



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
HIGH COURT CIVIL APPEAL NO. 4 OF 2017
(FORMERLY MERU HCCA NO. 25 OF 2015)

MORRISON M'TETU.....APPELLANT

VERSUS

DANIEL MUGENDI.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment delivered by **B.N Ireri *Principal Magistrate in Chuka PM's Court Civil suit No. 118 of 2014***. In that case the appellant herein had been sued by the Respondent for tort of negligence arising in a road traffic accident involving motor vehicle Registration No. KAN 096 N and the Respondent who was injured as a result. The motor vehicle was owned by the appellant. The parties agreed and recorded a consent on the question of liability and in that regard the appellant agreed to shoulder 80% blame or liability while the Respondent conceded to 20% of the liability in the accident.

2. The subordinate court proceeded on the basis of written submissions after the parties agreed to that mode of disposal of the suit. The Respondent had pleaded the following injuries in his plaint and submissions before the lower court namely;

- (i) Dislocated distal inter-pharyngeal joint of the thumb of the left hand.
- (ii) Dislocated proximal inter pharyngeal joint middle finger of the left hand.
- (iii) Fracture of the head of proximal ring finger
- (iv) Extensive soft tissue injuries of the left hand
- (v) Bruise over lateral melleoli area of the right ankle joint.

3. The Respondent also pleaded for loss of earning capacity and stated that because his left hand was severely affected he lost earning of Ksh.250/- per day for one and half years and sought to be awarded Kshs.1,800,000/-. On special damage, the Respondent pleaded and sought Kshs.75,318/- as particularized in his pleadings.

4. On his part the appellant had pleaded before the Subordinate Court that, the Respondent could not be awarded special damages on matters not specifically pleaded and proved. His submissions for general damages for the injuries suffered by the Respondent was Kshs.150,000/-.

5. The trial court as observed above proceeded on the basis of written submissions filed and made the

following awards;

- a) Special damages - Kshs.48,474/-
- b) General damages - Kshs.400,000/-
- c) Loss of earning capacity - Kshs.400,000/-

The total awards above was arrived at after factoring in 20% concession of liability by the appellant and therefore the total award was Kshs.848,474/- plus costs and interests.

6. The appellant felt aggrieved by the decision of the subordinate court and preferred this appeal raising the following six grounds in his Memorandum of Appeal namely:-

(i) That the learned magistrate erred both in law and fact when he awarded a sum of Kshs.500,000/- as damages for injuries suffered which amount was manifestly excessive and high.

(ii) That the learned magistrate erred both in law and fact when he awarded a global amount of Kshs. 500,000/- as damages for loss of earning capacity which amount was high and excessive.

(iii) That the learned magistrate erred both in law and fact by holding that loss of earning capacity can be classified as general damages provable on a balance of probabilities.

(iv) That the learned magistrate did not consider the appellant's written submissions and authorities.

(v) That the learned magistrate erred by failing to follow precedent.

(vi) That the learned magistrate erred both in law and fact for considering irrelevant matters.

7. This appeal also proceeded through written submissions and both the appellant have filed their respective submissions which I have considered. In my view this appeal basically has only two issues namely:-

(i) Whether the award on general damages was too high in the circumstances.

(ii) Whether an award on loss of earning capacity should have been made and whether amount awarded under that head was too high in the circumstances.

8. To begin with the first issue, this court has noted that the major injury suffered by the appellant in this appeal was severe injuries to his left arm. The medical reports tendered in the subordinate court to wit, the P3 form and doctor's report clearly show that those injuries were severe because it resulted to some deformity of some fingers. The appellant did not tender any medical evidence in rebuttal of the opinion of the doctor who treated the Respondent and prepared the report. The trial court used its discretion and awarded the Respondent general damages, of Kshs.400,000/- and being a discretionary matter, this court can only interfere with the award if it is established that the trial court applied wrong principles or took or failed to take into account relevant factors in arriving at the award or that the award was so manifestly excessive or inordinately low that it must have been an erroneous estimate. The appellant in my view has failed to establish this and I find no merit to interfere with the award made by the learned trial magistrate on general damages.

9. On the question of loss of earning capacity, this court wishes to make it clear that loss of earning capacity is and should fall under the category of special damages. The provisions of order 2 rule 4 of the Civil Procedure Rules requires that such matters must be specifically pleaded and particularized so that

the opposite party is not taken by surprise. It must also be noted that matters to do with earning capacity are specific in nature because it relates to what particular individual was involved in at the material time. In this case, the Respondent at the trial did not tender any evidence to show that he was earning Kshs.250/- or demonstrate the type of employment he was in whether he was self employed or an employee. I therefore agree with the appellant that no evidence was tendered to support the claim on loss of earning capacity and it was erroneous for the trial court to find the claim was provable on a balance of probability as any other claim on general damages. I have seen the decision of **Hon. Justice Sergon** on ***ENOCK KEDOGO -vs- HILLARY ISAAC JILANI (MSA C.A NO. 176 of 2006)*** but with respect my view is that the **Hon Judge** just quoting another decision in obiter that damages under the head of "**loss of earning capacity**" can be classified as general damages but that was not the issue for determination in that appeal. Loss of earning capacity for all practical reasons is a special claim requiring specific proof to be awarded. The Respondent failed in that respect and the trial court was in error to give an award under that heading.

In the premises this appeal partly succeeds. The award of special damages of **Kshs.48,474/-** shall remain as the same is not faulted by the Appellant in this appeal. I also find no merit to disturb the award of Kshs.400,000/- as general damages for the aforesaid reasons. The award of Kshs.400,000/- for loss of earning capacity is set aside. The total amount awarded to the Respondent shall be **Kshs.484,474/-** plus costs and interests in the lower court. Half costs is awarded in this appeal to the Appellant.

Dated and delivered at Chuka this 8th day of March 2018.

R.K. LIMO

JUDGE

8/3/2018

Judgment signed, dated and delivered in the open court in the presence of Murithi holding brief for Kamunyori for Respondent.

R.K. LIMO

JUDGE

8/3/2018