



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 29 OF 2015

PETER NGUGI KIMANI.....APPELLANT

V E R S U S

JOSEPH KARIUKI.....RESPONDENT

J U D G M E N T

1. The appellant was aggrieved by the judgment and decree of Embu Chief Magistrate in CMCC No. 28 of 2014 in which the respondent was awarded damages for loss of amenities of Kshs.2,608,160/= all inclusive plus costs of the suit and interests. The parties recorded a consent on liability at 80:20 ratio with the defendant bearing 80%.

2. The grounds of appeal are mainly that:-

(a) *That the damages for pain and suffering were manifestly excessive;*

(b) *That the learned magistrate erred in the way he assessed the damages for earning capacity of the plaintiff.*

(c) *That the magistrate erred in adopting a multiplicand of Kshs.8,000/= and a multiplier of 15 years without taking into consideration the evidence and the case law.*

(d) *That the magistrate erred in law and in fact in awarding future medical expenses for prosthesis and dentures which were not specifically pleaded and was excessive in the circumstances.*

(e) *That the learned magistrate did not subject the assessed damages for earning capacity to the level of permanent incapacity suffered by the plaintiff.*

3. This appeal was argued by way of written submissions by consent of the parties. The appellant was represented by Munene Wambugu & Kiplagat while Khan & Associates is for the respondent.

4. The duty of the appellate court was explained in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES [1976] & ANOTHER VS LUBIA & ANOTHER (No.2) [1985] eKLR**. The court observed:-

...The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

5. For grounds 2, 3, and 4 of the memorandum of appeal, the case of **MUMIAS SUGAR LTD VS FRANCIS WANALO [2007] eKLR** was relied on. The dicta of the court indicated:-

The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. 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.

6. The dicta emphasizes on the fact that damages for loss of earning capacity is purposed to compensate the plaintiff for the risk that he may not get employment or suitable employment in future due to the permanent full or reduced capacity he has suffered as a result of the injuries sustained. It also acknowledges that the right principles must be applied by the court to ensure that the damages awarded are adequate and not excessive to compensate for the financial loss in cases where the plaintiff is not employed.
7. The appellant argues that the plaintiff herein was self-employed and could still engage in his vocation despite losing a limb. He reared cows and chicken which he told the court he sold and contradicted himself on the reason for doing so.
8. The appellant said the magistrate was wrong to say that the respondent could not earn a living again and justified the award of the prosthesis limb to aid him in earning a living. It ought to have been fair if the court declared that the plaintiff had lost his earning capacity and awarded damages but not award both damages and the prosthesis.
9. It was further argued that adopting a multiplicand based on Government Wage Guidelines was wrong because the respondent was a farmer of Kshs.9,000/=. The court ought to have adopted the minimum wage of a stock-man or herdsman of Kshs.5,600/=.
10. According to the appellant, the multiplier of 15 years had no basis in that the court awarded cost of an artificial limb. There was also no justification for damages for loss of earnings. The 100% incapacity was not justified since the respondent was walking with two arms crutches. The assessment by Dr. Ruga of 50% should have been applied.
11. Relying on the case of **KENYA BUS SERVICES LTD VS GITUMA [2004] EA 91** the appellant argued that damages for future medical expenses ought to have passed the test of special damages, of being specifically proved.
12. The case of **SIMON TAVETA VS MERCY NJERU [2014] eKLR** was cited as having followed similar principles. The respondent did not amend his plaint to include the figure for future medical expenses. The appellant argued that the award of Kshs.150,000/= and Kshs.10,000/= for cost of prosthesis and dentures was not based on any pleading or evidence.
13. The appellant concludes by arguing that his submissions were not considered for he had articulated on all the issues in the grounds of appeal.
14. The respondent submitted that future medical expenses and future earning capacity are general damages and need not to be specifically pleaded and proved like special damages. The two medical reports were in agreement that that the respondent required an artificial limb to cost between Kshs.150,000 – 250,000/= and denture of Kshs.10,000/=. The learned magistrate took the middle ground and awarded Kshs.200,000/= and Kshs.10,000/= for dentures. These figures were based on the evidence of the experts and were not inordinately high.
15. He relied on the case of **THOMAS K. NGARUIYA & 2 OTHERS VS DAVID CHEPSIROR [2012] eKLR** where it was held that:-
- A claim for future medical treatment was part of general damages and thus did not need to be specifically pleaded.*
16. It was further submitted that the degree of incapacity of 50% was based on the medical report of Dr. Njiru. There was no evidence to the contrary to lead to a contrary finding.
17. The respondent further argued that the court was correct in relying on the Government Wage Guidelines in assessing the income of the deceased. The guidelines are applicable in cases where the income of the deceased is not known. The amount of the multiplicand is not taxable as argued by the appellant.
18. The respondent relied on the case of **ERIC ONYANGO OKUMU VS SDV TRANSAMI (K) LTD eKLR** where it was held:-
- This is ahead of damages awardable irrespective of whether the plaintiff was in salaried employment or not before the injury. The factors to be considered in awarding it vary with the circumstances of each case. The include age and qualifications of the plaintiff, his remaining work life, his disabilities....*
19. I have considered the submissions of the parties in this appeal. The main issues are the manner in which the damages for future medical expenses and for future earning capacity was computed. The issue may be singled out as the quantum of damages. The parties had recorded a consent on liability at the ratio of 80:20 with the defendant bearing 80%. Liability is therefore not an issue in this appeal.
20. This court adopts the general approach of appeal courts not to interfere with an award of damages by the lower court unless the appellant can prove that a relevant factor was not taken into consideration, or that the award was based on wrong principles or was not based on evidence. This was the principle adopted in the case of **MUGAMBI & ANOTHER VS GITUIRU [2004] eKLR**.
21. On the issue of future medical expenses, the learned magistrate awarded Kshs.200,000/= for an artificial limb. Dr. Njiru's report indicated that the respondent had suffered a total loss of the right lower limb from the crush injury leading to amputation of the leg above the knee. Dr. Ruga observed that the respondent had lost function of the right limb.
22. The respondent lost the right limb since the amputation was above the knee. Dr. Ruga assessed the permanent loss of earning capacity at 50%. This degree is what the learned magistrate adopted in assessing damages. The respondent was aged 43 years at the time of the accident. It cannot be said that the magistrate erred in this regard.
23. In that condition of loss of the right limb, Dr. Njiru and Dr. Ruga agreed in their reports that the respondent required the use of an

