



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 60 OF 2018.

WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT

VERSUS.

LUKA WAFULA NAMASAKA.....RESPONDENT

[An Appeal from Judgment and decree in Original Bungoma CMCC 289/2016 delivered on 31.8.2018 by Hon. S.O. Mogute – PM]

JUDGMENT.

By Plaint dated 15th June, 2016 Luka Wafula Namasaka the Respondent sued the West Kenya Sugar Company the appellant Seeking;

- a) General damages.**
- b) Loss of future earnings and earning capacity.**
- c) Special damages of Kshs.7,493,126/=.**
- d) Interest on (a), (b) and (c).**
- e) Costs of the suit.**

The claim arises from injuries sustained in a road traffic accident involving Motor cycle Reg. No. KMCE 230N owned and rode by the Plaintiff/Respondent and Tractor Reg. No. KTCB 835H owned by the Appellant/Defendant on 23.6.2015 along Kamukuywa – Kimilili road.

The defendant filed statement of defence denying that it is the registered owner KTCB 835H Tractor or; that it was involved in an accident on the stated date along Kamukuywa – Kimilili road. Without prejudice the defendant averred that if an accident occurred (which is denied) it was solely caused by or contributed to by the negligence of the plaintiff. They stated the particulars of negligence on the part of the plaintiff.

After full hearing the learned trial magistrate found the defendant wholly liable and in his Judgment stated;

In the instant case I adopt a multiplier of 22 years which I consider fair and reasonable in the circumstances of this case. It works out as follows;

21115 x 22 x 12 = Kshs.5,574,360/=.

Special damages:

In regard to the medical expenses I award Kshs.387,996/=, medical report Kshs,2,000/=, copy of records Kshs.550/= and future medical expenses Kshs.120,000/=.

The above were pleaded and proved to the required standards. In summary, Judgment is entered for the plaintiff against the defendant as hereunder:-

- | | |
|-----------------------------------|-------------------------|
| a) General damages | Kshs.2,000.000/= |
| b) Loss of future earnings | Kshs.5,574,360/= |

c) Special damages	Kshs.390,546/=
d) Future medical expenses	Kshs.120,000/=
Total	Kshs.8,084,906/=

Plaintiff is awarded the costs of the suit and interest at Court rates.

Aggrieved by the Judgment. The appellant filed this appeal on the following grounds;

1. *The Learned Trial Magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion on the same.*
2. *The Learned Trial Magistrate erred in fact and in law in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.*
3. *The Learned Trial Magistrate erred in fact and in law in finding that the respondent had proved his case on a balance of probability.*
4. *The Learned Trial Magistrate erred in fact and in Law in failing to apportion liability against the Respondent despite evidence from the Appellant that he was driving too fast in a crowded area.*
5. *The Learned Trial Magistrate erred in fact and in Law in ignoring the pleadings and submissions for the defence.*
6. *The Learned Trial Magistrate erred in fact and in law in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence thus lowering the respondent's probative evidentiary value.*

The evidence before the trial court was that plaintiff is a Pharmaceutical technologist who was at material times employed by St. Domiano Hospital Bungoma, earning a salary of Kshs.21,545/= per month. On 23.6.2015 he left Kamukuywa at 7p.m. riding Motor cycle Reg. No. KMCE 230N T.V. Star going to Kimilili along Kamukuywa – Kimilili road near the Market there is a feeder road joining the main road from left side – when facing Kimilili. From that feeder road suddenly a tractor emerged and joined the main road. It hit him and he lost consciousness. He did not see the tractor before it hit him as it did not have its lights on. A good Samaritan took him to St. Domiano Hospital where he was admitted for 6 days and discharged. He was later again admitted at Moi Teaching and Referral Hospital for 23 days. He continued attending clinics as out patient. As a result of the accident he sustained;

- a) ***Severe head injury with resultant loss of consciousness.***
- b) ***Thoracic spine injury with Compression collapse fracture of T4 Vertebral body associated with incontinence of urine and stool and paralysis of both lower limbs.***
- c) ***Fracture of the middle third of the right femur.***
- d) ***Compound fragmented fracture of the right patella.***
- e) ***Marrow Oedema T3 and T5 Vertebral bodies.***
- f) ***Anemia due to blood loss.***

Pw4 P.C. Cleophas Juma attached to Kimilili Police Station produced a traffic file of the accident which showed that one Benjamin Luka was charged in Kimilili Traffic 281/2016 with offence of careless driving but same was withdrawn for lack of witnesses. From the Investigation the tractor had entered the main road from a feeder road and hit the Motor cyclist in the middle of the road.

