



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CORAM: R. MWONGO, J.

CIVIL CASE NO. 283 OF 2011

MOHAMED HUSSEIN.....PLAINTIFF

VERSUS

MAHAT KUNO ROBLE.....DEFENDANT

JUDGMENT

Introduction

1. The plaint in this case was filed on 22nd July 2011. It concerns an accident that occurred way back on 23rd July, 2008. There are several distressing things about the eight year journey this case has taken. For example, the proceedings show that the suit was certified ready for trial by 18th April, 2013, and Waweru, J, directed a hearing date to be taken at the registry. For some unrecorded reason, the next court attendance was two years later on 27th May, 2015, before Aburili, J. Parties entered a consent on that day – a big achievement. Still, parties were filing additional documents as late as 22nd March, 2016. There was no movement again until 21st September, 2017.

2. On that date, the hearing on the quantum of damages commenced before me. Parties entered into several consents which resulted in only one witness giving oral evidence. Both parties closed their cases on that date, and all that remained was the filing of submissions, for which directions were issued. The file then went to “sleep” until submissions were filed on 1st October and 12th November, 2018, respectively. By then, I had been transferred to another court station. Finally, the file followed me on 25th February, 2019.

3. This case exemplifies failures of both file and registry tracking management, but also reflects some of the positive case management aspects, such as getting parties to enter into substantial consents at critical moments.

Background

4. In the plaint, the Plaintiff claims damages arising from an accident allegedly caused by the defendant. He alleges that on 23rd July, 2008, the defendant drove motor vehicle registration number KAE 555G, a Lorry truck carelessly, recklessly and in a dangerous manner. That whilst he, the plaintiff, was on duty at shell petrol station, along General Waruinge Street in Eastleigh, the defendant’s truck knocked him down, dragging him under the tyres of the said motor vehicle. As a result he sustained serious injuries, loss and damage, for which the defendant is liable.

5. The damages claimed by the plaintiff are as follows:

- i. General damages for pain, suffering and loss of amenities.
- ii. Special damages in terms of treatment, hospitalization, accommodation and related expenses totaling to Kshs. 1,299,116/=.
- iii. Damages in terms of lost income to the 31st July, 2011 quantified at Kshs. = 3,600,000/= (made out at Kshs 100,000/- per month)
- iv. Damages in terms of future loss of income and income earning and working capacity.

v. Interest on the liquidated amounts from the time of filing this case until full payment and general damages from the judgment date.

vi. Costs of the suit plus interest.

6. The Special damages claimed were broken down as below:

i. Treatment expenses at St. Mary's Hospital Kshs. 39,410/=

ii. Treatment expenses at Coptic Hospital.....Kshs. 118,706/=

iii. Dr. Fred Otsyeno's paymentKshs 82,000/=

iv. Expenses on physiotherapy at Coptic HospitalKshs. 6,200/=

v. Further treatment expenses, continuous drugs and

physiotherapy at Alif and Awes Medical centres..... Kshs. 556,300/=

vi. Accommodation expenses while in Nairobi for

treatment.....Kshs 481,000/=

vii. Search on the motor vehicle..... Kshs. 500/=

viii. Medical examination report and Doctor's court

attendance..... Kshs. 3,000/=

7. Before the hearing, liability was agreed at the ratio of 80%:20% in favour of the plaintiff. Thus, the only issue pending for resolution is the quantum of damages. Still, the parties agreed on the following aspects of quantum at the hearing:

a. That the medical reports of Dr Moses Kinuthia and Mr Wokabi, respectively dated 7th July, 2012 and 21st July 2015 be admitted as evidence without calling the doctors; and that Dr Otsyeno's report dated 23rd May 2011 be struck out;

b. That the variance in permanent incapacity in the said medical reports be disregarded, and instead the incapacity level be agreed at 30%;

c. That the costs of the medical examination and doctor's court attendances of Kshs 15,000/= be agreed at a reduced amount of Kshs 3,000/=

d. That the following special damages be abandoned:

i. The treatment expenses, drugs and physiotherapy costs at Alif and Awes medical centres of Kshs 556,300/=

ii. Accommodation expenses of Kshs 481,000/=

Quantum

8. From the medical reports of Dr. Moses Kinuthia dated 7th July, 2011 and Mr Wokabi dated 21st July 2015, the injuries sustained were stated as follows:

a. Fracture of the right humerus

b. Fracture dislocation of right elbow

c. Fracture dislocation of distal phalanx right middle finger

d. Crash injuries of left foot toes with traumatic amputation of left 3rd, 4th and 5th toes

e. Fracture of left tibia and fibula malleoli (bimaleolar fractures)

9. The Doctor observed that the fracture of the right humerus was operated on and fixed with a metal plate. The plate was later removed. The dislocated right elbow had been reduced and splinted, the crashed left foot toes had been amputated. The fractures of the left tibia and fibula

has been treated conservatively and immobilized with a plaster cast. The plaintiff had complaints of pain and stiffness of the right elbow, the right upper limb is weak and he is not able to use his limb for heavy work or lifting and has pain on the left ankle joint.