artificial limb. The only thing the doctors differed on is the cost of the prosthesis with Dr. Njiru assessing the cost as Kshs.250,000/= while Dr. Ruga put it at Kshs.150,000/=.

24. I do not agree with the appellant that the artificial limb enhanced the earning capacity of the respondent so as to justify denying him damages for loss of future earning capacity. The prosthesis would serve the respondent in helping him to move around to attend to his very personal needs including the call of nature. The learned magistrate did not err in law and fact in awarding the cost of the artificial limb and damages for loss of future earning capacity.

25. The cost of prosthesis and the dentures was within the figures recommended by the two doctors. The award of Kshs.150,000/= and Kshs.10,000/= was based on evidence and on correct principles of the law.

26. The income of the respondent was not known. He said he used to earn Kshs.200/= daily in his livestock farming but had no supporting documents.

27. The use of unskilled workers wages as outlined in the Government Wages Guidelines is applicable in this case. The argument of the appellant that the respondent ought to have been awarded the multiplicand of Kshs.5,000/= for a herdsman or watchman is misleading and not acceptable. The respondent owned his own livestock and was not a herdsman. The multiplicand of Kshs.9,000/= applied by the learned magistrate was not a misdirection as alleged.

28. It was also argued that the damages for future medical expenses and damages for loss of earnings are special damages and must be proved. The appellant relied on cases decided in the 1990s. Jurisprudence has developed over the years and things changed.

29. In the case of **ERIC ONYANGO OKUMU VS SDV TRNSAMI (K) LTD [2007] eKLR** which is more recent, it was held in reference to such damages:-

This is a head of damages awardable irrespective of whether the plaintiff was in salaried employment or not before the injury. The factors to be considered in awarding it vary with circumstances of each case. They include age and qualifications of the plaintiff, his remaining work life, his disabilities....

30. The same principle was upheld in the case of **MWAURA MURIUKI VS SUERA FLOWERS LTD & ANOTHER [2014] eKLR** in regard to loss of earnings that:-

The claim for loss of earning capacity is general damages claim and is deemed to flow directly from the claim and need no be pleaded.

31. In this case, the learned judge cited the case of **MUMIAS SUGAR CO. LTD VS FRANCIS WANALO [2007] eKLR** with approval which made a similar finding.

32. It is my finding that the assessment of damages in this case was supported by evidence, was based on the right legal principles and that the damages were not inordinately high. I find no reason to interfere with the findings of the learned magistrate.

33. Consequently, the appeal fails and it is hereby dismissed with costs.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Ongwen for respondent

Ms. Muriithi for Kiplagat for appellant