



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: D.S. MAJANJA J.)

CIVIL APPEAL NO. 102 OF 2018

BETWEEN

GERALD OYUGI.....APPELLANT

AND

EVANS OKEYO MOCHERE.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. K. Onjoro, SRM dated 7th September 2018 in Kisii CMCC No. 536 of 2015)

JUDGMENT

1. On 25th August 2015, the respondent was riding motor cycle registration number KMDQ 326E when it collided with the appellant's motor vehicle registration number KBX 845T at Ekerorano area along the Kisii – Migori road. The respondent sustained injuries and filed a suit seeking damages. After hearing the suit, the trial magistrate found the appellant fully liable and awarded the respondent the following damages:

General damages	Kshs. 800,000/-.
General damages for loss of earning capacity	Kshs. 3,168,000/-
Special damages	Kshs. 47,790/-
TOTAL	Kshs. 4,015,790/-

2. The appellant is aggrieved by the trial court's finding on the issue of liability and quantum of damages. The first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126). I will deal with the issue of liability first.

3. The respondent (PW 1) recalled that on the material day, he was riding the motor cycle when he was knocked by a motor vehicle trying to overtake another motor vehicle. In cross-examination, he admitted that he was carrying a pillion passenger, had a licence and was appropriately dressed with a reflector jacket and boots. He further explained that he was riding on the left side of the road when the motor vehicle hit him from the front while trying to overtake. PC Caleb Osodo (PW 2) confirmed that the accident took place involving the respondent's motor cycle and the appellant's motor vehicle. He did not visit the scene of the accident and at the time he testified, the matter was still under investigation.

4. As the appellant neither testified nor called witnesses, the trial magistrate held that the respondent's evidence was uncontroverted hence the appellant was fully liable.

5. Ms Angasa, counsel for the appellant, submitted that even though the appellant did not call any evidence, the trial magistrate ought to have apportioned liability. In her view, the trial magistrate should have taken into account the fact that PW 2 did not indicate any guilt on the part of the appellant and that the police investigation file was not brought to assist the court in determining the issue of liability. Mr Otara, counsel for the respondent, supported the decision of the trial magistrate and submitted that since the appellant did not provide any evidence, the respondent's case was not controverted.

6. Having considered the entirety of the evidence I have outlined above, I am constrained to reach the same decision as the trial magistrate. The respondent's evidence was uncontroverted. I doubt that the failure to call the investigating officer or produce the police file would affect the respondent's case as the police officer's testimony was sufficient to buttress the fact that the accident took place. This view is fortified by

the decision of the Court of Appeal in **Moses Theuri Ndumia v I G Transporters Limited and Another MSA CA Civil Appeal No. 42 of 2018 [2018]eKLR** where it cited various decisions and observed as follows:

[12] In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondents. If the respondents had information that the impact of collision was in the centre of the road, we are persuaded under the provisions of Section 112 of the Evidence Act, they had a responsibility to adduce that evidence so as to disprove the appellant and the police officer who produced the abstract form. See KENYA POWER & LIGHTING CO LTD –VS – PAMELA AWINO OGUNYO CIVIL APPEAL NO 315 OF 2012 where a Bench of this Court differently constituted had the following to say;

“We note, in any event, that the appellant made various allegations in its statements of defence against the respondents. These included, inter alia, that the appellant was not the supplier of electricity in the stated region where fire damage took place; that the damaged crop was illegally planted in an area reserved for the appellant as a way-leave for its power lines and electric cables and that the respondents had failed to leave adequate space between the crops and electric poles so as to prevent the possibility of the crop being burnt in the event that a fire broke out. A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107- 109 of the Evidence Act which place a burden of proof or what may be called evidential burden of proof on the party making the assertion. In JANET KAPHIPHE OUMA & ANOTHER V MARIE STOPES INTERNATIONAL KENYA (KISUMU) HCCC NO 68 OF 2007 Ali Aroni, J. Citing EDWARD MURIGA through STANLEY MURIGA V NATHANIEL D. SCULTER CIVIL APPEAL NO 23 OF 1997 had this to say on the said provisions of the Evidence Act;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”

7. I now turn to the issue of quantum of damages. The thrust of the appellant’s case is that general damages awarded were too high in the circumstances while the claim for loss of earning capacity was not proved and should not have been awarded. In considering this issue I am guided by what the Court of Appeal stated in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987]KLR 30** that :

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

8. The nature and extent of the respondent’s injuries were not disputed. The particulars of the plaint show that the he sustained a contusion of the right foot, amputation of the right big toe, deep cut wound on the 2nd toe, multiple bruises on the 2nd, 3rd, 4th and 5th toes and a fracture of the foot bone. He was initially treated at Kisii Teaching and Referral Hospital but was transferred to Moi Teaching and Referral Hospital where he was admitted for one month. He produced the P3 form and the respective hospital discharge summaries. Dr Ogando Zoga (PW 3) also testified on the respondent’s behalf and produced a medical report. He confirmed the injuries sustained by the respondent and noted that the respondent right big toe was amputated. At the time he examined the respondent on 21st October 2015, he was in the process of healing. He assessed permanent disability at 10%.

9. As regards general damages, the respondent proposed Kshs. 2,500,000/-. He relied on the case of **James Joseph Rughendo v Kenya Power and Lighting Company Limited NRB HCCC No. 539 of 2004 [2011]eKLR** where the plaintiff suffered damage to the radial, ulnar and median nerves, 3rd degree electrical burns involving both palms and legs with the total burn area being 40%, below knee amputation of the right leg and amputation of the left big toes and part of the second toe. He was awarded Kshs. 3,000,000/- as general damages in 2011.

10. The appellant submitted that a sum of Kshs. 300,000/- as general damages was reasonable. He called in aid the case of **Agroline Hauliers Limited and Another v Michael Abongo Kisemba MGR CA Civil Appeal No. 6 of 2015 [2015] eKLR** where the claimant sustained a contused neck, chest and left hand and a fracture of the left patella. He was awarded Kshs. 400,000/- in 2015.

11. In considering the level of damages to award, the Court of Appeal held in **Sosphinaf Company Limited v James Gatiku Ndolo NRB CA Civil Appeal No. 315 of 2001 [2006]eKLR** that:

The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards and principles developed by the courts, ultimately what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.

12. I have considered the decisions cited by both parties before the trial magistrate. The injuries sustained by the claimant in **James Joseph Rughendo v Kenya Power and Lighting Company Limited (Supra)** bear little relationship to the case at hand and could not provide or be relied upon to provide a useful guide to the trends in awards in cases like the respondents. In that case, claimant’s sustained a serious burns and amputation of one leg and toes on the other foot. Likewise, the case cited by the respondent did not involve any form of amputation.

13. While the court is guided by the cases cited to it, ultimately the duty of this court is to ensure that award for injuries in similar cases are consistent and fairly compensate the claimant. The Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

14. A more appropriate case is ***National Cereals and Produce Board v Protas Wafula Wanyama*** ELD HCCA No. 89 of 2016 [2018]eKLR. In that case, the plaintiff sustained a swollen and tender right foot, cut wound on the right middle toe which was tender, traumatic amputation of the right 4th toe which was tender and a cut wound on the right 5th toe which was tender. The court reduced an award of Kshs. 400,000/- to Kshs. 200,000/- in 2018. The court in that case cited ***Peter Kioko & Another v Hellen Muthee Muema*** KBU HCCA No. 153 of 2014 [2018] eKLR in which the respondent suffered blunt head injury and crush injury of the left big toe, resulting in amputation of the toe. The appellate court reduced the sum awarded by the lower court from **Kshs. 300,000/- to Kshs. 200,000/- in 2018.**

15. Based on those two recent and relevant cases, I find that the award of Kshs. 800,000/- is on the higher side, excessive and out of sync with recent trends for damages awarded for similar injuries. Taking into account the fact that the respondent's right big toe was amputated and the multiple bruises on the other toes together with the fracture of the foot, I would award Kshs. 300,000/- as general damages.

16. As regards the claim for loss of earning capacity, the respondent pleaded in his plaint that before the accident he was in perfect health and was a boda boda rider. He was earning Kshs. 15,000/- per month. He was aged 28 years old and would continue to work for another 20 years but for the accident which left him incapacitated. The respondent told the court that he could no longer ride a motorcycle due to his injuries. In cross-examination, he stated that he was earning about Kshs. 1,000/- daily out of which Kshs. 500/- would be used for daily expenses leaving him with Kshs. 500/-. Although, he worked from Monday to Saturday, he stated that he was a casual employee.

17. After considering the evidence, the trial magistrate accepted that the respondent would earn Kshs. 3,000/- weekly and an average of Kshs. 12,000 per month. Since he would work for about 50 years, the trial magistrate used a multiplier of 22 years before coming to a total of Kshs. 3,168,000 (Kshs. 12,000 X 12 X 22).

18. In the case of ***Butler vs Butler*** [1984] KLR 225, the Court of Appeal dealt with the principles applicable when the court is considering a claim for loss of earning capacity. In that case, the court distilled the following principles;

- 1. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid as before the accident are lessened by his injury.*
- 2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.*
- 3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.*
- 4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.*
- 5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.*
- 6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.*

19. I find that there was sufficient evidence that the respondent was a boda boda rider. He confirmed that when the accident took place he was in fact carrying a pillion passenger. He was injured on the foot and his large toe was amputated. This would affect his earning capacity as the foot is necessary for peddling. This evidence was not challenged by calling counter evidence.

20. The issue though is what factors would go towards determining the award. The trial magistrate only considered the fact that the respondent's incapacity for the rest of his working life. However, the respondent did not suffer complete disability. Dr Zoga assessed his disability at 10% hence there was a possibility that given his age, the respondent would probably look for alternative work. I doubt that he would be a boda boda rider for the rest of his working life. The respondent did not lead any evidence of his qualifications and his capacity to do any other work that would go towards calculation of the damages for loss of earning capacity. He admitted that he was a casual and would be dismissed at any time which is a factor that the court could take into account.

21. I therefore find and hold that the trial magistrate failed to take into account relevant factors in coming to a proper award for the loss of earning capacity. While I accept the expected earnings, I would reduce the multiplier to take into account the respondent's age, the level of incapacity as assessed by the doctor, the ability to seek alternative opportunities and the fact that the lump sum awarded would be invested and earn income amongst other vicissitudes of life and imponderables. I therefore award a multiplier of 4 years making the award for loss of earning capacity Kshs. 576,000/- (Kshs. 12,000 X 12 X 5).

22. Before I conclude this judgment, I return to the issue of general damages. As was stated in ***Butler v Butler*** (Supra), the court is entitled to make separate awards for loss of earning capacity and for general damages and this the court was correct to make separate awards as prayed by the respondent.

23. While I affirm trial court judgment on the issue of liability, I allow the appeal on terms that the award of damages for general damages and loss of earning capacity is set aside and substituted with the following judgment:

(a) General Damages Kshs. 300,000/-

(b) Loss of earning capacity Kshs. 576,000/-

24. The amount shall accrue interest from the date of judgment before the trial court and the appellant shall have costs of the appeal assessed at Kshs. 40,000/-.

DATED and DELIVERED at KISII this 28th day of MARCH 2019.

D.S. MAJANJA

JUDGE

Ms Angasa instructed by Omwega & Company Advocates for the appellant.

Mr. Otara instructed by Ben K. Gichana & Company advocates for the respondent.