REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 22 OF 2018

MILKA KEMUMA KIMANGA.....APPELLANT

-VRS-

PETER GABI NYANDISI.....RESPONDENT

{Being an appeal against the Judgement of Hon. M. O. Wambani – CM Nyamira dated and delivered on the 23rd day of October 2018 in the original Nyamira Chief Magistrate's Court Civil Case No. 183 of 2015}

JUDGEMENT

By a plaint dated 13th October 2015 the respondent sued the appellant seeking the following reliefs: -

"(a) General damages, damages for loss of earnings and earning capacity.

(b) Future medical expenses and operations and artificial leg.

(c) Special damages.

(d) Costs and interest of this suit.

(e) Interest on (a), (b) and (c) above at court rates."

The claim was premised on a motor accident which occurred along the Kebirigo – Kericho – Nyamira road on 2nd August 2015 involving the appellant's motor vehicle KBW 208Z and a motor cycle KMDB 468T which was being driven by the respondent. The respondent blamed the collision on the negligence of the defendant, his servant or employee.

In a statement of defence filed on 3rd February 2016, the appellant opposed the claim and attributed the accident to negligence on the part of the respondent. However, upon hearing the case and the appellant not having called any witnesses at the hearing, the trial Magistrate found the appellant wholly to blame and entered judgement on liability in favour of the respondent at 100%. Thereafter the trial Magistrate awarded the respondent damages as follows: -

"(a) General Damages for Pain, Suffering and Loss of Amenities	**–**	**Kshs. 1,500,000/=.**
(b) Loss of Earnings and Earning Capacity	**–**	**Kshs. 2,160,000/=.**
(c) Medical Expenses	**–**	**Kshs. 55,200/=.**
(d) Special Damages	**–**	**Kshs. 15,600/=.**
(e) Future Medical Expenses	**–**	**Kshs. 1,400,000/=**
Total	**–**	**Kshs. 5,130,800/=."**

The respondent was also awarded the costs of the suit and interest at the usual court rates.

Being aggrieved by the trial Magistrate's findings on liability as well as the assessment of damages, the appellant preferred this appeal. The grounds of appeal are that: -

> **"1. The Learned Trial Magistrate erred both in fact and in Law in failing to hold that it was the Respondent's responsibility to ensure that he took caution while on the road, while all evidence pointed to the negligence of the Respondent.**
>
> **2. The Learned Trial Magistrate erred both in law and fact in failing to find that the Respondent having been negligent and having admitted so, no liability could be attributed and/or inferred against the Appellant. The court award is unsustainable and baseless in the circumstance.**
>
> **3. The Learned Trial Magistrate erred in law and in fact by holding the Appellant liable at <u>100%</u> whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the Appellant and neither was the same proved or at all.**
>
> **4. The Learned Trial Magistrate erred both in Law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained any and/or the purported injuries, in view of the fact that medical evidence adduced were insufficient and of no probative value.**
>
> **5. The Learned Trial Magistrate erred both in Law and in fact by awarding the Respondent general damages for Pain and Suffering and Loss of Amenities at KES 1,500,000/=, LOSS OF Earning Capacity at KES 2,160,000/=, Medical Expenses at KES 55,200/= and Special Damages at KES 15,600/= for amputation which damages were excessive in the circumstance and not proved at all.**
>
> **6. The Learned Trial Magistrate erred both in law and in fact by awarding the Appellant future medical expenses at KES 1,400,000 when the same was neither pleaded nor proved.**
>
> **7. The Learned Trial Magistrate erred in Law and in fact, by failing to dismiss the Respondent's suit with costs to the Appellant."**

The appeal was canvassed by way of written submissions. On liability, Counsel for the appellant submitted that the evidence tendered did not prove negligence against the appellant on a balance of probabilities and finding the appellant liable at 100% merely because she did not adduce evidence was erroneous. On this Counsel relied on 2 cases: -

- **Dave v Business Machines Ltd [1974] EA 68** where the court held:-

> **"Now if an appearance had been entered and the defence filed and if only failure on the Defendant's part had been failure to appeal, either personally or through his advocate…. …..the Plaintiff ought properly to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim."**

- **Susan Mumbi v Kefala Grebedhin (NBI HCCC No. 3321 of 1993)** where the court stated: -

> **"The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial."**

Counsel pointed this court to the provisions of Sections 107 and 108 of the Evidence Act and urged it to set aside the finding of liability and dismiss the suit with costs stating out that the respondent admitted he did not have a licence that qualified him to ride the motor cycle on the road.

