



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 286 OF 2016

YUSUFALI ABBASBHAI.....1ST APPELLANT

MUSTAFA ABBASBHAI.....2ND APPELLANT

VERSUS

FRANCIS MUENDO MWONGELI.....RESPONDENT

(Being an appeal against the decree and judgment delivered on 4th May, 2016 by

Hon. M. Chesang (Mrs) Resident Magistrate at Milimani Nairobi in Civil Suit No. 1948 of 2015)

JUDGEMENT

1. The instant Appeal arises from judgment from Magistrate Court at Milimani whereof the Respondent had sued Appellants over claim of road traffic accident.
2. The Appellant were held liable and Respondent was awarded damages plus costs and interest.
3. Thus the Appellant lodged an appeal set out 7 grounds of appeal namely;

(i) The Learned Magistrate erred in fact and in law in finding the Appellants wholly liable given the circumstances under which the accident occurred.

(ii) The Learned Magistrate erred in law and in facts in holding that the Respondent would no longer work again in future while wholly relying on the evidence of a single doctor.

(iii) The Learned Magistrate erred in fact and in law by adopting and applying a minimum wage of Kshs.10,500/= as Respondent monthly earning thus making an excessive award of Kshs.1,890,000/= loss of income.

(iv) The Learned Magistrate erred in law and in facts in making an award of Kshs.1,000,000/- general damages which is excessive in view of the injuries sustained by the Respondent.

(v) The Learned Magistrate erred in law and in facts by ignoring precedent.

(vi) The Learned Magistrate erred in fact and in law by failing to give a reasoned judgement.

(vii) The Learned Magistrate erred in law and facts by holding in favour of the Respondent without adequate evidence.

4. The parties were directed to file submissions to canvass the appeal.

APPELLANT'S SUBMISSION:

5. The appellant submits that the Magistrate erred in fact and in law in finding the Appellants wholly liable given the circumstances under which the accident occurred.

6. The Police Abstract (PEXHI) produced by PW2 show that the driver was to blame for the accident. In cross examination he could not tell how the accident occurred, neither could he tell how the pedestrian was hit. Appellant (s) were never charged with the offence of dangerous

driving, neither was there an investigation report relied upon by PW2.

7. He was categorical that he was not at the accident scene and therefore could not inform the court competently how the accident occurred. Moreover, he was not the investigating officer; he did not visit the accident scene, there was no sketch map of the area where the accident happened.

8. In light of the above submission, there ought to be an apportioned blame or liability on both the Appellants and the Respondent by the Magistrate's Court.

9. The appellant contend that, the trial Magistrate erred in law and in fact by adopting and applying a minimum wage of Kshs.10,500/= as Respondent monthly earning thus making an excessive award of Kshs.1,890,000/= loss of income.

10. At paragraph 7 of the Respondent's plaint it is stated that at the time of accident the Respondent (read Respondent) was a businessman and trading as a hawker making a profit of approximately Kshs.1,200/= in a day or Kshs.28,200/= a month.

11. The Respondent was 34 years old at the time of the accident. In his medical report dated 4th December, 2014, Dr. Cyprius Okore (PW1) in his expert opinion and prognosis stated that the Respondent's left and right legs 30% and 35% permanent disability.

12. Further there was no proof of the Respondent earning Kshs.1,200/= per day as a hawker, even no receipts to calibrate his standard of living such as house rent and his general daily expenditure. Furthermore the Respondent did not prove even on a balance of probability that he lost his future earnings. Going by the percentage of disability the Respondent could still engage in some activity that could earn him a living.

13. Appellant relies on the case of *SJ vs Francesco Di Nello & Another [2015]* where the Court of Appeal stated as follows;

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income 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.... 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.”

14. The appellant argues that the trial Magistrate erred in law and in fact in awarding Kshs.1,000,000/= being general damages which was excessive in view of the injuries sustained by the Respondent.

RESPONDENT'S SUBMISSIONS:

15. The respondent submits that, this court lacks jurisdiction to entertain and determine the Appeal without a proper record of appeal and call upon this court to dismiss the appeal for its incompetency and failure to comply with court orders as issued on 03rd May, 2019.