General damages

10. The Plaintiff proposes an amount of Kshs. 5,000,000/= for general damages. He cited the case of **Sabina Nyakenya Mwanga v Patrick Kigoro and another [2015] eKLR** where the court awarded Kshs. 3,000,000/= as general damages for multiple soft tissue injuries, fracture of the right upper arm, fracture of distal femur right thigh bone, fracture of the right patella knee, fracture of the pelvis and fracture of the distal radial-wrist.

11. On the other hand, the Defendant proposes an amount of Kshs, 800,000/=. He relies on the case of **SAO v The Registered Trustees of Anglican Church [2017] eKLR** where the court reduced an amount of Kshs.800,000/= to Kshs. 600,000/= for head injury with brain concussion and damage of right lower mandible jaw left cheek, blunt chest injury, soft tissue injuries, fracture of the right tibia/fibula at the midshaft region, compound fracture left tibia/fibula at distal metaphysic, fracture left ankle joint involving malleolus bones and dislocation of right ankle.

12. The plaintiff case of **Geoffrey Wamalwa v Kyalo Wambua (2018) eKLR** where the court awarded Kshs.700,000/= for compound fracture of the right tibia/fibula, cut wound on the scalp, cut wound on the chest and cut on the lower lip.

13. In my view, the authorities relied on by the plaintiff are more relevant to the type of more serious injuries incurred by the plaintiff compared to the defendant's authorities which cover far less serious injuries. I note that the plaintiff presently has a stiff and painful hand; painful right limb and ankle joint and is unable to carry heavy items; he also lost three toes and has difficulties wearing shoes and walking. It is evident therefore that he suffered loss of amenities and is not in a position to walk with stability. Permanent incapacity was agreed at 30%.

14. Taking into account all the above matters, I consider that an amount of Kshs 2,500,000/= in general damages would be sufficient in this case.

Future loss of income and income and earning capacity

15. The plaintiff has pleaded future loss of income and income earning and working capacity. The distinction between loss of earning capacity and loss of future earnings was brought out in the case of **SJ v Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:"

"14. Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

'It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.'"

Damages for loss of income/loss of future earning

16. The plaintiff submits that as a result of the accident, he lost his only source of livelihood as he was incapacitated for over one and a half years due to injuries sustained. Consequently, he says he is unable to take up demanding jobs as he used to. He further had to close down his business and sell all his assets to facilitate his treatment. These factors have reduced his earning capacity for which he claims at the rate of Kshs, 100,000/= per month from 31st July, 2011 to the date of filing the suit totaling to Kshs. 3,600,000/=.

17. On the contrary, the defendant submits that the plaintiff did not prove his alleged monthly earnings. He asserts that transportation of fuel is not a small business and one would expect a record of invoices, LPO's, bank statements and such-like documents which would ordinarily be available as proof of income.

18. Damages for loss of income are in the nature of special damages and must therefore be specifically pleaded and proved. Like special damages, they must be determined factually by evidence and would then be assessed based on determinable loss or expenditure. In this respect, the Plaintiff failed to meet the cardinal criteria for proof to aid the court in determining what loss of future earnings and loss of income he suffered. Although he pleaded his earnings prior to the accident, such figures were not proved.

19. In **Mbaka Nguru & Anor. v James George Rakwar [1998] eKLR** the court of appeal stated:

"We need not set out here the statement of Lord Goddard C.J. It will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them."

20. The court is therefore unable to make an award under this head of loss of income.

Loss of earning Capacity

21. In the plaint, the plaintiff seemed to intertwine loss of earning with loss of income when he sought damages for “*loss of earning and income to be calculated at Kshs 100,000/= per month since 23rd July, 2008 to 31st July, 2011*”. Loss of earning capacity is, in fact, under a different category.

22. Compensation for loss of earning capacity is calculated against the background of a claimant’s ability to earn money at the date of injury. It is not compensation for lost future wages, but is a form of compensation for the lost ability to earn income. Thus, strict proof is not necessary in a claim for loss of earning capacity and for the same reason the earning capacity may be categorised as an element of general damages “*which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury*”. Damages in this respect are awarded for the lost ability to earn money on account of the injuries suffered. In this case, there is an agreed 30% incapacitation, meaning that the plaintiff when at his present best can assert only seventy percent of his former ability and would have to work thirty percent harder than he was used to in order to reach his previous capacity to earn.

