



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 25 OF 2015**

**SWAN CARRIERS LTD.....APPELLANT**

**VERSUS**

**MIKE MONUBI NYAGWOKA.....RESPONDENT**

**(Being an appeal from the judgment of the Honourable Chief Magistrate Mr. Njoroge**

**dated 10<sup>th</sup> February, 2015 in the Chief Magistrate's Court**

**Civil Suit No. 260 of 2013 at Kisii)**

**JUDGMENT**

1. This is an appeal against the trial court's decision in **Civil Suit No. 260 of 2013**. The only issue arising in this appeal concerns the assessment of quantum as the parties herein entered consent on liability at 75:25 in favour of the respondent on **16<sup>th</sup> December, 2014**. The appellant is particularly aggrieved by the trial court's award of Kshs. 1,000,000/= for loss of earning capacity to the respondent.

2. In his written submissions, counsel for the appellant contends that the respondent did not specifically plead for loss of earning capacity and that at the time of the accident he was not employed. He argues that in the absence of proof of earnings, employment or a clear demonstration of how the injuries sustained have affected or are likely to affect the earning capacity of the respondent, the trial court erred in awarding damages under this head and therefore urges the court to allow the appeal.

3. As rightly submitted by the appellant, an appellate court will not ordinarily interfere with a trial court's discretion to assess damages unless the award is inordinately high or low as to represent an entirely erroneous estimate or the trial court proceeds on wrong principles or misapprehends evidence in some material respect. (See *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia (1982 -88) 1 KAR 727*)

4. The respondent, Mike Monubi Nyagwoka, sustained severe injuries due to a road traffic accident involving the appellant's motor vehicle registration number KAU 504 K pulling trailer ZC 7811 along Kisii- Keroka road. Before the trial court, he testified that in the morning of 3<sup>rd</sup> March 2012, he was walking off the road from Kereri Girls School towards Kisii town when the appellant's truck, which was being driven from Keroka to Kisii, failed to slow down at a corner and hit him. As a result of the accident his left lower limb was amputated and he sustained bruises on the head and on the right leg with a wound on his knee. He told the court that he was rushed to Christa Marianne Hospital where he was admitted for 41 days. He also visited Moi Referral Hospital in Eldoret and later went to AIC Mission Hospital, Kijabe where he was fitted with a prosthetic limb for Kshs. 200,000/=. The respondent testified that he still experienced pain and that the injuries had affected him mentally and physically. He also testified that he had studied journalism and the injuries had affected his employability as he was unemployed at the time.

5. Dr. Vincent Omedo (PW 2) who had treated the respondent first hand, produced the respondent's medical report confirming that he had sustained injuries on the left limb which was severed, superficial injuries to the face and bruises to the head. He assessed the degree of harm as grievous and testified that there was permanent disfigurement and disability due to the loss of the limb.

6. Alexander Kering (PW 3), an Orthopaedic technologist working at AIC Mission Hospital, Kijabe produced the quotation for the respondent's prosthetic limb. He stated that the limb had cost Kshs. 200,000/= but would need replacement every 5 years. He testified that the recommended version of prosthetic could cost Kshs. 500,000/= and the respondent would require about 7 replacements in the future. The appellant did not call any witnesses to testify. After the close of the respondent's case, the trial court made the following award:

a. Liability – 75:25

b. (i) General damages for pain and suffering	Kshs 1,400,000.
(ii) Loss of earning capacity	Kshs. 1,000,000
(iii) Cost of future prosthesis	Kshs. 600,000
c. Special damages	Kshs. 55,955
Total	Kshs. 3,055,955
Less 25 %	
Net total	Kshs. 2,292,000/=

7. The appellant only contests the award for loss of earning capacity. In *Mumias Sugar Company Limited vs. Francis Wanalo CA KSM Civil Appeal No. 91 of 2003[2007] eKLR* which was relied on by the respondent before the trial court, the Court of Appeal in explaining the rationale for awarding loss of earning capacity echoed its earlier decision in *Butler v Butler (1984) KLR 225* thus;

*“...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. 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 case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the 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, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. 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 or approximate financial loss that the plaintiff has suffered as a result of disability.”*

8. Loss of earning capacity has been distinguished from loss of earnings which is a special damage claim and must be specifically pleaded and strictly proved. Loss of earning capacity is a general damage claim which need not be pleaded. In *SJ vs. Francesco Di Nello & Another CA NRBCIVIL APPEAL NO. 177 OF 2008[2015] eKLR* the Court of Appeal held:

*“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...”*

(see also *Cecilia W. Mwangi and Another vs Ruth W.Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR*)

9. The factors to be considered in making an award for loss of earning capacity include the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any. (See *Butler v Butler (Supra)*).

10. The Courts have in some instances used the multiplier formula to assess the loss of earning capacity. However, where the facts do not facilitate the application of the multiplier approach, the court will opt for a global sum as the Court of Appeal did in the case of *Mumias Sugar Company Limited vs. Francis Wanalo* above. In that case, the Court of Appeal awarded Kshs. 500,000/= for diminution of earning capacity where the claimant who was aged 26 years and an apprentice at the time suffered deformity of two fingers.

11. In the present case, the respondent was 24 years old at the time of the accident. He suffered more severe injuries as compared to those suffered in the aforementioned case which was decided in 2007. The respondent’s assertion that he was a journalism graduate was not contradicted by the appellant. From the authorities cited above, it is evident that the fact that the respondent was not employed did not bar him from compensation for loss of earning capacity. In reaching its decision, the trial court also considered the medical report prepared by PW 2 which listed the impact of the loss of the lower left leg on the respondent as follows;

- The ability to carry out activities of daily living and usual routines has been significantly curtailed by the loss of one limb and he has had to rely on assistance from relative[s] to perform his usual chores.
- Psychological feeling of disfigurement due to alteration of body image.
- The post-traumatic stress suffered as a result of the horrific accident that resulted in prolonged insomnia has affected his quality of life
- The loss of time during admission and while undergoing rehabilitation out of hospital has had a negative impact on his studies and other life endeavors.
- The anxiety of being able to fit back to society and continue with his previous activities may affect his level of performance.

f. The loss of the left lower limb has meant that he may need to alter his living arrangements as he may not be comfortable with living in a storeyed structure.

12. The report listed a host of factors which would inevitably diminish the respondent's earning capacity. I therefore find that the trial court did not err in its award and uphold its finding. The upshot is that this appeal fails and is dismissed with costs to the respondent assessed at Kshs. 20,000/=.

**Dated, signed and delivered at Kisii this 14<sup>th</sup> day of August 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Wesonga For the Appellant**

**Mr. Nyambati h/b Mr. Masese For the Respondent**

**Rael Court clerk**