



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 546 OF 2014

JOHN KINYUA MURAGE..... 1ST APPELLANT

JAMLECK MWANGI2ND APPELLANT

M. W. KIBUGI 3RD APPELLANT

- V E R S U S -

JOSEPH ONYANGO OBURA..... RESPONDENT

(Being an appeal from the judgement of Hon. C. Obulutsa (Mr), Ag Chief Magistrate delivered on 12th August, 2014 in Nairobi CMCC No. 4529 of 2013)

JUDGEMENT

1) Onyango Obura, the respondent herein, filed a compensatory suit against John Kinyua Murage, Jamleck Mwangi and M. W. Kibugi, the 1st, 2nd and 3rd respondents respectively, for the injuries he sustained in an accident which occurred on 25.10.2010 along Ring Road at Kariokor involving him and motor vehicle registration no. KAT 406Y. The suit was later withdrawn from this court and transferred to the Chief Magistrate's Court, Milimani pursuant to the order issued by Justice Hatari Waweru on 23rd July 2013. The suit was eventually heard and determined in favour of the respondent wherein he was awarded ksh.5,815,450/= as damages. The appellants were dissatisfied with the aforesaid decision hence they preferred this appeal.

2) On appeal, the appellants put forward the following grounds in their memorandum:

1. The learned judge erred in law and misdirected himself when he failed to consider the defendant's submissions on both points of law and facts.

2. That the learned magistrate's decision was unjust, against the weight of evidence and was based on points of fact and wrong principles of law and has occasioned a miscarriage of justice.

3. That the learned magistrate erred in law and misdirected himself when he failed to consider that compensation for loss of future earning capacity is to be awarded as part of general damages.

4. The learned judge erred in law and fact in finding the appellants 100% liable in view of the evidence produced before court and in particular the following:

a) That the police in the OB said that none of the parties was liable for the accident.

b) That the plaintiff relied on documents that were never produced in court and therefore never formed part of the proceedings in awarding special damages.

c) That the plaintiff did not call any witnesses to corroborate his theory.

d) That the plaintiff failed to prove his case on liability against the defendants.

5. The learned magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by plaintiff

a) General damages	ksh.2,500,000
b) Loss of diminishing earnings	ksh.2,592,000
c) Cost of artificial leg	ksh.720,000
d) Special damages	ksh. 3,450

Net **ksh.5,815,450**

6. The learned magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions made by defence counsel on liability and quantum

When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

3) I have on my part re-evaluated the case that was before the trial court. I have also considered the rival submissions. Though the appellant put forward a total of six grounds of appeal, those grounds may be summarised to two main grounds i.e the question of liability and that touching on quantum.

4) On the first issue touching on liability, it is the submission of the appellants that the respondent had failed to tender credible evidence to establish liability as against them therefore the learned chief magistrate erred when he found them wholly liable. The respondent is of the view that he presented evidence showing that the appellants were solely to blame for the accident. The respondent was the only witness who testified in support of his case. He stated that on the fateful day, he was at Kariokor waiting to board a motor vehicle to his place of work **Keys Labour Ltd** at 680 Hotel in Nairobi Central Business District (C.B.D). He said he was knocked down by a motor vehicle which was coming from the direction of town and headed to Pangani. The respondent stated that the motor vehicle which knocked him, did not stop. He said, he later learnt that the police took him to hospital where he had his right leg amputated below the knee. The respondent stated that he reported to the police who issued him with a police abstract form which he produced as an exhibit in evidence. The appellants on the other hand, summoned one P.C. Duke Mogaka (D.W.1) to testify in support of their defence. DW1 stated that a report was made to Pangani Police Station on 25.10.2010. He also confirmed that a police abstract form was issued which indicated the name of the victim to be Fred Onyango. DW1 stated that an error may have been made by the person who made the initial report since the respondent was not the initial reportee. The appellants have urged this court to find that the respondent did not prove that they are to blame for the accident. I have carefully re-evaluated the evidence tendered by both sides before the trial court. It is apparent from the recorded evidence that the respondent stated that he was injured at the Raymond Kariokor while waiting to board a motor vehicle to Nairobi C.B.D. This assertion was not controverted by the appellants. In fact the witness summoned by the appellants produced documents which corroborated the evidence of the respondent that he was knocked down by motor vehicle registration no. KAT 406Y. The occurrence book produced by DW1 indicated that the accident victim was standing beside the road when he was hit. The same document blamed KAT 406Y. The appellants' argument that the respondent did not prove liability therefore falls by the wayside. Consequently, upon re-evaluation of the evidence tendered, I find no fault in the decision of the learned chief magistrate to find the appellants solely liable.

