



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.68 OF 2017

HUMPHREY OKUMU ODONDI.....APPELLANT

VERSUS

IMPERIAL DRIVING SCHOOL.....RESPONDENT

(An appeal from the judgment of the Hon. J.S. Wesonga, SRM sitting at the SPM's Court at Oyugis in Civil Suit No.124 of 2016 dated 13th day of November, 2017)

JUDGMENT

[1] Pursuant to a plaint dated 15th June, 2016, filed at the Chief Magistrate's Court at Oyugis in Civil Suit No.124 of 2016, the plaintiff/appellant, **HUMPHREY OKUMU ODONDI**, made a claim for damages against the defendant/respondent, **IMPERIAL DRIVING SCHOOL**, arising from a road traffic accident which occurred on 15th March 2016, along the Kisii - Oyugis road at Ragama area, involving the plaintiff's motor cycle Registration NO.KMDS and the defendant's motor vehicle Registration No. KBU 639K.

[2] It was pleaded that on that material date, the plaintiff was lawfully riding on his motor cycle when it violently collided with the defendant's motor vehicle thereby causing him to suffer injuries as well as loss and damages.

The plaintiff contended that the accident occurred as a result of the defendant's negligence and/or recklessness in the manner of driving of the motor vehicle by its driver, servant and/or agent.

The plaintiff therefore prayed for damages for pain and suffering and for loss of earning capacity. He also prayed for special damages, future medical expenses, interest and costs of the suit.

[3] A statement of defence dated 22nd May 2016, was filed by the defendant. The ownership of the material motor vehicle by the defendant was denied and so was the occurrence of the accident.

The defendant denied negligence on its part and the damage and loss occasioned to the plaintiff and contended that if the accident occurred, then it was as a result of the sole and/or contributory negligence of the plaintiff.

The defendant thus prayed for the dismissal of the suit with costs.

[4] Judgment on liability was by consent entered at the ratio of 80% - 20% in favour of the plaintiff.

The matter thereafter proceeded for hearing on the quantum of damages.

Ultimately, the trial court in a judgment dated 13th November 2017, awarded damages to the plaintiff in the sum of Kshs.1,100,000/=. Future medical expenses Kshs.1,200,000/=. general damages for pain and suffering and Kshs.717,600/= loss of future earnings. The total award was Kshs.3,017,600/= less 20% contributory negligence i.e. Kshs.2,414,080/=.

[5] Being dissatisfied with the award, the plaintiff preferred the present appeal on the basis of the sole ground contained in the memorandum of appeal dated 30th November 2017. He prays for the appeal to be allowed and the judgment on quantum by the trial court be set aside. He further prays for re-assessment of quantum on general damages and loss of past, present and future earnings.

[6] At the hearing of the appeal, both the appellant and the respondent presented their written submissions through their respective advocates i.e. **KULECHO & COMPANY ADVOCATES** for the appellant and **NISHI PANDIT & COMPANY ADVOCATES** for the respondent.

This court, having given due consideration to the appeal on the basis of the rival submissions, holds the view that the appeal is essentially on quantum of damages.

[7] With regard to such appeals, guidance was given by the Court of Appeal in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE –VS- A.H. LUBIA & ANOTHER (1982-88) 1 KAR 777**, where it was held that:-

“The principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that; it must be satisfied that either the judge, in assessing the damages took into account on 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.”

[8] Herein, it is the appellant’s contention that the trial court erred in law and in fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing general damages and loss of past, present and future earnings thereby arriving at a very low award on the said damages.

In particular, the appellant raises issue with the award made by the trial court for pain and suffering and loss of past, present and future earnings and proposes that the same be increased. He proposes that the award of loss of past, present and future earnings be increased to Kshs.3,588,000/= based on a figure of 500/= being daily earnings for a period of 26 days in a month and 23 years being the projected years that he was expected to work and earn income considering that he was 27 years old at the time of the accident and was expected to work upto the age of 50 years but for the accident.

[9] The appellant’s major complaint was to be that the impugned award in general damages and loss of earnings was inordinately low, regard being given to the degree of the injuries suffered by him as a result of the accident.

Two medical reports were tendered in court to show the extent of the injuries and their resultant effect on the appellant’s general wellbeing.

[10] The report by DR. Wanjala dated 13th June 2016, indicated that the main injury occasioned to the appellant was a crush injury on the right leg leading to comminuted compound fracture of the right tibia and fibula and below knee amputation of the leg. The other injuries were minor in nature and comprised of lacerations to the scalp and fingers of both hands.

[11] According to the doctor, the said injuries caused a lot of physical psychological pain, blood loss and suffering as they amounted to grievous harm. They left the appellant totally dependant on crutches to walk. He experienced difficulties in performing basic tasks such as going to the toilet, bathing and dressing. He became in need of counseling due to the emotional and psychological trauma. He required a prosthetic leg at an estimated cost of Kshs.500,000/=. His life was shattered as he was no longer able to do his usual work as an electrician. The extent of permanent and functional incapacity as a result of the accident was 60%.

