



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCA. NO. 105 OF 2016

MULANDI DAVID KOLE.....APPELLANT

-VERSUS-

GEORGE ODHIAMBO OBIEWE.....1ST RESPONDENT

MABEL W ASUMBA.....2ND RESPONDENT

(Being an Appeal from the judgement of Honourable C.K. Kisiangani (R.M.)

delivered in Machakos CMCC 1245 of 2007 dated 7th September, 2016)

BETWEEN

MULANDI DAVID KOLE.....PLAINTIFF

-VERSUS-

GEORGE ODHIAMBO OBIEWE.....1ST DEFENDANT

MABEL W ASUMBA.....2ND DEFENDANT

JUDGEMENT

1. The suit in the trial court arose out of a road traffic accident in which the appellant was a driver of Motor Vehicle reg. No. KAR 571D when motor vehicle KZL 609 registered in names of the 1st Respondent and beneficially owned by the 2nd Respondent hit the vehicle that the appellant was driving. The appellant was injured and he thus instituted **Machakos CMCC 1245 of 2007** that he indicated that he sustained right elbow dislocation and displacement of lower end of the right radius in which he was awarded Kshs 350,000/- general damages thus prompting instant appeal.

2. The appeal is solely on quantum and sets out the following grounds:-

(i) The Learned Trial Magistrate erred in fact and in law in awarding general damages that she failed to follow precedent set by superior courts or courts of concurrent jurisdiction in cases of similar injuries in awarding damages in spite of submissions made before her.

(ii) The Learned Trial Magistrate erred in fact and in law by awarding damages on the lower scale though having found the respondents 100% liable for causing the accident.

(iii) The Learned Trial Magistrate erred in her assessment of the damages that would have been awarded to the appellant as the same was manifestly low and injustice was occasioned.

(iv) The Learned Trial Magistrate erred in her assessment of damages that were not commensurable with the injuries sustained and/or in tandem with the evidence availed before her.

3. The parties agreed to canvass the appeal via written submission which they filed and exchanged.

4. Learned counsel for the appellant submitted that the trial court did not consider the submissions of the plaintiff and the authorities relied upon therein for example **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others (2013) eKLR** where courts have awarded between Kshs 1.3 and 1.5 million in respect of the injuries suffered similar to those of the appellant in the instant case. According to counsel, the medical report indicated that the appellant suffered 30% incapacitation and the trial magistrate failed to award loss of earning capacity because she found that the same were not pleaded and sought reliance in the case of **Mwaura Muiruri v Suera Flower Limited & Another (2014) eKLR**, where he argued that the court in that case found that claim for loss of earning capacity is a general damages claim and it is deemed to flow directly from the claim and need not be pleaded. Counsel submitted that the failure of the appellant to drive vehicles to earn a living was caused by the wrong perpetuated by the respondents hence he lost earnings as a result of the accident and ought to be awarded damages for loss of earning capacity. Learned counsel submitted that the award of general damages was manifestly low and this court ought to increase them. It was the strong argument of counsel that the award of special damages of Kshs 3,200/- was erroneous because the appellant produced receipts that showed that he expended Kshs 67,976/-.

5. Learned counsel submitted that the court should make the following order on damages

Pain and suffering 3,000,000/-

Loss of amenities500,000/-

Loss of earning Capacity.....500,000/-

Special Damages67,976/-

6. In reply, learned counsel for the respondent submitted that according to the pleadings, the injuries that were indicated as having been suffered by the appellant were right elbow dislocation and displacement of lower end of the right radius and that at the time that Dr. Waithaka Mwaura examined the appellant he complained of pain in the right upper limb, difficulty in lifting objects and a permanent scar. Counsel submitted that when Dr. Mutunga examined the appellant, he was found to have a healed scar on the right elbow, limitation of flexion and extension of the elbow joint, unable to lift objects and unable to utilize the right hand fully due to stiffness. In this regard, learned counsel submitted that the trial court correctly addressed itself to the nature of injuries suffered by the appellant and the award of Kshs 350,000/- was more than enough. Counsel relied on the case of **Gogni Rajope Construction Co Ltd v Francis Ojuok Olewe (2015) eKLR**. Learned counsel further submitted that the appellant sought future medical expenses of Kshs 500,000/- and special damages of Kshs 67,976/- but the same was not specifically pleaded in the plaint and the same were not awardable.

