REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 44 OF 2017

BIGOT FLOWERS LIMITED.....APPELLANT

VERSUS

AGNES NJERI MAINA.....RESPONDENT

(Being an appeal from the judgment of Hon Z Abdul SRM delivered on 26th September, 2017 in CMCC No 349 of 2013)

JUDGMENT

Background and issues

1. The plaintiff was involved in an industrial accident when she slipped and fell at work on 09/03/2009. She first went to Karati dispensary for treatment on the same day. Thereafter, she went for treatment to Naivasha district hospital.

2. The trial court found the injuries to be: Broken upper canine tooth; Fracture of right elbow joint; Fracture of right middle finger and disability at 20%. By consent, liability was apportioned at 80%;20% in favour of the plaintiff, and damages were awarded as follows:

a. General damages	Kshs	500,000.00
b. Special damages	Kshs	5,000.00
c. Loss of future earning capacity	Kshs	1,702,656.00
Less contribution 20%	Kshs	441,531.00
Total	**Kshs**	**1,766,125.00**

3. In this appeal only two issues arise, both in respect of the quantum of damages awarded: Whether the award was inordinately high compared to the injuries sustained; and, Whether the trial magistrate disregarded legal principles for award of loss of future income when the respondent was not permanently incapacitated.

4. There is no need to go into any length in describing the accident. The questions in issue surround the injuries sustained, the level of incapacity suffered and the due compensation for them.

Injuries

5. PW4 Melody Ahohi a clinical officer at Karati Dispensary, where the plaintiff first went for treatment. PW4 testified that she treated her for painful elbow joint; broken canine tooth and pains on the shoulder. She produced the Karati treatment cards as P Exb 2 a-b. Exb 2a shows that the patient had ***"Painful elbow joint, inability to walk, swollen right finger and broken canine tooth".*** Exb 2b shows examination on 10/1/2012 almost three years later and 10/2/2012. The injuries are indicated as ***"fracture right elbow joint, fracture pelvic rim, fracture 2nd finger right hand".*** These injuries are in tandem with what the trial court found except for the fracture of the pelvic rim, which the court did not find.

6. In cross examination, PW4 admitted that she was not the first one to see the patient in the first instance. She also stated that they had no x-ray facility and referred the plaintiff to Naivasha District Hospital.

7. PW3, Mesa Silvester, a clinical officer at Naivasha District hospital produced medical notes as Exb 4. Page 16 record of appeal exhibits Naivasha District hospital. Appointment card which shows appointments from 16/10/2012 to 16/1/2013, and medical notes indicate *"patient still experiences pain that radiates from the cervical region right upper limb"*.

8. The plaintiff's star witness, was PW2, Dr Omuyoma. He examined the plaintiff four years later on 11/5/2013. Relying on the treatment card from Karati dispensary of 9/03/2009 and Naivasha District hospital of 14/3/2013, he found that she suffered the following injuries: Broken upper canine tooth; fracture of the right elbow; and fracture of the right middle finger. According to him, she also suffered fracture of right pelvis. He assessed the injuries as grievous harm and permanent disability at 20%.

9. By consent, Dr S Malik's medical report dated 16/5/2014 was tendered as DExb 1. He was not called to give testimony or be cross examined. His report is critical and dismissive of all the previous medical reports and treatment notes. It is marked "Without Prejudice" and relies on his examination of the plaintiff and refers to treatment notes at Karati and x-rays dated 12/10/2012. It tends to show that, based on the first treatment notes at Karati dispensary, the injuries suffered by the plaintiff were loss of tooth, soft tissue injuries to right elbow and middle finger and that no plaster of paris was administered on plaintiff. The doctor's concluding opinion was that: *"the dispensary findings and the findings of the doctor who complied her first medical report are both grossly exaggerated"*

10. I have carefully perused the lower court file and the pleadings. In essence the defence was an outright denial of the accident, and in the alternative that the plaintiff was negligent; and further, that the plaintiff's claim was fraudulent. Contrary to **Order 7, Rule 5.of the Civil Procedure Rules**, no list of documents or witnesses to be relied on at trial by the defence was proffered at any time before or during the hearing. Dr Malik did not file a witness statement or affidavit to introduce his report, so it is unclear how it could be construed as an exhibit.

