



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 331 OF 2017

KENNEDY ONGERE.....1ST APPELLANT

JOSEPH WAMBUGU.....2ND APPELLANT

VERSUS

ANTHONY KINYANJUI KARIUKI.....1ST RESPONDENT

MICHAEL MBOYANO.....2ND RESPONDENT

KENYA BUS SERVICES.....3RD RESPONDENT

CONSOLIDATED WITH

HIGH CIVIL APPEAL NO 240 OF 2016

MICHEAL MBOYANO.....1ST APPELLANT

KENYA BUS SERVICES MANAGEMENT LIMITED.....2ND APPELLANT

VERSUS

ANTHONY KINYANJUI KARIUKI.....1ST RESPONDENT

MICHAEL MBOYANO.....2ND RESPONDENT

KENYA BUS SERVICES.....3RD RESPONDENT

(Being an appeal from the judgment and decree delivered on 8th April, 2016 by Hon. D.W. Mburu (PM) Milimani Commercial Courts in CMCC No. 2480 of 2014)

JUDGMENT

1. The 1st Respondent, Anthony Kinyanjui Kariuki, instituted this case against the 1st and 2nd Appellants (Kennedy Ongere and Joseph Wambugu respectively) and the 2nd and 3rd Respondents (Michael Mboyano and Kenya Bus Services respectively). The claim was for damages for injuries arising out of a road traffic accident involving the three motor vehicles owned and/or driven by the parties herein. The claim was denied.
2. During the hearing of the case, the parties recorded a consent on liability at 70% against the Appellants, 10% against the 1st Respondent and 20% against the 2nd and 3rd Respondents. The suit then proceeded for assessment of damages.
3. The trial magistrate assessed general damages for pain, suffering and loss of amenities at Ksh.1,000,000/= and special damages at Ksh.616,529/=. That is what triggered the Appeals herein.

4. The grounds of Appeal can be summarized as follows:

- (a) That the award of general damages is manifestly excessive.
- (b) That the trial magistrate erred in awarding the claim for loss of future earnings.

5. Two Appeals were filed herein and were later consolidated. The consolidated Appeals were canvassed by way of written submissions.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. The 1st Respondent, Anthony Kinyanjui Kariuki (PW2) who was the Plaintiff in the lower court gave evidence that due to the injury on his right leg, he was out of work for one year and six months. He further testified that as a matatu driver, he used to earn Ksh.1,000/= per day. He produced the P3 Form as exhibit. His further evidence was that he had no documents to prove his earnings and stated that no such documents are issued in the matatu business and that he signed a credit form at Kenyatta National Hospital and the bill was to be paid later.

8. Two medical reports were produced as exhibits. Dr. Washington Wokabi (PW1), a Consultant Surgeon described the 1st Respondent’s injuries in the report dated 19th July, 2014 as compound open fractures of the right tibia and fibula. That treatment included surgical toilet to immobilize the fractures and metal external fixators. That antibiotics for the infected fractures were also given. No permanent incapacity was assessed. A re-examination was recommended in 10 – 12 months. The resumption of duties as a driver was not recommended before then.

9. A second medical report dated 1st July, 2014 by Dr. Leah Wainaina was produced by consent. The same reflects a fracture of the right mid third tibia and fibula. That treatment included surgical toilet and admission was from 11th January, 2014 to 22nd January, 2014. That no permanent incapacity was expected and no future treatment was expected.

10. The Appellants counsel submitted that an award of Ksh,400,000/= as general damages was reasonable. The court was referred to several authorities with comparable injuries wherein the award of general damages ranges from the sum of Ksh.200,000/= to Ksh.700,000/=. These decisions were made between the years 2015 and 2018.

11. The 1st Respondent’s side supported the award of general damages made by the trial court. Several authorities were cited which reflect awards of between Ksh.600,000/= and Ksh.1,200,000/= between the years 2006 and 2018.

12. On behalf of the 2nd and 3rd Respondents, it was submitted that an award of between Ksh.300,000/= to Ksh.500,000/= is reasonable. The authorities referred to reflect awards of between Ksh.300,000/= and ksh.550,000/= during the years 2012 to 2018.

13. I have taken into account the passage of time and the incidence of inflation. I have also noted that in some of the decisions the counsel have referred to have more severe injuries than the case at hand while others have less severe injuries. The 1st Respondent recovered from the injuries without any complications or need for further treatment according to the medical reports produced. Taking into account that the injuries sustained by the 1st Respondent and further taking into account comparable injuries, I agree with the Appellants that the award made by the trial magistrate is on the higher side. I would assess the same at Ksh.600,000/=.

14. On the loss of earning capacity, the Court of Appeal in **S J v Francesco Di Nello & another [2015] eKLR** gave the exposition of the law as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in **Fairley v John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40** at pg 14 wherein Lord Denning M. R. said as follows:

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

(a) In the case of **Butler v Bulter [1984] KLR** where the court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

“i)...

ii) 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.”

(b) It was stated in the case of **Nzoia Sugar Company Ltd v Francis Wanalo [2017] eKLR**

“It is important to realize that there is a difference between an award for loss of earnings 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.”

15. The 1st Respondent pleaded loss of future earnings. He pleaded in paragraph No. 5 of the plaint that he was a Public Service Vehicle driver earning Ksh.1000/= daily. His oral evidence was that he earned 1,000/= per day and was out of work for eighteen months. The trial magistrate accepted this evidence and awarded the sum of Ksh.432,000/= calculated at 6 days per week for 18 months (Ksh.1,000/= x 6 x 4 x 18).

16. The Plaintiff's oral evidence that he was working as a matatu driver is uncontroverted. I find the 1st Respondent proved loss of future earnings. Under the Regulation of Wages (General) (Amendment) Order 2013, the minimum daily wages for a driver of a medium sized vehicle in Nairobi is Ksh.799.05. I round up the same to Ksh.800/=. I award loss of future earnings at Ksh.800/= per day for six working days per week for the estimated period of recovery given by the doctor. This works out as follows:

$Ksh.800 \times 6 \times 4 \times 12 = 230,400/=$

17. The award of Ksh.184,129/= for special damages was not contested.

18. The award of Ksh.184,129/= for special damages was not contested. The total comes to Ksh.1,014,529/=. Consequently, the Lower Court judgment is hereby set aside and substituted with a judgment for Kshs.1,014,529/= plus costs and interest. The Appeal having been partially successful, each party to bear own costs. The costs in the Lower Court remain with the 1st Respondent/Plaintiff.

Dated, signed and delivered at Nairobi this 26th day of Nov., 2020

B. THURANIRA JADEN

JUDGE