Dw1 Benjamin Shirandula Luka, the driver of the tractor gave evidence for the defence. He adopted his witness statement date 12.1.2016 as evidence in Chief. He testified stating;

I had entered the main road Kimilili – Kamukuywa and suddenly the Plaintiff who was on board a Motorcycle violently rammed on the front right tyre of the tractor and fell on the road.

I stopped the tractor and called my supervisor Mr. Were. I and other good Samaritans carried the Plaintiff and put him on a salon car and the Plaintiff was taken to Hospital.

I blame the Plaintiff for the accident as his motorcycle had no lights thus I was unable to see on the road and further for veering off his lawful land onto the tractor's lawful land and subsequently ramming onto the front tyre of the tractor as he was riding too fast in the circumstances.

Upon analyzing the above evidence the Learned Trial Magistrate on liability state;

The driver of the tractor owed other road users a duty of care at that time since he was entering the main road from a feeder road. He was expected to stop and ascertain that there was no oncoming motor vehicle or motor cycle before joining the main road i.e. Kamukuywa – Kimilili road (main road) at that time had a right of way. The evidence of Pw3 the Police officer who produced the police abstract report corroborated the plaintiff's testimony that the accident incurred at a junction when the tractor entered into the main road from a feeder road and hit the motorcyclist who was riding along Kamukuywa – Kimilili road. It is also on record that the driver of the tractor was charged with the offence of careless driving contrary to Section 49 of the Traffic Act. This clearly shows that the police after carrying out their investigations concluded that the driver of the tractor (Dw1) was to blame for the accident. The outcome of the traffic case is not material because the Court is not bound by the said case.

Having taken into account the submissions by both Counsel and the evidence on record I find and hold that the driver of motor vehicle registration No. KTCB 835H Mahindra tractor was wholly to blame for the accident. From the copy of records produced herein it is noted that the defendant is the registered owner of Motor vehicle registration No. KTCB 835H. The defendant is held vicariously liable for the negligence of its driver/agent/servant.

Mr. Ogejo for the appellant in his written submissions, submitted on both liability and quantum. Appellant's counsel submitted that the police officer who gave evidence never visited the scene nor was he an Investigating officer. He urged this court to treat his evidence as hearsay. He submitted that the evidence of the plaintiff that he was hit on the main road and that the tractor did not have lights is contradicted by the evidence of the driver of the tractor who testified that he had already entered the main road and that it is the Plaintiff who rammed into the tractor. He further submitted that the trial magistrate did not resolve the issue as to who between the Plaintiff and Defendant did not have light on. He submitted that where the court is uncertain as to whom to blame for the accident liability should be apportioned at 50:50.

M/s Mumalasi for the Respondent on liability submitted that the evidence on record is clear that the accident occurred at a T – Junction when the Appellants tractor was driven abruptly from a feeder road to the main road without stopping and to confirm that the highway was clear before joining it. Counsel submitted that even if the Respondent saw the tractor on that feeder road his expectation was that the driver would stop to make sure the highway was clear. Counsel submitted that the Respondent did not do anything that would have amounted to negligence on his part.

This being a first appeal, the court is obliged to re-evaluate the evidence and arrive at its own conclusion;

In the case of *Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123* by Sir Clement De Lestang, it was held that:

***“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*”**

There is no dispute that the accident occurred on 23.6.2015 involving the motorcycle Reg. No. KMCE 230N owned by Respondent and where the Respondent was the rider and the Tractor Registration No. KTCB 835H owned by the appellant and driven by the driver and/or agent. How did the accident occur?