5) On quantum, it is the submission of the appellants that the learned chief magistrate fell into error in his assessment of damages. It is argued that the awards on damages was inordinately high and erroneous. The respondent is of the view that the awards on damages were commensurate with the injuries sustained by the respondent and were also within the range given in near similar cases. The learned chief magistrate made the following awards in favour of the respondent:

i. General damages	ksh.2,500,000
ii. Loss of diminishing earnings	ksh.2,592,000

iii. Cost of artificial leg	ksh.720,000
iv. Special damages	ksh. 3,450
Net total	ksh.5,815,450

6) It is also apparent from the pleadings and the evidence tendered that the respondent suffered compound fractures of the right tibia, compound fractures of the right fibula, skin and muscle loss on the right leg below the knee. The doctor also indicated that the respondent suffered permanent incapacity of 45%. It is the submission of the appellants that the respondent had failed to summon the doctor who prepared the medical reports to produce the same therefore the medical report was of no probative value. It would appear the respondent did not address his mind over this issue. I have on my part examined the record and it is clear that the medical report prepared by Dr. Wambugu was produced by the respondent without summoning the doctor to produce it. The record does not indicate that the appellants raised any objection to its production. I think it is not acceptable to allow the appellants to keep silent before the trial court only to raise an objection on appeal. Parties should take the earliest opportunity to raise such objections before the trial court. If they fail to do so, then they lose the right to do so on appeal. Consequently, this court declines to entertain the objection on appeal.

7) The appellants have argued that the award of kshs.2,500,000/= for pain and suffering is high therefore it should be reviewed downwards to ksh.1,500,000/=. They cited the case of **Esther Ingolo vs Swaleh Said Hamed Bilele and 2 others (2006) eKLR** where the victim was awarded ksh.1,200,000. The respondent argued that the award should not be disturbed stating that the case cited by the appellants is more than 10 years old. The respondent relied on the case of **Jackson Mutuku Ndeti vs A. O. Bayusuf & Sons Ltd (2007) eKLR** where an award of ksh.2,000,000/= was made for an amputated leg in 2007. I am persuaded by the arguments put forward by the respondent that the award on pain and suffering should not be disturbed.

8) On loss of future earnings, the appellants are of the submission that the trial court heavily relied on the medical report of Dr. Wokabi who was never called to testify hence his report was not properly produced. The appellants urged this court to set aside the award of kshs.2,592,000/= and substitute it with ksh.350,000/=. The appellants relied on the case of **Mwaura Muiruri vs Suera Flowers Ltd & Another (2014) eKLR** where the plaintiff was awarded ksh.150,000/=.

9) In the case before this court, the respondent stated that he is able to walk but only work using his hands. The appellants pointed out that at the time of hearing the respondent was aged 47 years therefore multiplier of 18 years was wrong. It was also argued that it is not foreseeable that the respondent would have worked as a bouncer upto the age of 60 years. It was further pointed out by the appellants that the net salary per month should have been ksh.10,000 as against ksh.12,000/=. I think the appellants have raised pertinent issues which I am persuaded to agree. First, the multiplier of 18 years in my view is erroneous. I am convinced that a multiplier of 13 years is reasonable. I am also convinced that the net salary of ksh.10,000/= should be the actual applicable figure.

10) On this ground the learned chief magistrate fell into error. On this head I will award Ksh.1,560,000/= calculated as follows:

$$10,000 \times 13 \times 12 = 1,560,000/=$$

11) The appellants also challenged the award on purchase of prosthesis claiming that no expert evidence were tendered to support the claim for ksh.720,000/=. This court was urged to award a sum of ksh.300,000/= in its place. The respondent was of the view that at the age of 42, it is estimated that a change of the artificial leg may be undertaken six times hence the award made by the trial magistrate was a reasonable one. I have however pointed out that at the time of judgment in the trial court the respondent was aged 47 years. I therefore find the assessment of the trial court on this head to be exorbitant hence it must be interfered with. I am persuaded by the proposal by the appellants that ksh.300,000/= is a reasonable figure in the circumstances of this case.

12) On special damages I am convinced that the amount granted by the trial court was pleaded and proved, therefore nothing turns out on the appellants' challenge.

13) In the end, this appeal partially succeeds. The appeal as against the award on general damages for pain and suffering is dismissed.

14) The appeal as against the award on special damages is also dismissed.

15) However, the appeal as against the award on loss of future earnings is allowed. Therefore the award of kshs.2,592,000/= as loss of future earnings is set aside and is substituted with an award of ksh.1,560,000/=.

16) The award on cost of artificial legs of ksh.720,000/= is set aside and is substituted with an award of ksh.300,000/=.

17) For the avoidance of doubt the resultant judgment on appeal is as follows:

i. General damages for pain and suffering ksh.2,500,000/=

ii. Loss of future earnings ksh.1,560,000/=

iii. Cost of artificial leg (prosthesis) ksh. 300,000/=

iv. Special damages ksh. 3,450/=

Net total ksh.4,363,450/=

v. Each party to meet their own costs of the appeal.

vi. Costs of the suit before the trial court is given to the respondent on the basis of the awards on appeal.

Dated, Signed and Delivered in open court this 16th day of March, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents