



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 54 OF 2014

SAMUEL NDUNG'U NGUGI.....1ST APPELLANT

KENNETH NDICHU KARANJA.....2ND APPELLANT

VERSUS

DAVID KIHARA MBUI.....RESPONDENT

[Appeal from the judgment of D. Orimba, Senior Principal Magistrate, in Kigumo PMCC No. 92 of 2013 delivered on 20th June 2014]

JUDGMENT

1. The appellants are aggrieved by the *quantum of damages* awarded in the lower court.
2. By an *amended plaint* dated 4th October 2013, the respondent pleaded that on 16th May 2012, he was a passenger in motor vehicle KAZ 312A. It was being driven along the Murang'a-Kenol Road. He claimed that the appellants' truck registration number KAK 610D was driven *carelessly*; that it eventually lost control and *collided* with the other vehicle.
3. The respondent suffered serious injuries; lost capacity for future earnings; and, incurred special damages pleaded at paragraph 10 of the amended plaint. He prayed for damages and costs.
4. In a *statement of defence* dated 16th July 2013, the appellants denied the claim *in toto*. They disputed that they were negligent; and, blamed the respondent; and, the driver of motor vehicle KAZ 312A for *contributory negligence*.
5. On 20th December 2013 the disputants entered into a consent *judgment* on liability in the ratio of 75% to 25% in favour of the plaintiff.
6. The learned trial magistrate assessed damages as follows: Kshs 1,500,000 as general damages; special damages Kshs 263,700; periodical replacement of the prosthesis at Kshs 720,000; removal of metal implants at Kshs 65,000; and, loss of earning capacity at Kshs 1,852,110.
7. The respondent was also granted costs of the suit.
8. The appellant filed a memorandum of appeal on 10th July 2014. There are *eight* grounds. They can be condensed into *four*. First, that the learned trial magistrate disregarded the appellants' submissions; secondly, that the trial court misapprehended the evidence on loss of earnings, loss of income and applicable multiplier; thirdly, that *part* of the special damages awarded were not strictly proved; and, fourthly, that the general damages were manifestly excessive.
9. At the hearing of this appeal, learned counsel for the appellant relied entirely on written submissions filed on 17th July 2017 and a further reply filed on 7th November 2017. The respondent's counsel relied on the submissions filed on 30th June 2017.
10. This is a first appeal to the High Court. It is thus an appeal on both *facts* and the *law*. I have *re-evaluated* all the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
11. I will deal first with general damages. According to the medical report of Dr. Wambugu dated 3rd October 2013 the respondent sustained the following injuries:

- a) Traumatic amputation of the right leg below the knee joint;
- b) Fracture of the right femur;
- c) Laceration wound on the right scapular region; and,
- d) Multiple bruises on the right side of his face.

12. The appellants contend that the respondent's wound healed well; and, that movements across the knee joint and hip joint were normal. They conceded that the fracture was managed by the reduction and internal fixation using metal implants. Accordingly an award of Kshs 1,000,000 would have been sufficient. The appellants contend that their *submissions* on that point were disregarded by the lower court.

13. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high*; or, *inordinately low*; or, founded on *wrong* principles. See **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

14. The appellants cited **Douglas Erick Nyakundi Masira vs Rongai workshop Ltd & another**, Nairobi, High Court Civil Case 28 of 2007 [2009] eKLR. The plaintiff there suffered compound fractures of the right leg which was later amputated. Damages for pain, suffering and loss of amenities were assessed at Kshs 800,000.

15. Reliance was also made on the decision by *Maraga J* (as he then was) in **Jane Otieno v Mombasa Liners Ltd & another**, Mombasa, High Court Civil Case 47 of 2003 [2005] eKLR. The plaintiff's right leg was amputated; there were fractures to the left ulna and radius among other injuries. She was awarded Kshs 800,000 for pain and suffering.

16. The respondents countered by relying on **Salome Wachira v Signon Freight Ltd & others**, Nairobi, High Court Civil Case 658 of 2004 [2007] eKLR. In that case there was an amputation at *mid-thigh*, injuries to the chest, ribs, left leg, hip and abrasions to the arms. Damages were assessed at Kshs 1,200,000.

17. From the evidence, the respondent suffered a *crush injury* of the right lower limb. It was *amputated* on 17th May 2012 *below* the knee joint. He underwent an open reduction of the fractured femur with a metal implant on 17th June 2012; and was fitted with a *prosthesis* in November 2012.