[12] The medical report by Dr. Modi M.Y., dated 16th February 2017, was similar to that of Dr. Wanjala, in relation to the injuries suffered by the appellant. He (Dr. Modi) noted that the stump arising from the amputation below the knee was well healed and that the appellant was already fitted with a prosthetic leg and could walk. However, the degree of the appellant’s permanent disability was estimated at 50%.

[13] From the two reports it is notable that the appellant suffered serious injury to his right leg leading to amputation between the knee. The effect of the injury was that the appellant lost part of his leg and could no longer walk without the help of crutches or an artificial leg. He was indeed fitted with an artificial leg to assist him in walking. However, he suffered between 50% to 60% permanent disability due to the accident. This impacted heavily on his general wellbeing and prevented him from undertaking useful activities with a view to earning an income or his daily bread.

[14] It’s therefore without doubt that the appellant was entitled to damages and loss from the respondent arising from the material accident which it was agreed was to a large extent caused by the defendant.

With regard to general damages for pain and suffering, the appellant had proposed a sum of Kshs.3.5 million due to the fact that he suffered permanent incapacity of between 50% and 60%.

The respondent had proposed a sum of Kshs.750,000/=.

The learned trial magistrate considered the two proposals on the basis of the authorities cited by both parties and made an award of Kshs.1.2 million general damages for pain and suffering.

[15] This court, having also considered the injuries suffered by the appellant and the physical suffering and pain he underwent after the accident and also after considering the authorities cited by both parties regarding general damages for pain and suffering, holds the opinion that the award of Kshs.1.2 million made by the trial court was adequate and reasonable to attract any interference from this court.

[16] With regard to damages for loss of past, present and future earnings, the appellant proposed a sum of Kshs.3.588 million based on the fact that he earned his living as a motor cycle taxi operator (boda boda) earning between Kshs.1000/= to Kshs.1500/= per day less Kshs.500/= for maintenance of the motor cycle and was expected to work upto the age of 50 years but for the accident while aged 27 years old, meaning that 23 years of his remaining working life was cut short. He computed the amount as follows: - 26 days x 500/= x 23 years x

12 months = 3,588,000/=.

[17] The appellant also asked for a sum of Kshs.2 million for future medical expenses on the basis that he would require a prosthetic leg and physiotherapy at that cost.

The respondent proposed a sum of Kshs.312,000/= for loss of earning capacity made up as follows: - 2,600/= x 20 x 12=624,000/= less 50%.

[18] The learned trial magistrate considered the proposals in the light of the evidence by the appellant and made an award of Kshs.717,600/= for loss of earning capacity. This was computed as follows: - Kshs.100/= x 26 x 23 x12= Kshs.717,600/=.

In arriving at that computation, the learned trial magistrate observed as follows:-

“The plaintiff pleaded that he worked as a boda boda operator and his daily earnings was Kshs.1000/=. On cross examination by counsel for the defendant he stated thus:-

“I would keep aside Kshs.400/= to offset the loan. Yes, out of the balance, I would use some amount to fuel and repair. In every two to three days, I would keep aside Kshs.1000/= for fuel and repairs. Yes, I would save about Kshs.100/= per day.”

Based on the foregoing excerpt of the plaintiff’s evidence, I concur with the learned counsel for the defendant and adopt Kshs.100/= as the plaintiff’s daily earning. It is not disputed that the plaintiff was 27 years old at the time of the accident. Learned counsel for the plaintiff in the submissions has proposed 26 working days a month and a multiplier of 23 years. Whereas learned counsel for the defendant has proposed a multiplier of 20 years. The plaintiff was 28 years old when the accident occurred. He should have been able to work at least at 60 years if not longer.

But due allowance must be given for the vagaries and uncertainties of life. I will therefore adopt a multiplier of 23 years.

Having said so, the calculation for loss of future earnings is as follows:-

100/= x 26 x 23 x 12= 717,600/=.”

[19] This court agrees with the foregoing findings by the learned trial magistrate and sees no good reason to interfere with them. It must however, be noted that according to the medical report by Dr. Wanjala, the appellant’s occupation was that of an electrician and not a boda boda operator.

With regard to the award of Kshs.1.1 million for future medical expenses, the report by Dr. Modi indicated that the appellant already had a prosthetic leg. The report by Dr. Wanjala, indicated that the appellant at the time of examination walked using crutches but would require a prosthetic leg at an estimated cost of Kshs.500,000/=. He would also require physiotherapy at a costs of Kshs.100,000/=.

[20] The award of Kshs.1.1 million for future medical expenses and that of Kshs.717,600/= for loss of earning capacity made by the trial court were both proper, reasonable and adequate and are hereby upheld by this court.

In sum, the ground of appeal raised by the appellant is overruled with the result that this appeal stands dismissed with costs to the respondent.

Ordered accordingly.

J.R. KARANJAH

JUDGE

27.09.2018

[Delivered and signed this 27th day of September, 2018].