7. Counsel urged the court to dismiss the appeal with costs to the Respondents

8. This being an appeal against quantum, the role of the Appellate court in this regard was considered in the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** where the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Kangu -Vs- Manyoka (1961 EA 705, 709, 713)** and this was that if the trial court;

a) Took into account an irrelevant fact or,

b) Left out of account a relevant fact or,

c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

9. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, viz;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.

d. Where awards in decided cases are to be taken into consideration then the issue of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

10. The Appellant avers that the Learned Magistrate's award was extremely low. They asked the court to review the evidence and facts on record and make an award as particularized in paragraph 5 above.

11. The evidence in the trial court was as follows; Pw1 was Mulandi David Kole who told the court that he was a matatu driver of KAR 571D and left driving because of the road traffic accident when he was injured on his right hand and it was his testimony that he was admitted at Kenyatta National Hospital for one month and that he could not lift his arm without supporting it. He produced the P3 form, the police abstract, the medical report by Dr. Kimuyu prepared on 14.8.2010, the Medical report prepared by Dr. Mutunga on 27.7.2015, the treatment notes by Dr. Odienge, medical report by Dr. Waithaka dated 17.12.14, the copy of search and receipts as exhibits.

12. On cross-examination, he testified that the police abstract indicated the owner of KZL as Obiero however the registered owner was later discovered hence the plaint was amended to include the 2nd respondent. The appellant's case was closed after he testified. The defendant did not call any witness and closed their case.

13. I have analyzed the evidence adduced herein as well as the submissions. The issues for determination as elicited from the appeal are:-

1) Whether a case for disturbing the award by the trial court has been made.

2) If yes, how much is the Appellant entitled to?

14. The appellant testified that he was involved in a road traffic accident and was injured. The trial court made a finding on liability at 100% that has not been challenged.

15. On quantum, the appellant pleaded that he suffered right elbow dislocation and displacement of lower end of the right radius.

16. According to the undated medical report that was prepared by Dr. Kimuyu J.M, a Senior Medical Officer at West End Medical Solutions Ltd, pursuant to examination that was carried out on 14.8.2010 it was observed that the appellant complained of pain in the right upper limb with difficulty in lifting objects and an opinion was made that the appellant was clinically stable; had mild elbow stiffness and tenderness with power grade 4 right upper limb. He had a healed scar of the right arm. He suffered bone and soft tissue injuries as a result of the accident and his right elbow developed post traumatic osteoarthritis and he was managed for the same; he had not fully recovered and is still not able to lift his right upper limb maximally; intensive physiotherapy of the right elbow joint is advised.

17. The Appellant was examined by Dr. H.O. Ong'ang'o, an orthopaedic surgeon and vide report dated 22nd August, 2005 where it was observed that the x-rays confirmed that he had a dislocation of the right elbow and a dislocated distal right radio ulna joint. On record is a clinical summary with respect to the appellant dated 30th March, 2005 that was conducted by Dr. Khaemba Wangwe, with advanced orthopedic studies in and a specialist in surgery of the musculoskeletal system. The notes observed that the appellant required aggressive physiotherapy and that he had a dislocated elbow. On record is also a report by Dr. Mwangi, a radiologist and its dated 26.1.2005 and the same noted that the appellant suffered osteoarthritis. I have seen a report dated 17th February, 2014 by Dr. Waithaka Mwaura, an occupational physician who observed that the appellant suffered post traumatic osteoarthritis and had 30% permanent disability. There is also a report dated 27.7.2015 by Dr. John Mutunga indicative that the appellant suffered post traumatic osteoarthritis of the right elbow joint and had 30% permanent disability.

18. I had the benefit of going through the written submissions that were filed by the counsels for the parties as well as the authorities that were supplied therein.

19. The trial court noted that there were three medical reports on record. I however note that there are more than 3 reports and some of them are prepared by specialists and others are prepared by persons not specialized in the area of injury that affected the appellant. The court ought to have gone ahead to give an opinion that it formed in the light of the different reports and why it opted to believe one report over the other. However the court seemed to agree that the appellant suffered 30% disability.

20. In this regard I make the following observations:-

a) All the reports on record agree that the appellant suffered osteoarthritis.

b) The reports prepared in 2014 and 2015 give assessment that the appellant had 30% permanent disability. However none of the authors are specialized in the study of bones.

c) The reports in (b) above were tendered in court and there was no objection to their production and no evidence to controvert them was tendered.

d) The reports in (b) above were made based on observation on the appellant in respect of an accident that occurred 10 years before.

21. The trial court relied on what was opined by Dr. Kimuyu, Doctor Waithaka and Dr. Mutunga who were not experts. In the circumstances, however taking into account the medical evidence on record, the award of Kshs. 350,000 was inordinately low in the circumstances. In **Kenyatta University –vs- Isaac Kamma Nyuthe(2014) eKLR** for fracture of right femur, soft tissue injuries to head and bruises of right knee, and with a permanent incapacitation of 20% the court on appeal reduced an award of Kshs.700,000/= to Kshs.350,000/= in 2014. In **Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok [2019] eKLR**, for occasional pains on the left thigh during the cold season, shortening of limb deformity, likelihood of developing early osteoarthritis of the left hip joint and knee joints, assessed permanent disability to 40%, the court set aside an award of 900,000/- to 600,000/- on appeal. In this regard bearing in mind the fact that the medical reports were unchallenged, it is probably true that the appellant suffered post traumatic osteoarthritis of the right elbow joint and had 30% permanent disability and therefore an award of Kshs 600,000/- for pain and suffering would be adequate. The appellant did not plead loss of amenities and thus the court cannot grant the same.

22. As to cost for loss of future earning, I opine that prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore important that evidence should be given to the court of as many solid facts as possible. One of the solid facts that must be proved to enable the court to assess prospective loss of earnings is the actual income which the plaintiff was earning at the time of his injury. The method of assessment of loss of earning capacity after the facts have been proved is

persuasively stated by: *Mcgregor on Damages' 14th Edn. in paragraph 1164 (page 797)*. as follows:

“The courts have evolved a particular method of assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the plaintiffs present annual earnings less the amount if any, which he can now earn annually and multiply this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodic payments over the years. This figure has long been called the multiplier; the former figure has now come to be referred to as the multiplicand. Further adjustment however, may have to be made to the multiplicand or multiplier on account of a variety of factors; viz, the probability of future increase or decrease in the annual earnings the so called contingencies of life and the incidence of inflation and taxation.”

23. From the evidence on record, the appellant did not plead damages for loss of future earning and even if the court were to consider the same, the evidence on record is too scanty to enable the court make a finding on what the appellant was making per day and what he expected to earn as well as what he lost as a result of the accident. There is no evidence that he was employed as a driver hence the claim for loss of future earnings as alluded to in the submissions fails.

24. The plaint claimed for special damages of Kshs 3,200/- . However, the receipts prove an amount well in excess of what was pleaded and in that regard, the finding of the trial court is undisturbed since such damages are awardable if they are specifically pleaded and proved. What had been pleaded was awarded and thus the trial court's finding thereon cannot be faulted.

25. In the result the appeal partly succeeds. The trial courts judgement is set aside and substituted with the following:

a) General damages for pain and suffering Kshs. 600,000/=.

b) Special damages.....Kshs 3,200/.

c) The appellant is awarded half costs of the appeal and full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 23rd day of October, 2019.

D. K. Kemei

Judge