



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 30 OF 2016**

**GITAU PERIS alias PERIS GITAU WAMBUI.....APPELLANT**

**VERSUS**

**GERALD NJOROGE CHEGE.....RESPONDENT**

*{Being an appeal against the Judgement of Hon. J. O. Oseko – SPM dated and delivered on the 2<sup>nd</sup> day of August 2016 in the original Kiambu Chief Magistrate’s Court Civil Case No. 225 of 2015}*

**JUDGEMENT**

By a plaint dated 18<sup>th</sup> August 2015 filed in the Chief Magistrate’s Court at Kiambu on 26<sup>th</sup> August 2015 the respondent sued the appellant claiming general damages for injuries sustained by himself following a motor accident involving the appellant’s motor vehicle Registration No. KBJ 022V and himself. He alleged to have been lawfully walking/standing off the road at a place called Ndumberi when the vehicle veered off the road and hit him occasioning him serious injuries. He attributed the accident to the negligence of the driver of the vehicle.

The claim was vehemently resisted but upon the same going to full hearing the trial Magistrate found the appellant wholly liable and awarded the respondent damages as follows: -

<b>“(i) General Damages</b>	<b>– Kshs. 900,000/=</b>
<b>(ii) Loss of future earnings</b>	<b>– Kshs. 2,688,000/=</b>
<b>(iii) Future medical expenses</b>	<b>– <u>Kshs. 150,000/=</u></b>
<b>Total</b>	<b>– <u>Kshs. 3,762,000/=</u></b>

Being aggrieved the appellant preferred this appeal to challenge both liability and the quantum of damages. The appeal is premised on the following grounds: -

**“1. That the learned magistrate erred in Law and in fact in finding that the defendant was 100% liable for the deceased fatal injury in view of the plaintiff’s evidence on record.**

**2. That the learned magistrate erred in Law and in fact in failing to apportion liability and disregarded the defendant's submissions while arriving at his judgment.**

**3. That the learned magistrate misdirected himself in Law and in fact in failing to note that the plaintiff failed to proof particulars of negligence pleaded in the plaint and failing to appreciate the fact that the deceased was a pedestrian and owed a duty of care while walking on the road.**

**4. THAT the learned magistrate erred in law and in fact in holding that the defendant was to blame for the occurrence of the suit accident contrarily to trite rule of evidence that allegations of negligence must be proved strictly which the plaintiff didn't.**

**5. THAT the learned magistrate erred in law and in fact in holding that the plaintiff had strictly proved his allegations of the negligence yet the factual evidential materials and testimonies before him did not amount to the same nor support and justify such a holding.**

**6. THAT the learned magistrate erred and misdirected himself in law and in fact in failing to apportion liability taking into**

account the totality of evidence both oral and documentary before him

7. **THAT the learned magistrate erred in Law and fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs. 900,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the plaintiff herein.**
8. **THAT the learned magistrate erred in Law in making such a high award as to show that the magistrate acted on a wrong principle of law.**
9. **THAT the learned magistrate's award on damages was so high as to be entirely erroneous.**
10. **THAT the learned magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.**
11. **THAT the learned magistrate erred in Law and Fact in awarding the plaintiff a sum of Kshs. 2,668,000/= for loss of future earnings which was not specifically pleaded and proved so as to amount to a miscarriage of justice.**
12. **THAT the learned magistrate erred in Law and fact in awarding loss of future earnings based on 100% disability and failed to take into account that the plaintiffs permanent disability was not 100%**
13. **THAT the learned magistrate erred in Law and fact by awarding special damages and future medical expenses contrary to trite Law that the same must be specifically pleaded and proofed.**
14. **That the whole judgment on quantum and special damages was against the weight of evidence before the court.”**

This appeal was consolidated and was supposed to be heard together with Kiambu HCCA No. 31 of 2016. However, due to an oversight Counsel for the appellant did not file submissions in HCCA No. 31 of 2016 but instead filed the submissions of this case thereat. In the premises whereas my findings on liability in this appeal shall also apply to HCCA No. 31 of 2016 the appeal on the assessment of damages shall be confined to this appeal.

As noted above this appeal proceeded by way of written submissions. I have carefully considered the rival submissions, the cases cited and also reconsidered and evaluated the evidence in the trial court so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses (*See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*).

