



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 44 OF 2016

DOMINIC MBITHI.....APPELLANT

VERSUS

AGNES MWINZI.....1ST RESPONDENT

JAMES MUASYA.....2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. D.W. Mburu, (MR.) P.M

dated 15th January, 2016 in Milimani CMCC No. 4036 of 2012)

JUDGMENT

The appellant was injured following a road traffic accident that took place on 7th February, 2012 along Mombasa Road. He was riding motor cycle registration No. KMCB 697Y when he was knocked down by motor vehicle registration No. KBM 842P owned by the 1st respondent and driven by the 2nd respondent at the time of the accident.

The appellant blamed the accident on the negligence of the 2nd defendant in the manner he drove the said motor vehicle. The respondents denied the appellant's claim in their defence and blamed the appellant for riding the motor cycle at excessive speed, without any due care and attention, failing to have reflectors on the motor cycle, attempting to ride on the path of the motor vehicle among other allegations.

After a full trial however, the lower court found in favour of the appellant and proceeded to award Kshs. 1,000,000/= for pain and suffering and Kshs. 47,342.82 special damages. The appellant was not satisfied with the said award and lodged an appeal by way of Memorandum of Appeal dated 10th and filed on 12th February, 2016.

The lower court was faulted for failing to appreciate the seriousness of the appellant's injuries which were life threatening and deserved an award of Kshs. 2 Million. The award of Kshs. 1Million was said to be too low and amounted to an erroneous estimate which was not fair compensation considering the injuries sustained. The lower court was also faulted for failing to consider and appreciate the appellant earning capacity had been diminished in that he could no longer ride a motor cycle which was his occupation, and which condition made him lose his job.

Parties were ordered to file submissions but only the appellant complied. When the matter was listed for hearing on 12th September, 2019 the respondents were ordered to file their submissions within 14 days after being served with the appellants submissions.

The matter was subsequently mentioned on 29th October, 2019 and again on 6th November, 2019 to allow the respondents file submissions. However the respondents did not comply and the judgment date was set.

In the brief submissions filed by the appellant, the court has been asked to enhance the award for pain and suffering and also consider the fact that the appellant is not able to engage in any work after the accident. The trial court cannot be faulted for holding the respondents wholly liable for the accident, because the evidence by the appellant and the eye witness P.W. 1 Yusuf Ngala Fadhili confirmed the appellant was knocked from behind and therefore cannot be blamed for the accident at all.

In making the award of general damages the trial court referred to some sited authorities, and took into account the injuries sustained by the appellant together with the subject of inflation.

I am supposed to reconsider the evidence adduced before the trial court and evaluate the same with a view to arriving at independent conclusion, This I have done.

The report by Dr A.O. Wandugu dated 25th June, 2012 was produced as exhibit 14A. The appellant sustained head injuries which led to mild headaches, fracture comminuted cervical spine, fracture, styloid process of the (R) Ulna, nerve injuries the (R) brachial plexus which led to wrist drop, cut wound on the lateral aspects of the right eye brows, right side of abdomen, knuckles of the 2nd and 3rd fingers of the right hand and right lateral mellaneous. He also sustained trauma to the right ankle joint and foot leading to swelling, and also had blood loss.

Dr. Wandugu attended to the appellant about five months from the date of the accident. The doctor formed the opinion that the injuries sustained by the appellants resulted in chronic disabling pains in the affected areas and which may need medication on and off. Cosmetic scars remained on the injured areas. Most importantly, the right hand was rendered disabled permanently due to nerve damage. These nerves known brachial plexus supply motor nerves to the arm. Neck movements were also affected permanently, and he was going to be monitored continually in a neorology clinic due injuries to the head. The right foot also suffered permanent weakness and by extension the entire leg. The percentage of disability was not expressly stated.

There is no doubt the appellant sustained serious injuries that resulted to disability cited by the doctor. He is going to live with that disability for the rest of his life. The authorities cited by counsel for the appellant were a guide to the award of damages but regrettably in the case of **Samuel Theuri Kibata vs. Emphatus Ngugi Mwaura** and other injuries were more concentrated to the legs.

In the present case, the appellant lost the use of his right hand and also the right foot. I agree that the award of Kshs 1 Million general damages for pain and suffering was inordinately low and therefore calls for intervention by the appellate court. The appellate court may interfere with the award made by the lower court if it is inordinately high or too low so as to attract the attention of the appellate court. That is the position in this case and in that regard, guided by the medical report and decided cases set aside the award of Kshs 1 Million and in place thereof make an award of Kshs 1.5 Million.

The appellant has submitted that she is entitled to general damages for loss of earning capacity. This claim was not pleaded and only the evidence of the plaintiff provided some right in that direction. Loss of earning capacity is a claim in general damages that need not be pleaded. In the case of **Mumias Sugar Company Limited vs. Francis Wanaro (2007) e KLR** the Court of Appeal observed as follows,

“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.”

The appellant was a qualified agronomist in a subsidiary company of Coopers and he used to advice farmers. His salary is not stated in any part of his evidence, but he testified that he no longer worked with the company and his salary had been stopped. At the time he gave evidence in May, 2015 he did not have any gainful employment and his employment had been terminated as a result of the injuries. He used to use both hands prior to the accident. He did not state his age but in the P3 form which he produced in evidence, his age was 48 years.

It is clear that this is a person who cannot be engaged in any gainful employment due to his injuries. Assuming however that he had not been injured, he was likely to work up to the age of 60 years. That is to say 12 more years. In the absence of any guide relating to salary, but considering that his testimony relating to is employment was never challenged, I can only approach this issue along the lines given by the Court of Appeal in the case cited above. I shall use a modest figure of Kshs. 15,000/= and apply a multiplier of five years considering that as a motor cycle rider, the risks are high and just as he was injured in the accident, many other risks would be considered.

The loss of earning capacity would therefore WORK up to Kshs. 15,000 x 12 x 5 = Kshs. 900,000/=.

In the end this appeal is allowed by setting aside the judgment of the lower court relating to general damages for pain and suffering and in place thereof enter judgment for the appellant as follows,

a. General damages	Kshs. 1,500,000/=
b. Loss of earning capacity	Kshs. 900,000/=
c. Special damages	Kshs. 47,342.80
Total	Kshs. 2,447,342.80

The appellant shall have the costs of the suit both in the lower court and in this appeal plus interest at court rates.

Dated, signed and delivered at Nairobi this 19th day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE