



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 143 OF 2016

CROP AFRICA LIMITED.....APPELLANT

-VERSUS-

JOSEPH MURANGIRI.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable L.M. Wachira (Mrs.) (Senior Principal Magistrate) delivered on 4th March, 2016 in CMCC NO. 5987 OF 2013)

JUDGEMENT

1. Joseph Murangiri, the respondent herein, instituted a suit by way of the plaint dated 24th September, 2013 in which he prayed for both general and special damages against the appellant for breach of statutory duty of care, plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that sometime on or about the 24th of September, 2010 while he was engaged in the lawful course of his employment at the appellant's premises, the tractor he had been assigned to manage abruptly bolted and knocked him against a wall, causing him to sustain injuries.
3. The respondent set out the particulars of negligence and breach of the appellant's contractual and/or statutory obligations in addition to setting out the particulars of the injuries he sustained.
4. The appellant entered appearance and put in its statement of defence dated 10th June, 2014 to deny the respondent's claim.
5. When the matter came up for trial, the parties recorded a consent on liability in the ratio of 30:70 in favour of the respondent. Subsequently, the respondent gave his evidence on quantum before closing his case, while the appellant closed the defence case without summoning any witnesses. The parties then filed and exchanged written submissions.
6. The trial court finally entered judgment in favour of the Respondent in the following manner:

a) Liability	70:30
b) General damages for pain and suffering	Kshs.800,000/=
c) Future medical expenses	Kshs.100,000/=
d) Loss of future earning capacity	Kshs.778,140/=
e) Special damages	Kshs.78,367/=
Total	Kshs.1,756,507/=
Less 30% contribution	Kshs.526,952/=
Award	Kshs.1,229,554/=

7. The aforesaid judgment now constitutes the subject of the appeal, with the appellant putting forward the following grounds in its memorandum:

(i) *THAT the learned trial magistrate erred in law and in fact in awarding general damages of Kshs.800,000/= which award was excessive, unwarranted and not commensurate with the injuries sustained in light of the evidence adduced.*

(ii) *THAT the learned trial magistrate erred in law and in fact in awarding Kshs.778,140/= for loss of earnings which award was excessive and unwarranted in light of the evidence adduced.*

(iii) *THAT the learned trial magistrate erred in law and in fact in not finding that the special damages claim ought to have been strictly proved by way of production and verification of receipts.*

(iv) *THAT the learned trial magistrate erred in law in not taking into account entirely the written submissions of the appellant.*

(v) *THAT the learned trial magistrate's finding and decision were against the weight of evidence adduced.*

8. This court invited the parties to file written submissions on the appeal. The appellant began by submitting that not only did the trial court award a manifestly excessive sum on general damages and that it did not take into account the appellant's submissions and authorities cited.

9. In that respect, the appellant urged this court to consider the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** where reference was made to the case of **Antony Mwangi v Martin Muiruri (2008) eKLR** in which a plaintiff who had sustained a fracture of the femur was awarded Ksh.400,000/= as general damages; and **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** in which case the High Court sitting on appeal substituted an award of Kshs.1,000,000/= with that of Kshs.450,000/= under a similar head in a situation where the plaintiff therein had suffered fracture injuries.

10. The appellant also faulted the trial court for awarding damages under the head of loss of earnings in the absence of evidence of the respondent's earnings. The appellant referred this court to the case of **Cecilia W. Mwangi & another v Ruth W. Mwangi [1997] eKLR** where the Court of Appeal stated that loss of earnings must be specifically pleaded and strictly proved for an award to be made.

11. It was the appellant's contention that special damages equally sought ought to have been specifically pleaded and strictly proved.

12. The respondent in reply submitted that evidence was tendered before the trial court by way of receipts to show the expenses incurred, hence the trial court's award on special damages was proper.

13. The respondent further supported the trial court's award on general damages, arguing that the medical evidence on record was never controverted by the appellant and that the trial court considered all relevant factors in making its award.

14. Further to the foregoing, it was the respondent's argument that the trial court correctly tabulated damages for loss of earnings/diminished earnings since the respondent had demonstrated that due to his injuries, he would not be able to perform his employment duties as before.

15. The respondent therefore urged this court to dismiss the appeal with costs.

16. I have considered the rival submissions on appeal and the authorities cited. I have also re-evaluated the evidence which was tendered before the trial court for consideration.

17. It is clear that the appeal is challenging the findings on quantum, specifically the awards made under the heads of general damages, loss of earnings/diminished earnings and special damages. I therefore deem it practical to address the five (5) grounds of appeal contemporaneously under the three (3) heads.