On general damages, Counsel for the appellant submitted that the award for pain, suffering and loss of amenities was inordinately high and did not accord the principle of uniformity. Counsel submitted that the kind of injuries the respondent sustained attract awards of between 400,000/= and 700,000/= which is what the trial Magistrate should have awarded. Counsel cited the case of **Florence Njoki Mwangi v Peter Chege Mbititu [2014] eKLR** as one where the plaintiff sustained injuries similar to those of the respondent and was awarded Kshs. 700,000/=.

Counsel for the appellant also submitted that the respondent did not prove that he was entitled to damages for loss of earnings and earning capacity. Counsel contended that the said damages ought to have been specifically pleaded and strictly proved and as that was not done the court was wrong to award the same. Counsel urged this court to be guided by the Court of Appeal decisions in the cases of **Sande v Kenya Co-operative Creameries Ltd [1982] KLR 314, Douglas Odhiambo v Telkom Kenya Ltd Court of Appeal No. 115 of 2006** and **Isaac Mworia M'Nabea v David Gikunda [2017] eKLR**. Counsel contended that moreover the respondent did not adduce evidence to prove that he was engaged in any income generating activity or how much he was earning. Relying on the case of **Butler v Butler [1984] KLR 225,** Counsel submitted that loss of earning capacity should in any event have been included as an item within general damages but not as a stand-alone award.

On his part, Counsel for the respondent urged this court to dismiss the appeal stating that the respondent had proved his case on a balance of probabilities and that the trial court had exercised its discretion properly in assessing the damages and this court should be slow to interfere with the same as no justifiable legal reasons had been advanced.

The issues for determination in this appeal are: -

1. Whether the respondent proved his case on a balance of probabilities to warrant the finding of liability arrived at by the lower court.

2. Whether there is justification for this court to interfere with the trial court's assessment of damages.

I have carefully considered the evidence adduced in the trial court, the submissions and the cases cited by Counsel. The respondent gave evidence that on the material day he was standing off the Kebirigo – Mosobeti road on the left side waiting for a customer when the appellant's motor vehicle Registration No. KBW 208Z which was being driven towards Mosobeti veered off the road and hit him. He stated that he had not seen the vehicle and only suddenly realized he had been hit. This was corroborated by his witness John Maangi (Pw2) who testified that the motor vehicle was being driven at a high speed and was in the process of overtaking another motor cycle when it lost control and veered off the road and hit the respondent. The witness confirmed that the respondent was standing off the road. This witness was a passenger in the vehicle that hit the respondent and he was categorical that he saw what happened clearly. In his statement of defence, the appellant denied the particulars of negligence attributed to him in the plaint but did not adduce any evidence at the hearing. It is trite that averments in a pleading are just that and a party must adduce evidence to prove the same. The appellant having not adduced evidence at the trial, the averments in his defence were just allegations that did not offer any rebuttal to the plaintiff's case – **see Linus Nganga Kiongo & 3 others v Town Council of Kikuyu [2012] eKLR** where Odunga J faced with a similar issue and citing the cases of **Janet Kaphiphe Ouma & Another Kisumu HCCC No. 68 of 2007** and **Interchemie EA Limited v Nakuru Veterinary Centre Limited NBI Milimani HCCC 165 B of 2000** held: -

"The Plaintiffs have given evidence on oath supported by documentary evidence which go to prove their case. Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed."

Similarly, I find that the plaintiff herein proved his case on a balance of probabilities and is entitled to succeed. This is not a case where judgement was entered for the respondent merely because the appellant did not appear. The respondent adduced evidence and called a witness. They were both cross examined by the Advocate for the appellant. Their evidence was cogent and credible and accordingly the trial Magistrate's finding on liability at 100% against the appellant shall be upheld.

On the quantum of damages, the principles that guide this court are that in deciding whether to disturb the awards it must be satisfied that either the trial court took into account an irrelevant factor or left out of account a relevant one or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage – **see Kemfro Africa Ltd t/a Meru Express Service & another v AM Lubia & another [1982-88] KAR 727.** Applying the above principles to this appeal, it is my finding that I would not be justified in interfering with the awards made for pain, suffering and loss of amenities (Kshs. 1,500,000/=) and the medical expenses (Kshs. 55,200/=). This is not so for the other awards.

In respect of the award for pain, suffering and loss of amenities the respondent sustained: -

1. Amputation of the right leg below the knee.

2. Fracture of the right ulna and radius.

3. Soft tissue injuries of the right side of the chest.

The above were serious injuries that left him maimed for life. As correctly submitted by Counsel for the appellant similar injuries should attract comparable awards. However, in the quest for consistency courts must also recognize that no case is exactly the same as another and therefore each case must be decided with its own peculiar circumstances in mind. Given the nature of injuries suffered by the respondent and taking into account the passage of time since the judgement in **Florence Njoki Mwangi v Peter Chege Mbitiru**, I am satisfied that the award of Kshs. 1,500,000/= was not only adequate but also reasonable.

The medical expenses of Kshs. 55,200/= were specifically pleaded in the plaint and were strictly proved at the hearing and shall be upheld.

On special damages the trial Magistrate awarded Kshs. 15,600/=.However, of that amount, only the following was pleaded: -

"1. Medical report - Kshs. 7000/=

2. Police abstract – Kshs. 100/=

3. P3 Form – Kshs. 1000/=

4. Search certificate – Kshs. 500/=

5. Medical expenses – Kshs. 55,200/=")

At the hearing only Kshs. 7000/= in respect of the medical report was strictly proved and that is what should have been awarded. The award for special damages of Kshs. 15,600/= is accordingly set aside and substituted with special damages of Kshs. 7,000/=.

For future medical expenses the respondent's averment in the plaint was that: -

> **"9. The Plaintiff sustained very severe injuries and he requires future treatment and operations – an artificial leg at a cost of Kshs. 100,000/= which the Plaintiff claims herein."**

Future medical expenses are quantifiable and are therefore in the nature of special damages although awarded as general damages – **see Kenya Bus Services Ltd v Gituma [2004] EA 91** cited with approval by Wakiaga J in the case of **Isaac Mworia M'Nabea v David Gikunda [2017] eKLR.** In the instant case the respondent pleaded a sum of Kshs. 100,000/= for an artificial leg yet he was aware of the doctor's recommendation for replacement of the same after every three years. There was no justification therefore to award more than the Kshs. 100,000/= pleaded. In the premises the award for Kshs. 1.4million is set aside and substituted with one for Kshs. 100,000/= only.

For loss of earnings and earning capacity this court shall be guided by the holdings of the Court of Appeal in **Butler v Butler [1984] KLR 225 at page 226** that: -

> **"1. 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.**
>
> **2. 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.**
>
> **3. Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are not quantified separately and no interest is recoverable on them.**
>
> **4. Loss of earning capacity can be a claim on its own, as where the 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.**
>
> **5. 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.**
>
> **6. 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."**

The trial court applied the multiplier/multiplicand method and awarded the respondent a sum of Kshs. 2,160,000/=. It is not clear whether this was for loss of earnings or for loss of earning capacity which as was observed in the case of **Butler v butler (supra)** are different heads of damages. Loss of earnings is awarded for **"real assessable loss proved by evidence."** In this case the respondent did not qualify for an award for loss of earnings as he did not adduce evidence of real assessable loss. Apart from alleging that he was a **"boda boda"** rider he did not tender cogent proof that he indeed was. Moreover, he could not have been one given his admission that he did not have a licence when the accident occurred. Without a licence he could not have legitimately been engaged in the occupation of a motor cycle **"boda boda"** at the time and he was therefore not entitled to any damages for loss of earnings in any event. As for loss of earning capacity in **Butler v Butler (supra),** the Judges of Appeal held that: -

> **"4. Loss of earning capacity can be a claim on its own, as where the 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."**

The Judges also held that: -

> **"5. 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."**

In the case of **Shabani v City Council of Nairobi [1985] KLR 516** the court held that:-

> **"Damages for loss of future earning capacity could be awarded even in the case of a child.** "

The factors to be considered in making such an award were settled in the case of **Butler v Butler (supra): -**

> **"6. 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."

The trial Magistrate misconceived the law in assessing damages for loss of earning capacity arithmetically. Since she did not factor loss of earning capacity in the award of general damages then she was entitled to make a separate award for that bearing in mind the factors set out in **holding No. 6** in **Butler v Butler (supra).** Accordingly, the award of Kshs. 2,160,000/= is set aside and substituted with one for Kshs. 1,500,000/=.

In the upshot the appeal herein succeeds and judgement for the respondent against the appellant shall now be as follows: -

1. **Liability 100%**

2. **General damages for pain, suffering and loss**

   of amenities – Kshs. 1,500,000/=

3. **Loss of earning capacity – Kshs. 1,500,000/=**

4. **Special damages**

   (a) Medical expenses – Kshs. 55,200/=

   (b) Specials – Kshs. 7,000

   Sub-total – Kshs. 62,200/=

5. **Future medical expenses – Kshs. 100,000/=**

   Total – Kshs. 3,224,400/=

6. **Costs of the suit in the lower court.**

7. **Interest at court rates on both special and general damages calculated in the usual manner.**

8. The appellant shall however get half the costs of this appeal having succeeded partially.

It is so ordered.

Signed, dated and delivered in Nyamira this 19th day of December 2019.

E. N. MAINA

JUDGE