



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 54 OF 2019

EVANS JUMA OTWALA.....APPELLANT

VERSUS

JACKLINE KAZUNGU KAMBI.....RESPONDENT

(Being an appeal against the Judgment of Hon S. D. Sitati, Resident Magistrate Kilifi SPMCC No. 353 of 2018 dated 24th June, 2019)

Coram: Hon. Justice Nyakundi

Kittony Maina Karanja advocate for the appellant

M. S. Shariff advocate for the respondent

JUDGMENT

This is an appeal against the Judgment of the trial Court (**Hon. Sitati (RM)**) given on 22.6.2019 whereby he made the following declarations that Judgment be entered against the defendant for:

General damages for pain and suffering	Kshs. 850,000/=
Future medicals costs	Kshs. 100,000/=
Special damages	Kshs. 59,085/=
Loss of income and loss of future	
Earnings	Kshs. 2,038,000/=

The plaintiff was also awarded costs and interest of the suit. This order was made pursuant to a claim filed in Court on 5.10.2018 based on the tort of negligence loss and damage which arose out of an accident which occurred on or about the 10.2.2018. On account of that accident, it was pleaded that the plaintiff was lawfully travelling as a pillion passenger on board motorcycle registration number **KMEH 764H** along Mtwapa – Shanzu Road when the defendant authorized driver in control of motor vehicle registration **KBP – 737X** lost control and collided with the motorcycle carrying the plaintiff. The accident resulted in the plaintiff suffering personal injuries of **compound, comminuted fractures and displaced fractures and displaced fractures, loss of the talus bone on the left foot, compound dislocation of the left ankle joint and deep 7 x 3 cm cut wound on the left ankle.**

From the evidence before the trial Magistrate together with additional submissions the issues on liability and quantum were all decided in favour of the plaintiff. Aggrieved by the decision of the trial Court, the appellant appealed to this Court putting forward the following grounds of appeal:

(a). That the Learned Magistrate erred both in Law and fact by awarding a loss of income at Kshs. 238,000/= and loss of earnings capacity at kshs. 1,800,000/=.

(b). That the Learned Magistrate relied on the wrong principles in determination of the award for loss of income and loss of future earnings.

(c).That the Learned Magistrate erred in Law and fact in failing to consider the appellant submissions and authorities thereto while addressing assessment of damages.

In Law the Judgment of the trial Magistrate forms the decision of the Court regarding the rights and liabilities of the parties to the claim filed by the respondent to this appeal.

The appellant submissions

Learned counsel submitted that the main findings on the award of damages was not supported by any sufficient evidence. Learned counsel faulted the evidence relied upon by the trial Court a loss of earnings without proof on a balance of probabilities on the income of the respondent. The second issue equally argued by the appellant counsel is to the effect that loss of earnings capacity falls in the category of special damages to be proven strictly.

That standard of proof therefore was never discharged by the respondent before that trial Court. Learned counsel contention was to the effect that the respondent even failed to call a crucial witness from **Punda Mulia Paradise** to corroborate. The respondent assertion on employment and income earned. There is then the question raised by Learned counsel that the respondent used to be a business man trading in fruits from Tanzania which claim remained an assertion without proof and yet factored in by the trial Magistrate on loss of earnings.

The third issue Learned Counsel brought to the attention of the Court was in relation with lack of differentiation on applicable principles for loss of earnings and loss of future earnings capacity. This err according to Learned counsel occasioned a misdirection which in keeping with similar awards demonstrates a fundamental error in the final award.

In buttressing his arguments on both critical issues to this appeal Learned counsel cited and relied on the following authorities **Mumias Sugar Co. v Francis Wanato CA 911 2003 {2007} eKLR, John Kipkemboi v Morris Kidato {2019} eKLR, SJ v Francesco Dinello & Another {2015} eKLR, Keter Kemtai v Christopher Kamau {2018} eKLR, Magdalene Nzilau Mutende v Kennedy Mutwili {2019} eKLR, John Kibuchio Sharuna v Emmanuel Parsumu {2018} eKLR.**

In the sense of Learned counsel a finding on loss of income and loss of future earnings should be interfered with, varied, substituted or altogether set aside at the very least.

The Respondent Submissions

It was submitted by Learned counsel for the respondent that the trial Magistrate stayed within the bounds on loss of income and loss of future earning, award for the respondent. It was Learned counsel contention that the respondent was in active employment prior to the accident. This tragic incident happened at the age of 32 years old and therefore had an opportunity to work up to the age of 60 years.

Learned counsel further argued and submitted that for the trial Court to hold the multiplier of 10 years, it was to accord a fair and just compensation to the respondent for the and among capacity. On the authorities of **Luke Charles Musumba v Charles Munge {2017} eKLR, Mbogo v Shah {1968} EA 93, John Kipkemboi & Another v Morris Kedolo (supra), Bashir Ahmed Butt v Ahmed Khan {1982-88} KAR.**

Learned counsel urged this Court to apply the legal principles governing assessment of damages and the limiting jurisdiction of an appeal court to interfere with such an award.

He therefore stated that the evidence and the impugned Judgment has not shown any err, misdirection or taking into account irrelevant matters in the assessment of both limbs of damages.

Determination

Issues for determination

The duty of an appellate Court is well set out in the case of **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another CA No. 345 of 2000** where the Court held:

“As a first appellate Court we are not bound by the findings of fact made by the superior Court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O’Connor P. stated in Peters v Sunday Post Ltd {1958} EA 424, at Pg. 429:

“It is a strong thing for an appellate Court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness.” This Court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.” (See Ephantus Mwangi & another v Wambugu {1983} 2 KCA 100.) or in accordance with the principles and guidelines in Robert Nsioki Kitavi v Coastal Bottlers Ltd {1982} – 198 IKAR 891 – 895

“The appellate Court will only interfere with a trial Judge’s assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate.”

It is now settled Law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of Law and facts and come up with its findings and conclusions. (**Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424**) The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- (i). **First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
- (ii). **In reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
- (iii). **It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.**

These three principles are well settled and are derived from various binding and persuasive authorities including;

- (a). **Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);**
- (b). **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); Virani T/a Kisumu Beach Resort v Phoenix of East**
- (c). **Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)**

I stand by the **Court of Appeal for East Africa in Peters v Sunday Post Limited {1958} EA 424** where **Sir Kenneth O’Connor** stated as follows:

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1) {1947} A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate Court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of Law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of Law) the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

The test is for the Appellant Court to evaluate the evidence by subjecting it to a fresh scrutiny bearing in mind that inferences on demeanor, veracity and reliability of witnesses and the discretion to place reliance on one or either of orders remains a preserve of the Trial Court.

In the instance case from the grounds of appeal, it is clear that the applicant is aggrieved with the assessment of less of income and loss of earnings capacity.

As regards the different methods for quantifying loss of earnings capacity, the Court in **Archer Ebanus v Japhther Mclly Mouth Civil 2004 HCv R172** explained as follows:

- 1. If the Claimant is working at the time of the trial and the risk of losing the job is low amount then the lump sum methods is more appropriate and the record should be done.**
- 2. If the Claimant is working at the time of the trial and if there is a real serious risk of losing the job and there is evidence. That if the current job is lost there is high probability and the Claimant will have difficulty procuring an equally paying or better paying job, then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influential by the time at which the risk may materialize.**
- 3. If the Claimant is a high income earner, the multiplied/ multipliable method may be more appropriate.**
- 4. The lump sum is not determined by reference to any comparison with previous cases.**
- 5. If the Claimant is not working at the time of the risk and the unemployment were as a result of the loss of earning**

capacity.

Then the multiplier/multiplicable method ought to be used if the evidence shows that the Claimant is very unlikely to find any kind of employment.