11. As a rule of thumb, a court would expect that before an exhibit can be offered into evidence in court a foundation must be laid for the admission of such document. That is to say, there must be a witness who tenders it into court seeking that it be relied on. Thereafter, the document must undergo a process of proof. In **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR** the Court of Appeal clearly explained the process of how a document becomes an exhibit as follows:

> ***"18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.***
>
> ****….***
>
> ***20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account."*** (Emphasis added).

12. Applying the principles in the **Kennethe Mwige** case, the report of Dr Malik is an unexplained, untested, unproved document whose foundation was not laid prior to admission. It has no evidential value.

13. Thus, whilst the appellant, relying on Dr Malik's report, asserts in his submissions that the injuries to the plaintiff were:

> ***"loss of a tooth and soft tissue injuries to the right elbow and right middle finger…."***

and urges that the damages should be commensurate to those identified injuries, the basis for such submission lacks an evidential foundation given that Dr Malik's report remains unproved.

Nevertheless, in his submissions at the trial the appellant/defendant argued that:

> ***"The treatment notes from Karati Dispensary ought to guide this court in determining the extent of injuries sustained in the circumstances…"***

14. Having carefully scrutinized all the treatment cards and medical reports, it is clear to me that the plaintiff's initial treatment at Karati on 9/3/2009, was limited because of lack of facilities, including x-ray, according to PW4. The plaintiff was then referred to Naivasha Hospital. I note that there is no documentary evidence of an x-ray being done at Naivasha hospital immediately after the referral, although PW4 testified that she did receive – but did not record x-ray pictures on the treatment card – following the referral to Naivasha hospital. Despite the incapacities at Karati Dispensary in giving and recording full treatment, it is nevertheless clear that in the first treatment notes the plaintiff

was found to be suffering *"Painful elbow joint, inability to walk, swollen right finger and broken canine tooth"*, and the subsequent treatment card from Karati indicates that there were fractures.

15. In light of the foregoing evidence, I see nothing availed by the appellant that shows that the trial court came to the wrong conclusion on the injuries. This ground of appeal therefore fails.

Damages

16. *General damages:* The appellant urged that should have been at Kshs 100,000/= for loss of a tooth and soft tissue injuries to the right elbow and right middle finger. As already found herein, this court has concluded that the trial court was correct insofar as its findings on the injuries are concerned. The only question is whether the amount of general damages was inordinately excessive.

17. The trial court relied on the case of **Tarmal Wire Products Ltd v Ramadhan Fondo Ndegwa [2014] eKLR** where the Kshs 500,000/- in general damages was awarded by the High Court in Mombasa for: fracture on the left hand; fracture of the bone of the index finger; three lacerations on the left hand; a cut wound on the base of the left index finger; and two cut wounds on the left thumb. The plaintiff was noted to suffer stiffness of the left index finger and hence the doctor assessed permanent incapacity at 10%.

18. The injuries in the **Tarmal Wire** case are comparable to those found by the trial court here. As such, the trial court cannot be faulted for its award on this head which was done in 2017. I thus uphold the award of general damages.

19. *Loss of earning capacity:* As regards this issue the first point of significance is that the Ministry of Medical Services issued a letter recommending retirement of the plaintiff on medical grounds following the accident (See record of appeal page 60 and 61) following an explanation of the plaintiff's injuries. It is not disputed that the letter was accepted and acted on by the appellant (see record of appeal page 59), who retired the respondent on the said medical grounds. The Human Resources Manager stated:

> ***"This is to inform you that the same [Retirement letter of the Ministry] has been accepted. Your last day will be on 14th March 2014"***

20. In arriving at the loss of earnings, the trial court took the age of the respondent as 39 years and applied a multiplier of 16 years multiplied by her salary of Kshs 8,868/- as shown in her salary slip which was produced. She then obtained the total award.

21. The appellant proposed an award of Kshs 500,000/-. It further cited authorities where the award was reduced by the amount of the disability, as a principle. Accordingly, it was argued that the award should be reduced by 80% as the disability was assessed at 20%.