Pw1 in his written statement on how the accident occurred states;

I finished his work at Kamukuywa and started to travel to Kimilili at 7p.m. I was riding motorcycle Registration Number KMCE 230N T.V.S. Star. I was riding at a speed of 40km/hr on the tarmac. There is a feeder road after about 300 meters from Kamukuywa market. A tractor entered on the tarmac from that feeder road abruptly and I was not able to brake. It hit me and I lost conscious. The tractor didn't have lights at that time. I didn't see it at all.

Dw1 Benjamin Shirandula Luka the driver of the tractor in his written Witness statement which he adopted as evidence in Chief testified; On 23.6.2015 I was Maeni from ferrying sugarcane on tractor registration number KTCB 835H hearing to Misikhu weighbridge.

I had entered the main road Kimilili – Kamukuywa and suddenly the Plaintiff who was on board a motorcycle violently rammed on the front right tyre on the tractor and fell on the road. I stopped the tractor and called my supervisor Mr. Were. I and other good Samaritans carried the Plaintiff and put him on a salon car and the Plaintiff was taken to Hospital. I blame the Plaintiff for the accident as his motorcycle had no lights thus I was unable to see him on the road and further for veering off his lawful land onto the tractor's lawful lane and subsequently ramming onto the front tyre of the tractor as he was riding too fast in the circumstances.

The only witnesses to the accident who testified were the Plaintiff and Dw1 the driver of the tractor from the evidence the incident occurred at night. The accident occurred along the Kamukuywa - Kimilili main road. The evidence from the plaintiff and driver of the tractor is that the accident occurred at a T – Junction and the tractors driver was entering a main road from a Murram road. The tractor's driver was expected to stop and check that the road was clear before entering. Though he says he did this it is not true because he admits in Cross – examination that he did not see the cyclist before he hit his tractor. If as he says his lights were on, and he stopped and checked, it is not possible that he would not see the cyclist who was on the main road. The Plaintiff who was riding rightfully on the road could not have done anything to avoid the accident which was caused by the negligent driver of the tractor who joined the main road without first checking that it was safe to do so. I agree with the learned trial magistrate that the appellant driver bore the liability of the accident at 100%. The appellant submit that the Respondent should share liability. It is now settled in several decision that there is no liability without fault. The party to who seeks the plaintiff to bear some contribution on liability must prove the acts of negligence on the part of the plaintiff. If as in this case the appellant only states that he seeks contribution because the accident involved the motorcycle and his tractor, without proving acts of negligence on the part of the plaintiff on a balance of probability, the court will not assign any contribution.

On quantum the trial magistrate in his Judgment stated;

a) General damages.

b) Loss of future earnings and earning capacity.

c) Special damages of Kshs.7,493,126/=

d) Interest on (a), (b) and (c) above.

In quantum Counsel for the appellant submitted that the general damages awarded were high and urged this court to reduce the same. He proposed the sum of Kshs.400,000/= under this head to be adequate. On loss of future earnings, Counsel for appellant submitted that the Respondent testified that he was employed as a Pharmaceutical technologist and that his duties involved walking while arranging drugs and that as a result of the accident his services were terminated by St. Domiano Hospital. Counsel however submits that it was not shown that he cannot engage in other income generating activities. He submitted that from subsequent Medical reports the Respondent was shown to be able to walk. He submitted that the termination of employment was a sham as he had continued working for the employment in the 2 years after the accident 2013 – 2015.

On loss of future earning the counsel for the appellant submitted that the earning of the Respondent was established to be 21,115/= and that should be paid only for the days when he was seriously sick and therefore a multiplier of 6 months should have been adopted.

M/s Mumalasi for the respondent submitted that the trial court in assessing general damages took into consideration past similar decisions of comparable awards, the nature and extent of injuries sustained, on loss of future earnings and loss of earning capacity, counsel submitted that the Respondent proved that he was a qualified Pharmaceutical Technologist, earning Kshs.21,115/= per month and that as a result of the accident he was terminated his employment. Counsel submitted that the awards under this head were proper and the trial court took all factors into account.

What injury did the appellant sustain in the accident.

The Respondent in paragraph 6 of the plaint stated that as a result of the accident he sustained the following injuries as per the Medical reports exhibited;

SPINE:

- Thoracic spine injury with compression collapse fracture of T4 Vertebral body associated with incontinence of urine and stool and paralysis of both lower limbs.

RIGHT LOWER LIMB:

- Fracture of the middle third of the right femur.
- Compound fragmented fracture of the right patella.

FRACTURE RIGHT PATELLA

- Debridement and removal of patella fracture fragments and wound dressing was done at St. Damiano Medical Centre on admission.

RIGHT FEMURE:

- He was referred to Mediheal Hospital on 29/06/2015 for MRI of the spine and same day admitted to MTRH Eldoret, memorial wing.
- On 02/07/2015 operation of right femur fracture was done and a locking nail was inserted to immobilize the fracture to heal.

THORACIC T4 SPINAL INJURY:

- No spine injury operation was done, except bed rest.
- MRI thoracic spine of 29/06/2015 Dr. Derendra, Mediheal Hospital revealed the following findings;
 1. Compression collapse of T4 vertebral body with mild decrease in height.
 2. Marrow oedema T3 AND t5 vertebral bodies.
 3. Vertebral cord contusion at T4 level.

4. Pre-vertebral and paravertebral haematoma T3 and T5.

RIGHT LOWER LIMB:

- Painful deformity of the right knee joint associated with limited knee movements and ugly scars.
- Pains right hip and ankle joints.
- He has to use eight elbow crutch to move about.

LEFT LOWER LIMB:

- Left lower limb is weak and numb associated with left knee pains and wasting of muscles of the limb.

SOCIAL LIFE:

- Spinal injury has led to reduced sexual desire and loss of libido and is worried of keeping his marriage intact.

JOB:

- He lost his job at St. Damiano Medical Cottage following this accident. His services was terminated in September 2015 and he is unable to fend for himself and his family.

FINDINGS:

SPINE:

- Tenderness over T3-T6 thoracic vertebrae with maximum tenderness at T4.
- There was no obvious deformity of the spine.

RIGHT LOWER LIMB:

- There was wasting muscles of the right thigh, leg and foot.
- The right knee joint was stiff with patella bone fragment adherent to the femur at the knee joint with multiple ugly healed scars.
- The right knee movements and those of the right hip joint were both moderately tender.
- Power of the right big toe against resistance was reduced.
- The right ankle and the foot had several ugly healed scars with tight tendo-Achilles.
- X-rays of the right femur of 15/12/2015 showed a locking femur nail in a place but there was no evidence of healing of the fracture approximately 6 months after the injury.
- X-ray of 19/02/2016 still showed no bone healing at about 8 months. This is suggestive of non-union of this fracture.

The Respondent has produced a Medical report from St. Damiano Medical Centre prepared by Dr. Mbiti who in his prognosis stated;

- *The black, thigh and knee injuries are will heal with associated permanent deformity and marked loss of normal function.*
- *There is permanent right lower limb shortening and limping gait.*
- *Paralysis has partially subsided. Weakness remains on the right lower limb (POWER GRADE 3, power normal, 5 left lower limb) with marked muscular wasting.*
- *He may not lift moderate to heavy weights in his remaining lifetime due to the instability caused by the permanent spinal bone, eight femoral and right knee injuries.*
- *The client will remain with residual ambulation deficits due to the thigh and knee injuries; he may not do brisk walking or run without support.*
- *Part of the right patella was removed. This caused severe permanent instability of the left knee and limb generally with inevitable osteoarthritis of the joint.*

- He retains a foreign body (implant) in his right femur.
- Further complex and delicate operations for the removal of the orthopedic implant on the right thigh are indicated.
- The patient is bound to suffer severe joint and muscular complications such as osteoarthritis and muscular dystrophy or atrophy and their sequelae following the above injuries and surgical interventions.
- There is a likely hood of severe occupational difficulties (or change) due to the sustained injuries and their subsequent complications.