The Court therefore may award compensation under this head as such for loss of earnings capacity as a result of the loss or injury resulting from the wrong complained of against the defendant.

As stated in *Ilkida Osbourne v George Barsed & Another JMCA 2006* he said this: -

“In the case before me, the evidence is that Miss Osbourne has lost her job because she could no longer carry out the duties and responsibilities of a practical nurse. Her employer’s told her that that was the reason for not continuing her employment. So the risk materialized within six weeks of the accident.

What is clear is that she no longer work at jobs that require much lifting, bending or sitting. She can no longer work as a practice nurse or even a household helper. She testified that even when she stands for long periods, she experiences much discomfort.

Miss Osbourne testified that although she has the skills of a senior staff, she cannot utilize them because she suffers pain in her neck and back. If she sets up for long period, she says pain comes along. I am satisfied that Miss Osbourne should receive an award of loss of future earnings capacity.”

From the above passage, the predominant purpose for compensation is to cushion the Claimant and entitle her or to continue enjoying the existence of his or her socio-economic rights.

The duty of the Claimant is to make a full and fair disclosure of all the material facts as they relate to loss of income and or loss of future earning capacity. The extent of the award will therefore depend on all the circumstances of the case including the nature of injuries with a probable effect to impair the Claimant from continuing his or her normal duties as an employee or carry out the income generating activities.

In *Patrick Chupson v Everlin Eucal Smith & another (2013) JMCA Morrison JA* stated as such

“Therefore, once the Judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the Court.”

Among the factors to be taken into account are the factual circumstances of the Claimant, including the nature of his injuries. Although the Claimants employment stands at the time of trial is not a bar to recovery, it may have obvious effect on the kind of information that he is able to put before the Court with regard to his income and employment prospects for the future.

Where there is evidence to support its case, the multiplier/Multiplied method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity. This is hardly an exhaustive list and additional or different facts will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer importance and helpful guidance as to the correct approach, the individual circumstances of each Claimant must be taken into account.

It suffices to state that the comparative precedent setting cases bring to the fore the cornerstone of granting reliefs under loss of income and loss of future earnings capacity with regard to other issues. The Court in *Cecilia W Mwangi (1997) EKLR* held a 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.

At the root of the issue is for the trial Court to differentiate the discerning characteristics between loss of earning capacity and loss of future earnings.

The domain of the principles are stated in *SJ v Franscesco Di Nello & Another (2005) eKRL*. Where the Court of Appeal held as follows:

“Claims under the leads of loss of future earning capacity are discretionary 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 domination in earning capacity in earnings 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”

The same principle appears in the *Fairley v John Thomson Ltd (1973 2 Lloyds Law Report and Mumias Sugar Company Ltd v Francis Wanalo (2007) eKLR*.

For purposes of assessment of damages under these two limbs, it is clear that future loss of income is uncertain and has to be estimated, whereas loss of income after the occurrence of a tragic event is calculated upto the date of trial and conclusion of the suit.

In reference to the instant appeal, Learned Counsel for the Appellant contended that though a payslip bearing earnings of Kshs 15,000 was produced by the Respondent, it would have been appropriate to call the representative from **Panda Mulia Paradise** for purposes of corroboration. Learned Counsel argued and submitted that the claim for loss of earnings was never strictly pleaded and proved by the Respondent.

I have reviewed the evidence and set of facts as laid before Court by the respondent. As a Court, I have to contend with the jurisdiction of an appeals expressly defined in **Peter V Sunday Post Ltd (1958) EA 424**. The discretion as to whether or not to set aside a Judgment of the trial Court is governed by the principles in **Mbogo vs Shah C (1968) EA 93** to wit.

“The appellate Court will not interfere with exercise of discretion unless it is shown that the Lower Court took into account an irrelevant matter which he ought not to have taken into account or that he failed to take into account a relevant matter which he ought to have taken into account or that he has plainly gone contrary in his consideration of the issues raised before him.”