18. This being an appeal in the first instance, it is worth bearing in mind that this court can only interfere with the trial court's award on damages if it can either be shown that an irrelevant factor was taken into account, or that a relevant factor was disregarded, or that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

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

19. The injuries sustained by the respondent as pleaded in the plaint are closed fracture of the right femur (proximal 1/3). In his oral evidence, the respondent stated that following the incident, his leg fractured twice, his kidney was affected and he could neither talk nor walk normally.

20. The respondent testified that he was taken to St. Mulumba Hospital in Thika where he was admitted for close to one (1) month and metal plates were fixed in his leg and back. He further testified that upon being discharged from hospital, he had to use crutches to assist in walking for about one (1) year.

21. The respondent produced the medical evidence in his possession including the medical reports indicating his injuries and prognosis.

22. During cross examination, it was the respondent's evidence that he was injured on his back, leg and kidneys and that his degree of incapacity is not 100%.

23. In his submissions, the respondent on the one part urged the trial court to award a sum of Kshs.2,000,000/= citing the case of **Charles Mathenge Wahome v Mark Mboya Likanga & 2 others [2011] eKLR** where an award of Kshs.1,500,000/= was made to a plaintiff who

had suffered a cut wound on the scalp and a fractured right femur and **Elizabeth Wamuyu Wanjohi v John Muriithi Mbanya & 2 others [2015] eKLR** in which the court awarded a similar sum for fracture and soft tissue injuries.

24. On the other part, the appellant proposed a sum of Kshs.250,000/= while citing the authorities of **Brooke Bond (K) Ltd v John Mwangi Ng'ang'a [2011] eKLR** and **S.D.V. Transami K. Ltd v Scholastic Nyambura [2012] eKLR** where the respective courts awarded the sums of Kshs.200,000/= and Kshs.250,000/= for fracture injuries.

25. The learned trial magistrate settled for an award of Kshs.800,000/= while noting that she had considered the authorities cited before her, inflationary trends and the injuries suffered.

26. Upon my re-evaluation of the medical evidence which was adduced before the learned trial magistrate, I noted that the medical report by Dr. Theophilus Wangata dated 15th August, 2013 indicated that the respondent had been admitted in hospital for about 3 weeks during which time he underwent surgery. The doctor assessed the degree of permanent incapacity at 15% and categorized the respondent's injuries as grievous harm.

27. In the second medical report dated 15th July, 2014 Dr. P.M. Wambugu confirmed the nature of injuries as pleaded in the plaint and recorded in the earlier medical report, though he assessed the permanent incapacity at a slightly lesser degree of 10%.

28. Both doctors arrived at a similar prognosis that given the nature of his injuries, the respondent was at risk of developing osteoarthritis in the future.

29. I noted from my re-evaluation of the evidence and authorities cited by the parties that the injuries constituted in the authorities quoted by the respondent were of a more severe nature in comparison to the injuries sustained in the present instance. I also noted that whereas the authorities relied upon by the appellant involved comparable injuries, no degree of incapacity was assessed in either of them and furthermore, the said authorities were decided a few years back.

30. While there is nothing to indicate that the learned trial magistrate overlooked the submissions and authorities by the appellant, it is apparent that the learned trial magistrate did not disclose which authorities guided her assessment under this head.

31. Suffice it to say that I have considered the case of **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** where the High Court in dealing with an appeal against an award of Kshs.800,000/= made in respect of a plaintiff who had suffered injuries comparable to those sustained by the respondent decided to substitute the award with that of Kshs.500,000/=. Similarly, the court in **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** cited by the appellant on appeal substituted an award of Kshs.1,000,000/= for comparable injuries with one of Kshs.450,000/=.

32. In view of the foregoing, I am convinced that the award made by the learned trial magistrate was on the higher side. In my view and having considered comparable awards made, the range of degree of incapacity, the passage of time and inflationary trends, an award of Kshs.600,000/= would form a more appropriate award under this head.

b) Loss of earnings/diminished earning capacity

33. It was the respondent's testimony before the trial court that preceding the accident, he worked as a plant operator for about 30 years but since sustaining the injuries, has not been able to work under that capacity. He produced a copy of his driving license as P. Exh 6 to show that he is eligible to drive any kind of vehicle.

34. The respondent further testified that his salary was paid directly through the bank though he did not produce any pay slips in court.

35. In his cross examination, the respondent stated that he now stays home while his wife farms and that previously, he earned a salary of Kshs.14,000/=.

36. The respondent thereafter submitted that since he was 47 years of age at the time of the accident, a multiplier of 30 years would suffice coupled with the minimum wage of Kshs.6,891/= for a driver in 2015 to be tabulated as follows:

$$\text{Kshs.6,891} \times 12 \times 30 = \text{Kshs.2,480,760/=}$$

37. The appellant on its part submitted that the respondent was not entitled to any award under this head due to the fact that he did not prove the claim for lost earnings/diminished earnings.