18. *Dr. Ikonya's* opinion was that the respondent "may suffer" *permanent incapacity of about 65%*. The statement is inconclusive. *Dr. Wambugu's* opinion on the other hand was emphatic that incapacity was *40%*. The learned trial magistrate erroneously found that incapacity was "*agreed*" to be *65%*. There was *no* such agreement by the disputants.

19. Granted the injuries the award of Kshs 1,500,000 was too high as to be founded on *wrong principles*. Taking into account inflation and the age of the authorities, I find that a sum of Kshs 1,000,000 was more than sufficient. I set aside the award of general damages.

20. Special damages *must* be *specifically* pleaded; and, *strictly* proved. **Kampala City Council v Nakaye** [1972] E.A 446. The special damages were specifically pleaded at paragraph 10 of the amended plaint. I have studied the bundle of receipts (exhibit 2). I find that the respondent only *proved* the sum of Kshs 246, 585. I thus set aside the award by the lower court of *Kshs 263, 700*. I substitute it with the sum of Kshs 246, 585.

21. Ground 3 challenges the cost of the prosthesis. I am satisfied that the initial cost including fitting and training was Kshs 240,000. The receipt is attached. *Dr. Wambugu's* further opinion dated 14th February 2014 puts the cost of future prosthesis at Kshs 120,000. In that report, the doctor states that replacement should be done every 4 to 6 years. The learned trial magistrate found that with the plaintiff's young age, he would require 6 replacements. The total cost is Kshs 720,000. The finding is *reasonable* and supported by *professional evidence*. I decline to disturb that award.

22. There was a consent filed on 8th May 2014 on the *cost* of removing the metal implants at Kshs 65,000.

23. I will now turn to loss of future earnings. In assessing loss of income, the court must be guided by the age of the deceased, the incapacity, life expectancy, and vicissitudes of life. See generally **Kemfro v Lubia** [1982-88] KAR 727.

24. The appellants did *not* call any witnesses. From the evidence, the respondent was *22 years* at the time of the accident. The multiplier of *30 years* adopted by the trial court was *quite* reasonable.

25. The respondent was working in his uncle's *water vending business*. He said the daily wage was Kshs 1,000. The burden to prove the earnings fell on his shoulders. Section 107 of the **Evidence Act**. See also **Esther Wanjiru Kiarie v Mary Wanjiru Githaka**, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR.

26. The respondent did not produce any pay slip or a document to confirm it. But it was *not* controverted that he was *employed*. I find that the learned trial magistrate correctly relied on the *minimum wage* of Kshs 7,915 per month. The only error in the arithmetic was that the court factored *incapacity* at 65%. As I stated earlier there was *no* such agreement; and, the more *emphatic* finding was by *Dr. Wambugu* at *40%*. The arithmetic should thus work out as follows: Kshs 7,915 x 12 x 30 x 40/100 = 1,139,760.

27. Finally, it is *not* true that the appellant's submissions were *completely* disregarded. Final *submissions* are only for the *guidance* of the

court: they are *unlike* pleadings. There is *no* requirement that each and every submission or authority tendered be analyzed in the judgment. ***Joshua Shitawa v Kishan Builders Limited***, High Court, Eldoret, Civil Appeal 32 of 2012 [2015] eKLR. That ground of appeal fails.

28. The upshot is that this appeal *partially* succeeds. The judgment and the decree of the lower court are *set aside*. There shall now be judgment in favour of the *respondent* in the following terms-

- a) General damages for *pain and suffering*: Kshs 1,000,000.
- b) Loss of earnings: Kshs 7,915 x 12 x 30 x 40/100 = Kshs 1,139,760.
- c) Special damages: Kshs 246, 585.
- d) Future medical expenses on replacements of the *prosthesis*: Kshs 720,000.
- e) Future medical expenses on *removal* of metal implants: Kshs 65,000.

Subtotal.....Kshs 3,171,345.00

Less 25% contributory negligence.....Kshs 792,836.25

Net Award.....Kshs 2,378,508.75

29. Costs follow the event and are at the discretion of the court. I grant the respondent costs in the lower court. Each party shall however bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of February 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. Mbuthia holding brief for Mrs. Wang'ombe for the appellant instructed by L. W. Wang'ombe & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas and Mr. Elizabeth, Court Clerks.