In the case at bar the Respondent gave evidence as to his personal circumstances and employment history. Although, a representative of **Panda Mulia** was not summoned as a witness, the documentary evidence by way of a Payslip constituted material and admissible evidence to prove existence of fact on employment under Section 107(1) of the Evidence Act.

The discretion exercised by the Learned Trial Magistrate to admit the payslip without calling the employer is a latitude which has not been shown to fall within the ambit in **Mbogo v Shah Supra** to permit interference from the court. That the Respondent earnings stood at Kshs 15,000/- was never controverted by the Appellant with equal measure of evidence.

In allowing the Claim for loss of earning, it is on record that the Respondent pleaded loss of income and loss of future earnings pegged at a salary of Kshs 15,000/-. The principle which should guide the Court is whether there is a specific plea for special damages in the Plaintiff. It is duty for the Claimant to prove the precise mathematical calculation of the loss within which an assessment has to be compensated by the Court. The essence of pleas.

This perspective leads me to find that there is no error apparent on the face of the record or misdirection of fact or Law in awarding damages of loss of income of Kshs 238,000/-. That is the loss that the Respondent suffered specifically. There was evidence before the Learned Trial Magistrate of what period the Respondent was put out of employment due to the injuries as opined in Osborne case cited elsewhere in this analyses. The ground of appeal fails.

I now come to the issue of loss of future earnings capacity. Learned Counsel for the Applicant argued that the Respondent could not be entitled to damages of Kshs 1,800,000/- had the Learned Trial Magistrate not proceeded on wrong principles when making the award of the court.

The best evidence in this respect would be evaluating the testimony by the Respondent and the Medical Legal Report on prognosis and residual disability on the Respondent capacity to be in active employment following the injuries.

I refer to the case of **Livingstone v Ronoyard’s Coal Co (1880) 5 APP case 259** deponed such measure of damages as follows: -

“That sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

See also **British Transport Commissioner v Gourbey (1956) AC 185** where the Court held

“If the plaintiff had not been injured, he would have had the prospects of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened.

In many cases the amount of that income may be doubtful even if he had remained in good health and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between date of the trial may be certain but his prospective losses not. Such damages can only be an estimate, of the present value of his prospective loss.”

The crucial aspect of this appeal is whether the estimate of prospective loss based on income of Kshs 15,000/- and a multiplier of 18 years adopted by the Learned Trial Magistrate can be described as erroneous manifesting excessive award on the loss of future earnings capacity. In my considered view I do think so.

It is also clear that the Respondent was born in 1986 and therefore at the time of the accident she was a young lady full of vitality working in the hospitality industry. The amount earned before the injury is ascertainable. The respondent earnings can be mathematically computed to the last coin.

In answer to the issue of an assessment of damages for future earnings, the method of assessment falls into two categories. First a lump sum estimate or application of a multiplier/Multiplicand approach. According to the medical assessment by the Doctor who examined the Respondent she did suffer severe and post traumatic permanent disability of 35% of the whole being and wellness.

The effect of this was properly captured by the Learned Trial Magistrate and the likely hindrances for the Respondent’s performance in her profession as a receptionist. That pecuniary loss to me cannot be described as subjective or speculative to say the least. That the Respondent

would have been in active employment even beyond the retirement age of 60 years in the public service would not also be ruled out as observed by the Learned Trial Magistrate.

In my view the approach taken by the Learned Trial Magistrate in calculating the monetary loss of such formula of multiplier/multiplicand is not perse misdirection or error of fact or law.

In this case, the substantive arguments on appeal has only succeeded in showing the exercise of discretion by the Learned Trial Magistrate remains un impeachable on the basis of the law and reasons given in the impugned Judgment. Indeed, the proceedings in regard to loss of future earnings appears to be in tandem with the current grinding principles on this legal aspect.

The upshot of this is that this appeal is dismissed with costs payable by the Appellant to the Respondent.

Judgment delivered, dated and signed at Malindi this 18th day of December , 2020.

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R. NYAKUNDI

JUDGE