On liability the respondent pleaded that he was lawfully walking/or standing off the road when the appellant's motor vehicle veered off the road and knocked him down. He faulted the appellant's driver for inter alia, driving at an excessive speed, driving without due care and attention, failing to swerve, manage or control the motor vehicle so as to avoid the incident and failing to have regard for the safety of other road users. At the hearing he gave evidence that he and his cousin one Gerald Njoroge Njeri were walking home and were on the road side on the left Limuru-wards. He stated that the road was tarmacked and his cousin was ahead of him. He stated that he saw a vehicle which was coming from the opposite side of the road cross the road and hit his cousin before hitting him. It was his evidence that the vehicle was being driven at a very high speed and they did not therefore get a chance to escape from it. He blamed the driver for veering from the vehicle's side of the road and finding them off the road where they were. In cross examination he reiterated that the vehicle left the road and did not stop. He also stated that the road was straight and that the vehicle was very near when he saw it for the first time. Police Constable Fayu Ali testified in the case as Pw3. It was his evidence that he visited the scene after receiving a report of the same from Peris Wambu Githura (the appellant). He blamed the appellant for the accident and gave his reasons for doing so as, first, the absence of skid marks which would demonstrate that she attempted to avoid the accident and secondly for failing to observe the speed limit for a residential area. He stated that it was evident from the extent of the damage to the vehicle that the driver's speed was high. It was also his evidence that the vehicle left its side of the road and veered to the side where the victims were on the right. Although in her statement of defence the respondent denied the particulars of negligence attributed to her in the plaint, she did not adduce any evidence at the hearing. The evidence adduced by the respondent was therefore uncontroverted. Her advocate submitted that negligence was not proved as there was no evidence that the respondent was off the road. Counsel also pointed out that there was contradiction between the evidence of the respondent and his witness as to where the accident occurred. Counsel contended that there was evidence that the accident occurred inside the road and the respondent should therefore shoulder 50% contributory negligence. I am not persuaded that that ought to be so. This is because there is cogent and uncontroverted evidence that the appellant veered from her side of the road and crossed to the opposite side hence hitting the respondent. In my view whether the accident was on the road or off the road is in the circumstances of this case immaterial. The fact is that the vehicle left its side and veered to the side where the respondents were and hit them while they were lawfully using the road as pedestrians and who in my finding did not do anything to contribute to the accident. The allegation that the respondents were on the road is in any case a statement from the bar but not evidence and cannot negate the evidence of the respondents herein that they were walking beside the road. The trial Magistrate relied on the evidence before her to arrive at the finding on liability but not on the traffic case preferred against the appellant. The argument based on the case of *Lilian Birir & another v Ambrose Leamon [2016] eKLR* that a conviction for a traffic offence is by itself not conclusive proof of negligence does not therefore apply to this case. The respondents in this appeal adduced evidence which proves negligence against the appellant on a balance of probabilities. I find nothing in the evidence to attribute contributory negligence to the respondents and accordingly find the appellant wholly liable and hence uphold the finding of the trial Magistrate.

In regard to the quantum of damages the principle that should guide this court is that I ought not to interfere with the trial Magistrate's assessment of damages unless it is demonstrated either that the Magistrate acted on a wrong principle of law, or mis-apprehended the facts or the award is so inordinately high or so inordinately low as to represent a wholly erroneous estimate of the damage (*Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No. 2) [1987] KLR 30*). The injuries sustained by the respondent were: -

- **Head injury with deep cut wound right occipital scalp.**
- **Laceration wound right shoulder.**
- **Blunt trauma with swelling left hand.**
- **Compound fracture right tibia/fibula.**

At the hearing Dr. Moses Kinuthia confirmed the above injuries and stated that at the time of examination the respondent was walking with a limping gait on the affected leg, that the right leg was shorter than the left by 0.5cm the reason being that although the fractures had healed there was a malunion. He also opined that the respondent would require surgical correction at an estimated cost of Kshs. 150,000/=. He assessed permanent incapacity at 30%.

It is trite that similar injuries should attract comparable awards. Although the trial Magistrate stated that in arriving at the quantum of damages she considered past awards she did not cite any cases in her judgement. On my part I am persuaded that the respondent sustained injuries similar to those of the plaintiff in the case of **Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR** to who general damages of Kshs. 700,000/= were awarded for pain and suffering. It is my finding therefore that the award of Kshs. 900,000/= under that head was high and the same shall be set aside but considering that the respondent suffered 30% incapacity and the passage of time it shall be substituted with one for Kshs. 800,000/=. The proposal of Kshs. 500,000/= by Counsel for the appellant is too low considering the respondent suffered 30% permanent incapacity.

The future medical expenses and the special damages shall remain undisturbed as those were strictly proved.

The award for loss of future earnings cannot however stand for the simple reason that damages for loss of future earnings are not damages at large being that the same are capable of being quantified and hence must be specifically pleaded and strictly proved to be awarded. They are unlike damages for loss of earning capacity – *see the case of Fairley v John Thompson Ltd [1973] 2 Lloyd's Rep. 40 at page 41* cited with approval by the Court of Appeal in **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** where Lord Denning MR stated: -

***“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.”***

The respondent did not specifically plead and strictly prove the sum of Kshs. 2,688,000/= awarded to him as damages for future earnings and that award is therefore set aside. I however find that he is entitled to damages for loss of earning capacity. The doctor confirmed that even after healing he could only attain 70% working capacity. It is my finding that this will certainly affect his earning capacity. In the case of **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** the Court of Appeal stated: -

***“From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”***

Clearly therefore the respondent is entitled to damages for diminished earning capacity. Doing the best I can but considering that the respondent still has 70% working capacity, for loss of earning capacity I award him damages in the sum of Kshs. 600,000/=.

Accordingly, judgement in his favour shall now be as follows: -

<b>(i) Liability 100%</b>	
<b>(ii) General damages for pain and suffering</b>	<b>– Kshs. 800,000/=</b>
<b>(iii) General damages for diminished earning capacity</b>	<b>– Kshs. 600,000/=</b>
<b>(iv) Future medical expenses</b>	<b>– Kshs. 150,000/=</b>
<b>(v) Special damages</b>	<b>– <u>Kshs. 24,000/=</u></b>
<b>Total</b>	<b>– <u>Kshs. 1,574,000/=</u></b>

**(vi) Interest on special damages from the date of filing suit and on the general damages and future medical expenses from the date of judgement in the trial court.**

**(vii) Costs of the suit in the trial court.**

Costs follow the course but as the appellant has succeeded only partially I order that each party shall bear their own costs. It is so ordered.

**Signed and dated in Nyamira this 16<sup>th</sup> day of December 2020.**

**E. N. MAINA**

**JUDGE**

**Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18<sup>th</sup> day of December 2020.**

**MARY KASANGO**

**JUDGE**