



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 9 OF 2017

(Appeal originating from the Judgment of Hon. V.WAKUMILE PM at Nakuru in civil case Number 547 of 2017)

HAMO TRANSPORTERS COMPANY LTD.....1ST APPELLANT

ABDI OMAR.....2ND APPELLANT

=VERSUS=

DORCUS WANGUI KIRIRO.....RESPONDENT

J U D G M E N T

INTRODUCTION

This appeal arises from Civil Suit No.546 of 2015 filed by the respondents against Appellants seeking general and special damages for injuries sustained on 23rd January 2015. Liability was agreed at 75%:25% in favour of the appellant. Judgment on quantum was delivered on 8th December 2016.

The appellant was dissatisfied with award Kshs 600,000 to the respondent for loss of earning capacity and filed this appeal on the following grounds:-

1. That the trial court erred in awarding the plaintiff costs for hiring a domestic house help when no evidence was adduced to justify the award; that the medical evidence adduced did not establish degree of leverage
2. That the trial court made awards, which are duplicated. Unprincipled and untenable in law
3. That the judgment is unreasonable and contrary to law, principle and facts of the case.

The appellant urged the court to review and/or set aside the judgment and substitute with reasonable judgment upon evaluating evidence on record.

APPELLANT'S SUBMISSIONS

Counsel for the appellant submitted that the appellant was a lawful passenger aboard motor vehicle registration number KBN 436D Toyota that collided with motor vehicle registration no.KAX335V-ZD1909 TRAILER owned by 1st appellant and driven by 2nd respondent along Nairobi-Nakuru road.

In respect to 1st ground of appeal, the appellant argued that the respondent failed to prove she operated shop business and further, that as a result of the injury the respondent cannot work as a shopkeeper.⁷

Appellant further submitted that in her testimony the respondent could not recall when she last went for physiotherapy, which means she had fully healed; and that she testified having fully regained use of her right hand after 4 months.

The appellant argued that two medical reports by the respondent contradict each other as one assess incapacity at 30% while the other 15%. He urged the court to take judicial notice of the fact that in her own evidence in court, the respondent affirmed that after 4 months, she had regained full use of her right hand.

The appellant cited **Nakuru civil Appeal no.206 of 2015 Farah Award Gullet vs CMC Motors Group Limited**

RESPONDENTS SUBMISSIONS

In response to the first ground the respondents argued that claim for loss of earning capacity fall within the realm of general damages as opposed to loss of earnings/income which is special damage claim. Respondent cited the case of **Mumias Sugar Company Limited vs Francis Wanalo [2007] eKLR** Where the court of appeal held 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 future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proceed by evidence. Compensation for diminution in earning capacity is awarded as part of general damages...”

Respondent argued that this case is distinguishable from the case of **Joseph Moreka vs Telkom Kenya** and **Farah Awad Gullet vs CMC Motor Ltd** relied on by the appellant to challenge the trial court’s decision as they relate to claims for future earnings/income which are special damages.

Respondents further submitted that loss of earning capacity are awardable whether the claimant is employed or not and hence proof on income or employment is not a condition precedent for award of such damages.

He argued that award for loss of earning capacity are awardable upon proof of reduced/diminished capacity to earn and not only when claimant has suffered 100% permanent disability.

He further argued that proof of loss of earning capacity is not only by medical report but also by other sufficient evidence available including testimony and condition of claimant. He cited the case of **Peter M. Mailany v Mohamed Hassan Musa** where the court held that a court may proceed to assess general damages in the absence expert evidence if there is any other admissible evidence before it, which prove the nature of injuries on the required standard.

Further in the case of **Henry Binya Oyala v Sebera O.Itira [201] eKLR**, the court held that, the evidence of a doctor who prepared medical report is not mandatory and that the primary source of information about injuries sustained is by the victim himself; that the information of the victim is valuable and is complimentary to the doctor’s report.

The respondent’s contention is that denying the respondent award for loss of earning capacity due to variance in assessment of percentage of incapacity by the 2 doctors has no basis in law.

Counsel for the respondent submitted that the respondent was very categorical in her evidence that her right hand was completely deformed and has lost use in household chores.

As to whether enough evidence was adduced counsel for the respondents submitted that in addition to medical reports and testimony of respondent, the court made observation that the respondent cannot perform chores without assistance of a help; and that award of Kshs 600,000 under this head was reasonable.

As concern duplicity of award, the respondent submitted that it is settled law that court can award jointly or separately. He relied on **Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR** where the court of appeal restated the holding in **Butler V Butler [1984] KLR 225** Where the Court of Appeal reviewed English cases and concluded that damages for loss of earning capacity can be awarded separately from award for pain and suffering. In that case, the court awarded under two separate heads to a lady who had been severely injured in a road traffic accident.

In conclusion, the respondent submitted that the trial magistrate considered pleadings, law and evidence in arriving at the judgment, which is reasonable and proper.

ANALYSIS AND DETERMINATION

I have considered submissions by parties herein. I have also perused the court record and authorities cited.

What is issue is whether the trial magistrate was justified in awarding the respondent Kshs 600,000 under loss of capacity to earn being the cost for hiring domestic help. The appellant’s argument is that the award should have been taken care of under the head of under pain and suffering.

This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do bearing in mind the fact that unlike the trial court, I never had the opportunity to hear evidence first hand and observe demeanor of witnesses.

From record, it is not in dispute that the respondent sustained injury to the right hand. It is not also in dispute that she suffered percentage of incapacity. The two medical reports give varied percentage of incapacity one 15% and the other 30%.

There is no doubt therefore that the medical report produced by plaintiff confirmed incapacity. What was not ascertained is the percentage of incapacity. That aside while testifying in court the respondent showed court scars on her body which the court noted in the proceedings. Medical reports talk of deformity and stiffness of the right hand. This no doubt confirm that performance by the hand has reduced as a result of the accident.

On perusal of the record, I note that the respondent did not produce evidence of earnings. The award however is for capacity to earn. It does not fall under special damages but under general damages. It was enough for the respondent to prove that the function of her hand has reduced. That would automatically reduce her capacity to earn, as she cannot fully perform some of the duties she performed prior to the accident. It did not have to be 100% but prove of reduction. The percentage may guide the court in assessing degree of dependency on a third party to perform activities she engaged in prior to the accident.

I agree with arguments by counsel for the respondent that a claimant does not have to be in employment to be entitled to an award for earning capacity. A person who is not incapacitated in any part of body will not fail to engage in any form of employment, business or activity for a living. Failure by respondent to produce any documents to prove earnings should not disentitle her an award for reduction in capacity to earn.

The question that follow is, did the trial magistrate put into consideration loss of earning capacity while assessing damages under pain and suffering? If so, would an award under a separate heading amount to duplicity?

I am guided by decision in the case of *Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR* where the court of Appeal held as follows:

“...loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as separate head of damages. The award can be a token, or modest or substantial depending on circumstances of each case. There is no formula for assessing loss of earning capacity.”

On perusal of the judgment of the trial magistrate, I note that he opted to assess damages for pain and suffering and loss of earning under separate headings. It is clear from assessment under the headings of pain and suffering, he never put into consideration loss of earning capacity. This is confirmed by explanation given for award under the next heading of loss of earning capacity. There is no indication of mix-up. Record show that the resolve to asses separately was clear in his mind as he did the assessment.

In view of the above authority, I find that the 2nd and 3rd grounds of appeal are not merited.

From the forgoing, I do dismiss the appeal herein with costs to the respondent. The trial magistrate’s decision is upheld.

Judgment Dated, signed and delivered at Nakuru this 27th day of February 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola Wangui - Court Assistant

J. Ndung’u Njuguna Advocate - Counsel for Appellants

Seth & Wathigo Advocate - Counsel for Respondent