22. In **David Kigotho Iribe v John Wambugu Ndungu & Another [2008] eKLR** Koome J (as she then was) reduced the assessment by 50% to match the assessed disability on the principles as follows:

> ***"The characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more comprehensively in Moeliker -vs- Reynolle & Co. Ltd [1977] 1 WLR 132. In that case Browne L.J said at page 140, paragraph B:***
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> ***"This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earning which can already be proved at the time of the trial".***
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> ***The claim for loss of future earning as Brown L. J. said later at page 140 paragraph G is assessed on the ordinary "multiplier/multiplicand basis."***
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> ***Accordingly he is not able to be engaged in gainful employment, more so, as a driver because of the injuries. The plaintiff was aged 27 years when this accident occurred. He was earning Kshs.12, 000/- This was also supported by his then employer. Considering that the plaintiff can still use his hands to do some work, I will award the plaintiff a permanent disability of 50%. Considering that the plaintiff was aged 27 years and other vicissitudes of life and the general life expectancy in Kenya today, l will assess the loss of his future earning using the multiplier of 20 years i.e. Kshs 12, 000 x 20 x 12 less 50% = Kshs.1, 440,000"***

23. Further, the appellant also cited **Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR** where Nyamweya, J reduced earning capacity by 40% to Kshs 1,305,180/- and explained:

> ***"Given that both experts were agreed that the Respondent would suffer 60% disability, and it was not disputed that the Respondent was 41 years at the time of the accident and would have retired at about the age of 60 years, a multiplier of 15 years is reasonable in the circumstances taking into account that the Respondent will receive an early capital sum to compensate his loss which can be invested to produce an income, and his career might have been interrupted as a result of the normal risks of life . I therefore find that the loss of future earnings was Kshs 12,085 x12x15 = 2,175,200/=. Any rehabilitation of the Respondent would only result in 40% functionality and therefore reducing the future earnings by 40% would result in Kshs 1,305,180/=.***

24. Finally, reference was made to **James Thiongo Githiri v Nduati Njuguna Ngugi [2012] eKLR** where it was held:

> ***"The principle under this head of claim is that the court should take into account not only the present loss but also the capacity of the plaintiff to earn a future or improved income.***
>
> **…….**
>
> ***PW2 also testified that the plaintiff would suffer 50% disability for the rest of his working life. Taking that the plaintiff was 27 years of age at the time of the accident, and would continue working upto the age of 60, the average retirement age, the plaintiff would have 33 years of active working life. Allowing therefore that multiplier, per month at the rate of Ksh 7,500/=, the figure would be comprised of the number of working years, multiplied by the months in the year, and the average monthly nett earnings i.e. 33 x 12 x 7,500 making a total of Ksh 2,970,000/=. <u>However as the plaintiff would only be incapacitated to the extent of 50%, the said sum would be reduced by that 50%</u> as follows - (i) 33 x 12 x 7,500/= 2,970,000/= Less 50% = 1,485,000/= Add 15 months incapacity 127,500 = Total Shs 1,612,500/="***

25. Clearly, the principle that the injured person should be compensated as closely to the extent of his disability, appears to be widely accepted jurisprudence. I would agree with the appellant that the trial magistrate did not take this principle into account.

26. I am aware that the test to be applied by an appellate court on an appeal against an award of damages is that:

> ***"…[the] Court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."*** See **Mbogo & Another v Shah (1968) E.A. 93**

Disposition

27. In the present case, I think that the award for loss of earning capacity by the trial magistrate should have considered the clear evidence that the plaintiff suffered only 20% permanent disability and should have been compensated to the extent of that loss, in accordance with the applicable legal principles.

28. In light of all the foregoing, I allow the appeal on loss of earning capacity, set aside the award of the trial court, and substitute it with the following:

> 8,868/- x 12 x 16 = 1,702,656 (less 80%) = 340,531.20

The final award shall therefore be as follows:

a. General damages	Kshs 500,000.00
b. Special damages	Kshs 5,000.00
c. Loss of future earning capacity	
Kshs 1,702,656.00 less 80%)	Kshs <u>340,531.20</u>
Sub-total Kshs 845,531.20	
Less Liability contribution 20%	Kshs <u>169,106.25</u>
Total	**Kshs 676,424.95**

29. The parties shall bear their own costs of the appeal.

Administrative directions

30. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

31. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

32. Orders accordingly

Dated and Delivered via video conference at Nairobi this 18th Day of June, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Nasimiyu for the Appellant

2. Ms Amboko for the Respondent

3. Court Clerk - Quinter Ogutu