23. The case of **Butler v Butler 1984[KLR]** deals with the applicable principles in making an award for loss of earning capacity. In that case, the Court of Appeal stated as follows:

“Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ---. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

24. The defendant submitted that there was no evidence that the Plaintiff had lost his capacity to earn a living and that it emerged from the evidence that the reason why the plaintiff was no longer doing the alleged business was because he had sold his truck to finance his treatment and not because of incapacitation. That notwithstanding, the defendant proposed a global award of Kshs 750,000/= guided by the case of **Mumias Sugar Co. Ltd v Francis Wanolo [2007] eKLR** where the court awarded Kshs. 500,000/= and **Abukabar Abdalla vs Tawfiq Bus Services [2013] eKLR** where the court awarded Kshs. 500,000/=.

25. In the above case of **Mbaka Nguru**, the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

i. 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 paid as before the accident are lessened by his injury;

ii. 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;

iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;

iv. Loss of earning capacity can be a claim on its own, as where a 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;

v. 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 improper to award it under its own heading;

vi. 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.”

26. The test for valuation of lost earning capacity is only what is reasonable. In **Riddley v Grifall Trucking Company (1955) 136 Cal. App.2d 682, 688** it was held that evidence of actual earning before or after the injury merely assists the jury, as persons of ordinary intelligence and experience, in arriving at the amount of the award which is in their power to determine from the nature of the injury.

27. At the time of the filing the suit in 2011 the plaintiff was 43 years old as indicated in his witness statement. Thus at the time of the accident the plaintiff was 40 years. The plaintiff herein did not give any evidence as to his professional or academic qualifications, although he stated that he was a business man with his own fuel transportation company. There was no evidence of a business.

28. That notwithstanding, the Court of Appeal case of **Jacob Ayiga Maruja & Another v Simeon Obayo Civil Appeal no 167 of 2002**, held that:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good, But we reject any contention that only documentary evidence can

prove these things.”

29. In light of the above authority, the absence of documentation on the plaintiff’s earnings should not be a bar to recovery of damages. I consider that the he could have worked for a period of not less than 15 years to reach the official retirement age of 55. Of course in the informal sector the retirement age could be more than 70 years since, in my view, as an energetic and healthy man and taking into account all vicissitudes of life, he could have gainfully worked for 15 more years. Thus I am prepared to adopt a multiplier of 15 years using an income of Kshs.6,743/= per month, as the salary of a general laborer (which includes cleaner, sweeper, gardener, house servant) according to the **Regulation of Wages (General) (Amendment) Order, 2010**.

30. I have not been able to obtain any Wages Order for year 2008 or 2009, and have adopted the **Wages Order** for year **2010**. Using that Order, the amount would total to Kshs. 1,213,740/= calculated as follows:

$$6,743 \times 12 \times 15 = \text{Kshs } 1,213,740.$$

Special Damages

31. As earlier pointed out, the parties agreed to disregard special damages pleaded in the particulars of the plaint at paragraph 6 v), vi) and viii). Thus, the treatment costs and expenses incurred at Alif and Alwes medical centres (556,300/= + 481,000/=) amounting to a cumulative Kshs 1,037,300/= are disregarded . Equally, the medical examination report and doctor’s court attendance costs of 15,000/= were reduced to 3,000/= by consent. On the St Mary’s alleged expense of Shs 39,410, I agree with the defendant that there was no receipt provided, and I am therefore not able to accept the invoice as evidence of the amount paid.

32. The plaintiff in his submissions claims an amount of 165,198/= in special damages. However, taking the expenses which were receipted, invoiced or agreed by consent, I find the amount of Kshs 128,406/= to be payable. The amount is broken down as follows:

1. Treatment expenses at Coptic HospitalKshs.	118,706/=
2. Expenses on physiotherapy at Coptic HospitalKshs.	6,200/=
3. Search on the motor vehicleKshs.	500/=
4. Medical examination report and Doctor’s court attendance....	Kshs.	<u>3,000/=</u>
	Total	Kshs 128,406/=

Disposition

33. In light of all the foregoing, I find in favour of the plaintiff and award the following amounts:

a. General Damages.....	Kshs	2,500,000.00
b. Loss of earning capacity.....	Kshs	1,213,740.00
c. Special Damages.....	<u>Kshs</u>	<u>128,406.00</u>
	Kshs	3,842,146.00
Less 20% Apportioned Liability	Kshs	768,429.20
Total Award	Kshs	3,073,716.80

34. Interest on general damages shall accrue at court rates from the date of the award. Interest on special damages shall accrue at court rates from the date of filing suit.

35. The plaintiff shall also have costs of the suit.

36. Orders accordingly

Dated and Delivered at Nairobi this 25th Day of April, 2019

R Mwongo

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Makokha H/B for Namada.....for the Plaintiff
2. Mr Mukanzi h/b for Mrs Chirchir.....for the Defendant
3. Court Clerk...Sarah Orod.....