He was also examined by Dr. Lodrick N. Mumoki who prepared a report dated 19/2/2016 who in his report stated;

PROBLEM:

1. Compression collapse fracture of T4 Vertebral body associated with weakness of lower limbs and thoracic back pains, the latter rose on sitting and standing for long.
2. Non union fracture of the right femur 8 months after open reduction and insertion of a locking femur nail, associated with stiffness and osteoarthritis of the right knee joint.

COMMENT:

1. Non union fracture right femur will require re-operation.
2. The locking nail will be removed and fracture ends refreshed and compression plating done plus bone grafting to stimulate and accelerate fracture bone healing.
3. This could cost the patient Kshs.120,000/= (One hundred twenty thousand).

ASSESSMENT:

1. The percentage of permanent incapacity for problem No. 1 above was assessed at seventy (70%) percent and problem No.
2. at twenty five (25%), giving a combined sum total of seventy eight percent (78%).

From these Medical reports, the Respondent as a result of the accident sustained the following injuries;

- Severe head injury with loss of consciousness.
- Thoracic spine injury with compression collapse fracture of T4 vertebral body associated with incontinence of urine and stool and paralysis of both lower limbs.
- Fracture of the middle third of the right femur.
- Compound fragmented fracture of the right patella.
- Marrow oedema T3 and T5 vertebral bodies.
- Anemia due to blood loss Counsel for the plaintiff submitted for a sum of Kshs.4,000,000/= as general damages for pain suffering and loss of amenities.

All the Medical reports in the prognosis show that there was weakness of lower limb and non-union of the fracture of the right femur. While this will limit mobility the Respondent was not paralyzed as to be immobile. Indeed he Dr. Mbiti indicated that paralysis had subsided but would not run or do brisk waking without support or lift heavy materials. The claim under loss of earning capacity is available to the plaintiff where his chances in future work employment is lessened, or is terminated. In assessing damages under this head due consideration should be made to the age, the qualification and estimated, length of working life. The principles for assessment of damages under this head were settled in *Butler & Butler 1984 eKLR 225* where it was held;

1. "A person's loss of earning capacity occurs where as a result of injury his chances in the future of any work in the labour market or work as well as paid as before the accident are lessened by his injury.
2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.
3. Damages under the head of loss of earning capacity and loss of future earnings which in English were formerly included as on

unspecified part of the award of damages for pain, suffering and loss of amenity are none qualified separately and no interest is recoverable on them.

4. 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 they claimant was in employment then and/or at the date of the trial.

5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.

6. The facts to be taken into account in considering damages under the head of loss of earnings capacity will vary with the circumstances of the case, and they include such factors as the age and qualification of the claimant, his remaining length of working life, his disabilities and previous service, if any.

The trial magistrate in assessing a quantum under this lead proceeded on the principle that the Respondent should be compensated the equivalent of what he would have earned until retirement. As has been shown the Respondent was not paralyzed that he cannot do any job or engage in any income generating activity. His chances of work in the Pharmaceutical Industry may have been lessened due to his inability to carry heavy loads. There was no evidence that he cannot engage in any employment or perform any work. The occurrence of this accident did not end his working life. While courts would compensate plaintiff under the this lead, due consideration should be made to the age, profession, qualification to and injuries suffered to ascertain the quantum of damages that are appropriate. If the plaintiff despite the injuries is capable of engaging in employment or other income generating activity, that fact should be taken into account.

I have considered the trial courts assessment under this lead and he adopted a multiplier of 22 years I hereby reduce the multiplier of 22 years to 18 years.

The damages under the lead are as hereunder.

$Kshs.21,115 \times 18 \times 12 = Kshs.4,560,840/=$

The appeal is allowed to that extent only. The Judgment for any Respondent against the appellant will therefore be as hereunder;

1. General damages

Kshs,2,000,000/=

2. Loss of future earning

Capacity Kshs.4,560,840/=

3. Special damages

Kshs.390,546/=

4. Future Medical Expenses

Kshs.120,000/=

TOTAL KSHS.7,071,385/=

The Respondent will have costs of the appeal.

Dated at Bungoma this 11th day of March,2020.

S.N. RIECHI

JUDGE