38. In her analysis, the learned trial magistrate reasoned that being guided by the medical report of Dr. Wangata which indicated that the respondent experiences difficulty while driving, she is satisfied that the respondent will not be able to perform his usual duties and given his age, it may also prove difficult for him to return to an institution in order to receive training in a different field.

39. The learned trial magistrate further reasoned that in the absence of evidence of earnings, she would be inclined to apply the minimum wage for a tractor driver in 2010 which amounts to Kshs.11,790/= divided by half which leads to Kshs.5,895/=.

40. It was also the learned trial magistrate's reasoning that in considering the government retirement age of 60 years, she would apply a multiplier of 11 years, tabulated as follows:

11 x 12 x 5,895 = Kshs.778,140/=

41. Upon my re-evaluation of the evidence, I established that though the respondent did not adduce evidence of earnings, he tendered a copy of his driving license and a work booklet to support his evidence that he worked as a tractor driver.

42. I have equally re-examined the medical reports on record: Dr. P.M. Wambugu in his report was silent on whether the respondent's injuries would either impede him from earning an income or diminish his ability to earn. Nevertheless, in the preceding report by Dr. Theophilus Wangata, it was indicated that resulting from his injuries, the respondent not only has difficulty walking but also driving.

43. From the foregoing, I support the learned trial magistrate's finding that the respondent was entitled to damages for diminished earning capacity as opposed to loss of earnings, going by the earlier medical report by Dr. Wangata.

44. This brings me to the assessment under this head. On the multiplicand, the learned trial magistrate relied on the minimum wage regulations 2010 for a tractor driver in Thika which amounts to Kshs.11,790/=, though it remains unclear why she opted to apply half of that sum as the multiplier. Be that as it may, in my view the minimum wage regulations 2015 would have been the applicable regulations since they were in force at the time judgment was delivered in 2016. However, since use of the wage regulations 2010 was not specifically challenged by any of the parties, I see no reason to disturb the same.

45. On the multiplier, I noted that the learned trial magistrate did not cite any authorities which guided her choice of multiplier. I have therefore considered the case of **Richard Macharia Nderitu v Phillemon Rotich Langas [2013] eKLR** where the court applied a multiplier of 10 years in the instance of a 47-year old deceased person; **Patricia Mona & Another V. Samuel Opot Omondi & Another, [2014] eKLR** where a multiplier of 9 years was applied to a deceased bearing similar age; and the more recent case of **Nelly Nduku Mutua (Suing as the legal representative of the estate of James Mutua Makenzi-Deceased) v Africa Line Transport Co. Limited & another [2019] eKLR** where the court opted for a multiplier of 10 years for a deceased person aged 48 years.

46. In view of the foregoing, I am of the view that while the learned trial magistrate did not cite comparable authorities, she arrived at a multiplier which is comparable in terms of the age bracket of the plaintiffs in those cases and the respondent herein. I therefore see no need to interfere with the award made under this head.

c) Special damages

47. Under this particular head, the respondent urged the trial court to award a sum of Kshs.80,867/=, being Kshs.78,367/= for the medical expenses incurred and Kshs.2,500/= as cost of the medical report.

48. In response, the appellant submitted that the special damages sought should only be granted upon production of relevant receipts.

49. The trial court eventually awarded the sum of Kshs.78,367/= on special damages.

50. Upon my re-evaluation of the evidence on record, I noted that while the respondent had only particularized a sum of Kshs.2,500/= under this head, counsel for the respondent made an oral application to amend the particulars of the special damages in the plaint to read Kshs.78,367/= and which amendment was allowed in the absence of an objection from the appellant's advocate.

51. Further to the foregoing, I observed that the respondent produced receipts totaling a sum of Kshs.4,250/= and an inpatient deposit voucher for the sum of Kshs.76,167/=. Being guided by the case of **Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] eKLR** where the Court of Appeal rendered that payment vouchers constitute evidence of payment, I am satisfied that the respondent proved special damages in the total sum of Kshs.80,417/=.

52. However, the law is well settled that special damages must be specifically pleaded and strictly proved. Going by this principle, the respondent was only entitled to special damages to the extent of Kshs.78,367/= which is what the learned trial magistrate awarded. I find such award to be justified in the circumstances.

53. In the end, the appeal succeeds only in respect to the award made on general damages. Consequently, the trial court's award of Kshs.800,000/= under that head is set aside and is substituted with an award of Kshs.600,000/=. The judgment on appeal shall now read as follows:

a) General damages for pain and suffering	Kshs.600,000/=
b) Future medical expenses	Kshs.100,000/=
c) Loss of future earning capacity	Kshs.778,140/=
d) Special damages	Kshs.78,367/=
Gross Total	Kshs.1,556,507/=
Less 30% contribution	Kshs.466,952.10/=
Net Total	Kshs.1,089,554.90

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

Parties to bear their respective costs of the appeal.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2020.

.....

J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent