



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 555 OF 2015

MICHAEL ADEKA KHAEMBA.....1ST APPELLANT

LAZARUS KINYANJUI KARANJA.....2ND APPELLANT

LIKANYA LIMITED.....3RD APPELLANT

VERSUS

RASSANGYLLO MULI KUMUYU.....RESPONDENT

(Being an appeal from the judgment of Honourable Senior Principal Magistrate L. Kassan (Mr.) delivered on 23rd October, 2015 in CMCC No. 4594 of 2013)

JUDGEMENT

The Appellants have filed this Appeal challenging the judgment delivered on 23rd October, 2015 on the quantum of damages awarded by the trial magistrate. In a Memorandum of Appeal dated 19th November, 2015 the Appellants main ground of Appeal was that the award was excessive in the face of the evidence adduced and submissions made. In the said judgment, the trial magistrate awarded the Respondent General Damages of Kshs. 600,000, Loss of Earnings Kshs. 240,000, Future Medical Expenses Kshs. 350,000 and Special Damages of Kshs. 15,000/=.

The evidence adduced in the lower court revealed that the Respondent had suffered a fracture of the femur as a result of an accident which had been caused by the 1st Appellant. The trial magistrate found the Appellants 100% liable for the accident. Looking at the memorandum of Appeal filed herein, the Appeal is on quantum only.

The court has been called upon to determine the following issues;

- a) Whether the award of Kshs. 600,000/= was excessive for the injuries suffered?
- b) Whether the Respondents ought to have been awarded damages for loss of earning; and
- c) Whether the award on future medical expenses was excessive.

The Respondent called Dr. Nassir Bhanji as PW1 who testified on the nature of injuries suffered by the Respondent whose opinion was that the respondent would require a surgery to remove a nail inserted that would cost Kshs 350,000/= in Aga Khan Hospital as well as physiotherapy at least 3 months session in a week at a cost of Kshs. 2000 per session. On the other hand the Applicants called Dr. Jenipher Nyarera who examined the Respondent and his opinion was that the respondent had sustained a fracture of the femur which had healed with complications and requires review. He suggested Kshs. 80,000/= for future medical care.

This Appeal was canvassed by way of written submissions. The Appellants filed their submissions dated 22nd November, 2017 and submitted on the three limbs of the award they are challenging being the award on general damages, award on loss of earning capacity and award on future medical expenses.

On General damages, the appellants submitted that since the medical report by Dr. Bhanji was found to be exaggerated, the same should be disregarded and abundant caution exercised when considering the same. The Appellants further submitted that damages must be made taking into account comparable injuries or similar injuries and awards. The Appellant relied on the case of **Elizabeth Mulwa Vs - Tawfiq Bus Services[2003] eKLR** wherein the Plaintiff sustained a fracture of the femur, fracture of the tibia and fibula and a cut on the right thigh and the court awarded Kshs. 250,000/=.

They also relied on **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** where the Respondent suffered *Fracture of the right mid shaft femur, Fracture of the left mid shaft femur, Degloving wound on the right tibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and Multiple cuts on the forehead. The Respondent was awarded general damages of Kshs. 700,000/= in which case the Appellants submitted that the injuries were more severe in that case.*

More authorities were submitted by the Appellants which I have considered as well. In the end the Appellants urged the court to award not more than Kshs. 350,000/= in general damages.

On the award on loss of earning and loss of earning capacity, the Appellants submitted that the two prayers were deliberately linked as one whilst the two are distinct prayers. It was submitted that an award of loss of earnings is normally made where the claimant was working and there is evidence to show what he was earning a salary. That the award is normally calculated on a multiplier and is a special damages claim which must be strictly proved. Reliance was made to **Civil Appeal No. 91 of 2003 Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** where it was held that, *“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. 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”.*

The plaintiff also relied on **CECILIA W. MWANGI & another v RUTH W. MWANGI [1997] eKLR** where the court stated that, *“in her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just “throw figures” at the judge and ask him to assess such damages.”*

The Appellants submitted that the Respondent did not prove loss of earning as he had admitted that he did not produce documents to show that he was employed as a watchman.

On loss of earning capacity it was further submitted that the same could be awarded to a person who was not employed, to compensate him for the risk that he may not be employed in the near future. However, the applicants submitted that any loss to be suffered by the Respondent during the period of healing is already covered under the rubric of general damages and there is no need to compensate him under a different head.

On the award for future medical expenses the Appellants submitted that the award of Kshs. 350,000/= was high considering that Dr. Jennifer Nyarera had estimated the same to be Kshs. 80,000/=. He urged the Court to ignore the medical report by Dr. Bhanji which suggested that the Respondent would require Kshs. 350,000/= for the future medical costs at a private hospital.

The Respondent filed submissions dated 14th December, 2017 and submitted that the Applicants did not call any evidence to controvert that of the Plaintiff on both the issue of liability and quantum and therefore the Plaintiffs evidence remained un rebutted. The Respondent urged the court to dismiss the appeal.

I have considered the submissions in totality together with the authorities relied on by the parties. An appellate court is tasked with re-evaluating the evidence before the lower Court in order to make a finding and in so doing it will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law.

The general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial judge, the appellate court will only interfere where the trial judge in assessing damages either took into account an irrelevant factor or failed to consider a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**).

The Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** stated that; *“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”*

On the award on general damages I find that the trial magistrate misdirected himself in awarding excessive damages as to necessitate the intervention of this Court. As rightly observed by the learned magistrate, the injuries as stated by Doctor Bhanji were exaggerated. According to the P3 form and the treatment notes from P.C.E.A Kikuyu Rehabilitation Centre (which were Respondents documents and exhibits), the only injury sustained by the Respondent was fracture of the right femur. There is no mention of any other injury whatsoever. The award of Kshs. 600,000 was not commensurate with the injuries suffered and the authorities submitted.

The occupation of the Respondent in this case was not proven. Rather than the allegation that he was a watchman, no evidence was produced to prove the same. As was submitted by the Appellant, an award on loss of earning should be specifically proven so that the court can be able to calculate the same based on what the claimant was earning. This award will normally be awarded where a claimant has evidentially proven that he was working and earning a specified amount of salary. This was not the case. The same principle applies in a claim for loss of earning capacity. Therefore the award of Kshs. 240,000/= in loss of earnings was erroneously made and the same is quashed.

On the award of future medical costs, there are conflicting reports on the same from the two medical doctors who testified. PW1 suggested that the Respondent would require Kshs. 350,000/= for treatment at Aga Khan Hospital which is a private hospital whereas DW1 suggested Kshs. 80,000 for future treatment in a public hospital. From the testimony of the Respondent, he stated that he was treated at PCEA Kikuyu Hospital and not at Aga Khan Hospital. No evidence was adduced as to why the Respondent would need to attend Aga Khan Hospital for the future medical needs and not any other hospital. In awarding damages, a court ought to consider the circumstances of the case in whole. Even though medical expert opinion is meant to assist a Court in making its determination, the same is not binding on the face of it and ought

to be considered in addition to the other evidence adduced before the court.

In the case of **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR**, on the issue of future medical expenses **Justice Wakiaga held that, "8. On the issue of cost of future medical expenses it is clear that the plaintiff had pleaded the same and tendered in evidence by the two doctors who confirmed that the cost will be between Kshs. 60,000/- - 100,000/- at a government hospital and having noted that the appellant was admitted at Thika district Hospital where the K nail and plate were inserted I would allow this ground of appeal and award Ksh. 100,000/-."**

In this case, the court finds that the Appellants have given an estimate which is on the lower side while the Respondent has exaggerated the same. In my view a sum of Ksh.200,000/- would be reasonable.

In the end the Appellants appeal partly succeeds and the award will be as follows:-

- a) General damages for Pain and Suffering.....Kshs.200,000
- b) Future medical care Kshs.200,000
- c) Special damagesKshs.15,000
- d) Doctor's attendanceKshs.12,000
- e) Loss of earning and earning capacityNil.

TOTAL **Kshs.427,000**

Therefore I enter judgment for the Respondent on the sum of **Kshs.427,000/=**.

Each party to bear its own costs of the Appeal.

Dated, Signed and Delivered at Nairobi this 19th Day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*