P. Exhibits 1 and 2 respectively termed the respondent's injuries as follows:

(i) Fracture of the left radius

(ii) Urethral injury with inability to pass urine

23. Further to the above, the earlier medical report by Dr. Kinuthia categorized the respondent's injuries as grievous harm and estimated his incapacity to be about 18 months. No incapacity was indicated in the latter report.

24. In his oral evidence, the respondent stated that following the accident, he was rushed to hospital and admitted for 2 weeks since his urethra had blockage and his left arm was broken.

25. The above position was restated during his cross examination, save to clarify that he was first taken to Avenue Hospital and later admitted at Kenyatta National Hospital for the 2 weeks.

26. In his submissions, the respondent proposed an award of Kshs.3,000,000/ citing **Mutinda Matheka v Gulam Yusuf MOMBASA HCCC NO. 752 of 1993** and **Joseph Kirubi Nganga v Kenneth Oketch [2009] eKLR** where the courts awarded Kshs.1,000,000/ and Kshs.1,100,000/ respectively. The appellants on their part submitted that an award of Kshs.900,000/ would suffice under this head, placing reliance on **Absolom Agala v IMCO Building & Engineering Construction [2012] eKLR** where the court awarded Kshs.350,000/ for urethral injury and **Rosemary Tamba (suing as the next friend of Kevin Walimbwa Mike) v Francis Sikanga Sikolia & another [2013] eKLR** in which case the court awarded Kshs.900,000/ as general damages for comparable injuries.

27. The learned trial magistrate found the injuries sustained in the present instance to be severe and awarded the sum of Kshs.2,000,000 under this head.

28. From my re-evaluation of the evidence and rival submissions and authorities cited before the trial court coupled with my review of the learned trial magistrate's decision, I find nothing to indicate that the learned trial magistrate overlooked the appellants' submissions or authorities cited in this regard. That said, it is upon me to determine whether the learned trial magistrate either took into account any irrelevant factor or disregarded a relevant factor or arrived at an inordinately high award.

29. It is apparent that the authorities which were relied upon by the respondent were decided over 10 years ago. Moreover, I noted that the case of **Absolom Agala (supra)** cited by the appellants is comparable though decided a few years back whereas **Rosemary Tamba (supra)** equally quoted in the appellants' submissions entailed injuries of a more severe nature. Further to this, I must point out that in the absence of a cross appeal, I am unable to consider the respondent's plea for substitution of the awards made.

30. That said, it is my view that the learned trial magistrate did not indicate what guided her decision to settle for an award of Kshs.2,000,000/. In that case, I have considered other authorities in addition to those cited by the parties before me. The High Court in the

case of **Julius M. Kimaiyo & another v Fidelis Silingi Musila [2019] eKLR** awarded the sum of Kshs.900,000/ for injuries comparable to those suffered by the respondent. Also, the court in the case of **Judy Ngochi v Kamakia Ele Selelo Ledamoi [2019] eKLR** awarded Kshs.1,000,000/ for comparable injuries.

31. In view of the foregoing and having taken into account comparable awards made, I am convinced that the award of Kshs.2,000,000/ fell on the higher side and ought to be disturbed. I will therefore substitute it with a more reasonable award of Kshs.1,500,000/ under this head considering that the respondent has not fully recovered.

(b) Loss of earning capacity

32. Under this head, the respondent had urged the trial court to award a sum of Kshs.2,184,240/ taking into account a multiplicand of Kshs.9,101 being the minimum wage for a mason such as himself and a multiplier of 20 years in consideration of the fact that he was 25 years of age at the time of the accident, to be tabulated as follows:

$$9,101 \times 20 \times 12 = \text{Kshs. } 2,184,240/$$

33. The appellants urged that the respondent is not entitled to damages under this head since he had failed to prove employment, arguing in the alternative that the award ought to be tabulated as follows;

$$9,101 \times 18 \text{ months} = \text{Kshs. } 163,818/$$

34. The learned trial magistrate reasoned that since the respondent will be out of employment his entire life, an award of Kshs. 2,184,240/ will be fair.

35. Following my re-examination of the medical evidence tendered before the trial court, I observed that in his medical report by Dr. Moses Kinuthia estimated the respondent's period of incapacity at 18 months, though the nature of such incapacity was not specified. Needless to say that, none of the doctors who examined the respondent pointed out that his injuries would diminish or take away his capacity to earn in the future.

36. Further to the foregoing, the respondent did not tender any evidence before the trial court to show that as a result of his injuries, he was unable to earn an income. In that regard, I concur that the learned trial magistrate's finding that the respondent would be out of work his entire life was not founded on any facts or evidence.

37. In the premises, I find that the learned trial magistrate erred in awarding damages in this respect.

(c) Future medical expenses

38. The respondent on his part suggested that the trial court awards the sum of Kshs.320,000/ for future medical costs, while the appellants maintained that special damages must be both specifically pleaded and strictly proved.

39. Having considered the above, the trial court found that the sums indicated in the medical evidence remained unchallenged, thereby awarding the sum of Kshs.320,000/ as prayed.

40. Upon my re-examination of the two (2) medical reports produced before the trial court, I noticed that the medical report by Dr. Moses Kinuthia estimated the future medical expenses for removal of the metal plates, physiotherapy and serial urethrotomies at a total cost of Kshs.320,000/. In contrast, Dr. Wairoto D.K. through the second medical report indicated that the respondent would require removal of the metal plates and a urethroplasty costing Kshs.140,000/ in total. This particular doctor also mentioned that the respondent will not require physiotherapy.

41. From my re-evaluation of the above evidence, I am alive to the difference in estimates. I noted that the learned trial magistrate did not consider the second medical report in spite of the fact that it was produced by the respondent as **P. Exh 2**.

42. Be that as it may, I noted that the learned trial magistrate's award for future medical expenses was informed by the first medical report and as he correctly held, the appellants did not call their doctor who prepared the second medical report to clarify why he came to the conclusion that the respondent did not require physiotherapy.

43. In view of the circumstances, I am satisfied that the learned trial magistrate's award under this head was justified and I am not persuaded to disturb it.

44. In the end, the appeal succeeds to the extent of the awards made under the heads of pain and suffering and loss of amenities, and loss of earning capacity. The learned trial magistrate's awards under the mentioned heads are hereby set aside.

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

(a) General damages

i) Pain and suffering and

| | |
|-----------------------------|-------------------------|
| loss of amenities | Kshs.1,500,000/= |
| (b) Future medical expenses | Kshs.320,000/= |
| (c) Special damages | Kshs.89,590/= |
| Gross total | Kshs.1,609,590/= |
| Less 10% contribution | (Kshs.160,959)= |
| Net total | Kshs.1,718,631/= |

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 of the Lower Court until payment in full.

In the circumstances of this appeal, a fair order on costs of the appeal is to order that each party meets its own costs.

Dated, Signed and Delivered at Nairobi this 30th day of January, 2020.

.....

L. NJUGUNA

JUDGE

In the presence of:

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

..... for the Respondent