16. On ground 1; it is argued that the trial court erred in law and in fact in finding the Appellants wholly liable given the circumstances under which the accident occurred.

17. It is contended that when the matter came before the learned magistrate the Respondent testified on the circumstances of the accident and further called a witness PW2 who confirmed that indeed there was a road traffic accident involving the Respondent and motor vehicle registration number KBK 113P.

18. He testified that upon investigation by the police, the driver of motor vehicle registration number KBK 113P was blamed for the causing the subject accident. This testimony by PW2 was never challenged by the defence.

19. It is argued that it is to be noted that the Appellants did not call any witness to testify on the circumstances of the subject accident and/or dispute what the Respondent had tabled before court and as such the Appellant's claim remains just a mere statement that has not been substantiated.

20. In her judgement, the learned trial magistrate stated that *“the appellant did not testify but his statement filed together with the defence corroborates the Respondent's evidence.”*

21. The respondents rely on the case of *Gabriel Mwashuma vs Mohammed Sajjad & Another [2015] eKLR Civil Suit 79 of 2012, Hon. Justice Mary Kasango* where court held that;

“No evidence was tendered on behalf of the appellants. It follows that the Appellant's defence remained mere allegation.”

22. On ground 2; it is argued that, the trial magistrate erred in law and in fact by considering a single doctor evidence, adopting and applying a minimum wage of Kshs.10,500/= as respondent monthly earning and by awarding of future earning capacity to the sum of Kshs.1,890,000/=.

23. It is contended that, on loss of future earnings, the principles to be considered in determining whether an injured person is entitled to damages under this head was settled in the Court of Appeal in *Butler vs Butler [1984] KLR 225*. which held there as follows;

“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”.

24. The respondent submit that, it is not in doubt that the Respondent herein sustained severe injuries that resulted to him being unable to perform his professional duties as a hawker as he used to. His testimony concerning the same was corroborated by Doctor Cyprianus Okere who examined the Respondent and prepared a medical report. Further the said doctor was called before court as Respondent witness PW1.

25. It is argued that, the trial magistrate considered the evidence tendered before court and found out that the Respondent had no proof of earning and consequently applied a minimum wage of Kshs.10,500/=.

26. The fact the Appellants in their submission at the trial court gave an opinion that the court may adopt a minimum wage approach which the learned trial court magistrate adopted.

27. Further it is contended on ground 3; that the trial magistrate erred in law and in fact by awarding manifestly excessive amount of general damages of Kshs.1,000,000/= given the nature of injuries.

28. Injuries as per medical report of **Dr. Cyprianus Okoth Okere** produced in court;

i) Blunt back injury

ii) Deep cut on the abdomen

iii) Fracture of the right tibia

iv) Fracture of the right fibula

v) Fracture of the left tibia

vi) Fracture of the left fibula

29. The Respondent was treated at St. Mary’s hospital with an open reduction and internal fixation of the fractures with implants. Bone grafting was done. The metal implants were still in situ. Dr. Okere classified the injuries as grievous harm and awarded the Respondent permanent incapacity of 30% to the right leg and 35% to the left leg.

30. In submission on this head they relied on the following legal authorities;

a) Annexed authority of Hon. Justice E. Muchemi in Civil Appeal No. 58 of 2013 where Respondent with less serious injuries was awarded Kshs.2,000,000/= (two million) Dorcase Wangithi Mwaura vs Samuel Kiburu Mwaura & Another.

b) Annexed authority Hon Justice H.P.G Waweru Kirinjit Singh Magon vs Bonanza Rice Millers Civil Case No. 373 of 2008 where the Respondent with broken right upper leg (fractured femur) was awarded Kshs.1,500,000/= (one million five hundred thousand) Charles Mathenge Wahome and Others vs Fina Bank Ltd.

31. On the other hand the Appellants/Appellants did not submit any figure but on this head they relied on the case of *Anthony Keriga Mogesi vs Florence Nyomenda Tumbo Civil Appeal No. 147 of 2012* where the court awarded Kshs.600,000/=.

32. In *Mutua Kaluku vs Muthini kiluto [2018], Civil Appeal 180 of 2008*, stated that;

“I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard Kemp & Kemp on The Quantum of Damages, Volume 1 paragraphs 1-003. In my view to be comparable, the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provision for adjustment.”

33. In *Civil Appeal 132 of 2012, Peter Namu Njeru vs Philemone Mwagoti [2016] eKLR, Hon Justice P.J.O. Otieno* stated that;

“In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirety erroneous estimate of compensation to which the Respondent was entitle or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was holy injudicious not expected of a reasonable adjudicator”.

34. He further stated that, “This court takes notice that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be bringing nature on the trial court being a subordinate court. However the duty to assess damages remains a discretionary factor and there must be a clear and demonstrable show that there was an error to invite interference by an appellate court.”

EVIDENCE TENDERED:

35. The Respondent testified that he was on the extreme left side of the road at Langata at an area preserved for pedestrians on a two way traffic when motor vehicle registration KBK 113P came from the opposite direction, lost control, veered off the road and came to the other side of the road and knocked them down, as a result of which the Respondent sustained injuries.

36. He narrated that, the 1st Appellant did not testify, his statement filed together with the defence corroborated his evidence as such. Respondent stated that, the appellants were jointly and wholly liable for the accident.

37. **On Quantum;**

The Respondent stated that the injuries sustained were;

-Blunt back injury

-Deep cut on the abdomen

-Fracture of the right tibia

-Fracture of the right fibula

-Fracture of the left tibia

-Fracture of the left fibula

38. That the back healed well with a deformity on the lower 1/3. The left leg had a pus discharging wound. The Respondent doctor alluded to various degrees of permanent incapacity. Internal fixation of fractures was done with in-plants together with bone grafting.

39. The Respondent further narrated that he was a hawker earning Kshs.1,200/= per day. He was 34 years on the date of the accident. He can no longer hawk his wares due to the severe injuries sustained.

40. The degree of permanent incapacity of the right leg was assessed at 30% and that of the left leg at 35% by Dr. Cyprianus Okoth Okere for the Respondent. There was no medical report tendered by the Appellant.

ISSUES

41. After going through evidence on, pleadings and parties submissions, I find the issues are; *whether this court lacks jurisdiction to entertain and determine the Appeal without a proper record of appeal and call upon this court to dismiss the appeal for its incompetency and failure to comply with court orders as issued on 03rd May, 2019? Whether the liability against appellants was proved beyond reasonable doubt? Whether the award on general damages was inordinately high? And whether the award on loss of earning was justified in the circumstances of the instant case?*

ANALYSIS AND DETERMINATION:

42. The court perused the record and found that failure to comply on the procedural directions do not go to the root of the court's jurisdiction. In any case **Art 159 (2) (d) constitution of Kenya** would override such objection to enable court do substantial justice devoid of technicalities.

43. On ground 1; the appellant complains that the learned trial magistrate erred in law and in fact in finding the Appellants wholly liable given the circumstances under which the accident occurred.

44. When the matter came before the learned magistrate the Respondent testified on the circumstances of the accident and further called a witness PW2 who confirmed that indeed there was a road traffic accident involving the Respondent and motor vehicle registration number KBK 113P.

45. He testified that upon investigation by the police, the driver of motor vehicle registration number KBK 113P was blamed for the causing the subject accident. This testimony by PW2 was never challenged by the defence.

46. The court notes that, the Appellants did not call any witness to testify on the circumstances of the subject accident and/or dispute thus the Respondent testimony before court remained unchallenged and as such the Appellant's claim remained just a mere statement that has not been substantiated.

47. In her judgement, the learned trial magistrate stated that *"the appellant did not testify but his statement filed together with the defence corroborates the Respondent's evidence."*

48. In *Gabriel Mwashuma vs Mohammed Sajjad & Another [2015] eKLR Civil Suit 79 of 2012*, Hon. Justice Mary Kasango held that;

“No evidence was tendered on behalf of the appellants. It follows that the Appellant’s defence remained mere allegation.”

49. Ground 2; the complaint is, “That the learned trial magistrate erred in law and in fact by considering a single doctor evidence, adopting and applying a minimum wage of Kshs.10,500/= as respondent monthly earning and by awarding of future earning capacity to the sum of Kshs.1,890,000/=.

50. The Appellants aver that the learned trial magistrate award was manifestly high and the same was not proved. On loss of future earnings, the principles to be considered in determining whether an injured person is entitled to damages under this head was settled in the Court of Appeal in **Butler vs Butler [1984] KLR 225**. It was held there as follows;

“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”.

51. It is not in doubt that the Respondent herein sustained severe injuries that resulted to him being unable to perform his professional duties as a hawker as he used to. His testimony concerning the same was corroborated by Doctor Cyprianus Okere who examined the Respondent and prepared a medical report. Further the said doctor was called before court as Respondent witness PW1.

52. The learned trial magistrate considered the evidence tendered before court and found out that the Respondent had no proof of earning and consequently applied a minimum wage of Ksh10,500/=.

53. The court observes the fact that the Appellants in their submission at the trial court gave an opinion that the court may adopt a minimum wage approach which the learned trial court magistrate adopted.

54. However the amount ought to have been applied taking to account the fact that the figure would be gross but should be less expenses and statutory deductions which would leave a figure at the range of about Kshs. 5,000/=.

55. Ground 3; That the learned trial magistrate erred in law and in fact by awarding manifestly excessive amount of general damages of Kshs.1,000,000/= given the nature of injuries.

56. The injuries as per medical report of Dr. Cyprianus Okoth Okere produced in court were;

Ø **Blunt back injury**

Ø **Deep cut on the abdomen**

Ø **Fracture of the right tibia**

Ø **Fracture of the right fibula**

Ø **Fracture of the left tibia**

Ø **Fracture of the left fibula**

57. The Respondent was treated at St. Mary’s hospital with an open reduction and internal fixation of the fractures with implants. Bone grafting was done. The metal implants were still in situ. Dr. Okere classified the injuries as grievous harm and awarded the Respondent permanent incapacity of 30% to the right leg and 35% to the left leg.

58. In submission on this head respondent relied on the following legal authorities;

(1) Annexed authority of **Hon. Justice E. Muchemi in Civil Appeal No. 58 of 2013** where Respondent with less serious injuries was awarded Kshs.2,000,000/= (two million) **Dorcace Wangithi Mwaura vs Samuel Kiburu Mwaura & Another**.

(2) Annexed authority of **Hon Justice H.P.G. Waweru Kirinjit Singh Magon vs Bonanza Rice Millers Civil Case No. 373 of 2008** where the Respondent with broken right upper leg (fractured femur) was awarded Kshs.1,500,000/= (one million five hundred thousand) **Charles Mathenge Wahome & Others vs Fina Bank Ltd**.

59. On the other hand the Appellants did not submit any figure but on this head they relied on the case of **Anthony Keriga Mogesi vs Florence Nyomenda Tumbo Civil Appeal No. 147 of 2012** where the court awarded Kshs.600,000/=.

60. In **Mutua Kaluku vs Muthini Kiluto [2018], Civil Appeal 180 of 2008**, stated that;

“I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard Kemp & Kemp on The Quantum of Damages, Volume 1 paragraphs 1-003. In my view to be comparable, the previous cases must have

been made at the time or close to the time the injuries were suffered by a claimant, hence the provision for adjustment.”

61. In *Civil Appeal 132 of 2012, Peter Namu Njeru vs Philemone Mwangoti [2016] eKLR*, Hon Justice P.J.O. Otieno stated that;

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62. He further stated that;”

“This court takes notice that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be bringing nature on the trial court being a subordinate court. However, the duty to assess damages remains a discretionary factor and there must be a clear and demonstrable show that there was an error to invite interference by an appellate court.”

63. The appellants never demonstrated that the award was inordinately high to warrant this court to interfere with the same.

64. In sum the court makes the following orders;

i) The appeal succeeds to the extent that the minimum wage will apply being net estimated to be Ksh. 5250/= per month. Thus loss of earning reduced to ksh 945,000. Total award 1,945,000.

ii) Save that adjustment, the court finds no merit in other grounds and thus dismisses appeal with orders that parties bear their costs.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE