



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 132 OF 2016

NIHON COMPLEX LTD.....1ST APPELLANT

THOMAS NJOROGE KIRIMA.....2ND APPELLANT

VERSUS

JOSEPH KIPLAGAT TOWETT.....RESPONDENT

(Appeal from the Judgment of Honourable B. Maroro, Principal Magistrate delivered on the 28th September, 2016 in Nakuru CMCC No. 680 of 2013)

JUDGMENT

1. The Respondent was injured in a traffic road accident on the 16th March 2013 involving the appellants motor vehicle Reg. No. KBR 745F and his motorcycle wherein he was the rider. He sued the Appellants for compensation in damages for pain and suffering alleging negligence by the Appellants driver, the 2nd Appellant.

2. Upon hearing of the case the trial magistrate apportioned liability at the ratio 80:20 in favour of the Respondent and awarded damages for pain and suffering at Kshs.4,000,000/= special Damages of Kshs.188,190/=and damages for loss of earning capacity of Kshs.3,360,000/=.

3. This appeal is against the above award as being inordinately too high. The parties have filed written submission on the appeal.

Quantum of damages

Dr.Wellington Kiamba in his report on the Respondent's injuries dated 25th May 2013 tabulated them as:

- Traumatic severance of cervical vertebral column (Burst comminuted fracture of vertebrae C7 and T1 with grade 3 spondylosisthesis with resultant quadriplegia
- Soft tissue injuries to the chest, hip joints and lower limbs.
- Admitted for a month.

Complaints - Reduced sensation in upper and lower limbs

- Weakness of right upper limbs
- Painful left hip joint-walk with one crutch
- Stiffness of neck
- Not fully recovered
- Permanent disability assessed at 40%.

4. In the trial court the Appellants proposed a sum of Kshs.350,000/= citing 1993 and 1996 authorities.

The Respondent suggested Kshs.6 Million Citing 2015 decisions.

I note that the Record of Appeal does not have the Respondents/Plaintiffs submissions before the trial court nor the copies of the cited authorities.

5. Issue for determination

Whether the trial court's awards on damages are inordinately high as to call for interference by this court.

6. General damages for pain and suffering

The principles to be observed by an appellate court whether to interfere with a trial court's discretion in disturbing an award of damages are stated in **Kemfro Africa t/a Meru Express Services –vs- A.M Lubia & Another (1987) KLR 27**

(1) Either that the judge took into account an irrelevant factor or left out of account a relevant one.

(2) That the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages.

(3) That the trial court misapprehended the principles applicable in the assessment of damages Kemfro Africa...

There is no doubt that the Respondent injuries are serious.

7. An award of damages is at the court's discretion, but such discretion ought to be exercised judiciously and with reason.

In his Amended plaint dated 27th July 2014 the Respondent pleaded special damages of Kshs.149,800/= and sought general damages for pain and suffering, loss of earning capacity and loss of earnings and future medication.

8. In his judgment the trial magistrate while awarding the damages was persuaded by the case **Joyce Wangeci Richard –vs- Millie Trofan (2014) e KLR and Richard Mutinda Mwaniki (2014) KLR** where awards of Kshs.3,500,000/= and Kshs.3,200,000/= were made respectively.

9. **Section 78)2) of the Civil Procedure Act** enjoins the court to assume its original jurisdiction and re-assess the damages.

In **Millicent Atieno Ochuonyo –vs- Katola Richard (2015) e KLR**, for injuries to the pelvic with fracture of right pubic ramus and diastasis of the symphysis pubis, a sum of Kshs.3,000,000/= Million was awarded in May 2015.

In **Florence Hare Mkaha –vs- Pwani Tawakal Mini Coach & Another (2012) e KLR** an - award of Kshs.2,400,000/= for fractured right acetabulum and fracture of lateral condyl of femur and dislocation of left knee.

10. Further in **Georgina Wangari Mwangi –vs- David Mwangi Muteti (2014) –vs- David Mwangi Muteti (2014) e KLR**, the court awarded Kshs.7 Million for similar injuries while in **Civil Appeal No. 322/2012 Gabriel Kariuki Kithi –vs- Monica Wangui Wangethi (2016) e KLR** with fracture of the neck, bilateral rib fractures bilateral lung contusion injuries to both legs and numerous soft tissue, injuries, the court awarded Kshs.400,000/=.

11. In **Sabina Nyakenya Mwangi –vs- Patrick Kigoro & Another (2015) e KLR** the court awarded Kshs.3 Million for multiple soft tissue injuries fracture of right upper arm, fracture to the distal femur and right knee, pelvis and distal radial – wrist.

In the **HCCC No. 86 of 2008 Joseph Musee Mua –vs- Julius Mbogo Mugo & 3 Others**, the court awarded Kshs.2.5 Million for fractures to the tibia & fibula with shortening of the leg nerves, with soft tissue injuries.

12. In **Patrick Mwangi Irungu –vs- Charles Macharia & Another, NKU HCCC No.188 of 2005 (2008) e KLR** the plaintiff who sustained paraplegia secondary to fracture of the T-12 and LI vertebra was awarded Kshs.1,500,000/= in 2008.

13. The appellant did not submit on his claim that the sum of Ksh.4,000,000/= Million for pain and suffering was inordinately high.

Having considered the above authorities, I am persuaded that the award of Kshs.4,000,000/= Million on this head is inordinately high to be a realistic and reasonable estimate of the damage. Guided by the authorities I have cited I set aside the award and substitute it with an award of Kshs.1,800,000/= damages for pain and suffering. This is informed by the fact that the authority cited above, the plaintiffs injuries were more serious and the post injury effects more severe than the Respondents.

14. Damages for loss of earning capacity and loss of Earnings

An award for **loss of earning capacity** is made when the party claiming was employed at the time of the accident and at the time of trial.

15. The Court of Appeal decision in **Mumias Sugar Co. Ltd –vs- Francis Wanalo (2007) e KLR**, rendered that

“--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 the case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award when the plaintiff is not employed at 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 and suffering and loss of amenities or as a separate head of damages.”

16. The court rendered further that

“...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 approximate financial loss that the plaintiff has suffered as a result of the disability..”

17. I have looked at the Respondents evidence and the medical report.

The Respondent testified that at time of trial he was not working but before he used to carry vegetables and potatoes using a bicycle from Mauche to Njoro, getting Kshs.1,200/= per day. He testified that after the accident he could not work due to the injuries, could not bend or hold a *jembe* to dig.

18. The trial magistrate captured the above evidence in his judgment and adopted a sum of Kshs.1,000/= per day for 20 days in a month in respect of loss of earnings thus 20,000/= per month and also applied 14 years as the multiplier, stating that the Respondent could have worked upto 60 years and thus arrived at loss of earnings at

Kshs.20,000 X 14 X 12 = 3,360,000/=.

19. The appellant has urged that the trial magistrate calculated this head of damages as if the Respondent was dead. That is the impression created in the judgment.

20. However and as stated in the above Court of Appeal decision in **Mumias Sugar Company (Supra)** the trial court erred by not applying the correct legal principles.

21. The disability no doubt exposed the respondent to the loss of job as he could not bend or dig the work the respondent essentially used to do prior to the accident.

Though the income was not strictly proved it is now common practice that non production of documents to prove income is no longer the only way to approve an income. His testimony that he was working and earning an income of KShs.1,200/= per month was not challenged.

22. Nevertheless I find that the trial magistrate ought to have reverted to the Government minimum wages guidelines to come to a more realistic estimate of income. The Respondent was 36 years old at time of accident. The Doctor in his report did not state that the Respondent would never recover from the cervical spine injury which reduced sensation on his limbs.

23. Considering the above circumstances the respondent may not have the same working capacity and energy for the rest of his life but whatever he could do would be diminished and that would go into reduced earnings. There being no formula for assessment of the damages under loss of earning capacity, and guided by the justification stated in the **Mumias Sugar Company** case (Supra), and having stated that other ways of proving income are available, I find that the income amount applied by the trial court to have been unrealistic, as not been commensurate with the kind of work the respondent was doing.

24. I therefore set aside the said awards and substitute them with an income of Kshs.500/= per day for 20 days per month thus Kshs.10,000/= and a multiplier for the incapacitation/loss of earning capacity for a reasonable period of 10 years thus compute the damages at

Kshs.10,000 X 12 X 10 = 1,200,000/=.

25. My findings are buttressed by the fact that the respondent was a handcart pusher and being a cyclist and the chances of getting a better job is very diminished and as stated in the doctor's report. The injury had affected functionality of his neck, upper limbs and the cervical spine.

26. Special damages

What is pleaded in the plaint is special damages of Kshs.149,800/=.

It is trite that special damages must not only be pleaded but also strictly proved.

The Respondent's bundle of payment receipts (**PExt.16**) have not been filed with the Record of Appeal. In his testimony, he stated that the bundle of receipts amount to Kshs.181,590/=. No prove was adduced of the Kshs.181,590/= nor it is pleaded. The trial magistrate therefore erred in law by awarding the sum of Kshs.181,590/= when it was neither pleaded nor proved.

I set aside and substitute the award of special damages with Kshs.149,800/= as pleaded and proved.

27. In its totality the Appeal succeeds. The final findings are therefore as hereunder:

1. General damages for pain and suffering and loss of Amenities - Kshs.1,800,000/=

2. Damages for loss of future earning capacity - Kshs.1,200,000/=

3. Special damages - Kshs. 149,800/=

Total - **Kshs.3,149,800/=**

The above sum is subject to 20% reduction on contributory negligence. That leaves the Respondent with **Kshs.2,519,840/=**.

28. Interest at court rates on the above sum shall accrue from the date of the trial courts judgment.

Costs are awarded to the Appellant.

Dated, signed and delivered this 28th Day of February 2019.

J.N. MULWA

JUDGE