



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 82 OF 2015

WYCLIFF KEMBOY KIBET.....APPELLANT

VERSUS

HORKYNGS KILIRU AGANDA ALUNDA.....RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate

Honourable S. Mokuia in Eldoret CMCC No. 812 of 2014, dated 9th July, 2015)

JUDGMENT

The Plaintiff/Respondent sued the Defendant/Appellant in the lower court and prayed for General damages for pain and suffering, loss of future earnings capacity, future nursing care, the cost of prosthesis and special damages. He also prayed for the cost of the suit together with interest.

His case is that on 1st October, 2014 he was aged 38 years. He was working as a salesman earning 25,000/- per month. That day he was at Matunda Market, walking along Kitale-Matunda road, 10 metres off the tarmac. A lorry, Scania in make, registration number KBR 221C emerged from Kitale direction. It was owned by the Appellant herein. The said lorry veered off the road to where he was. It hit him and as a result sustained severe bodily injuries. He was admitted at Moi Teaching and Referral hospital for almost a month. His left leg which had sustained compound fractures was amputated above the knee. He paid for the treatment at the hospital 184,000/- and 30,000/-. A balance of Kshs. 65,157 remained to which he deposited a Title Deed as security. *Dr. Sokobe* who examined him and made a report indicated that permanent disability was at 40% and he'll need an artificial limb at the cost of 50,000/-.

The driver of the alleged lorry gave evidence for the appellant. He stated that on 1st October, 2014 he was transporting sand from Kitale to Eldoret using a Scania lorry registration number KBR 221C. He was on the left side of the road and at 20kph. A motorcycle emerged which prompted him apply emergency brakes. There and then the brake pipe bursted. The lorry moved very fast. He overtook a bus and thereafter hit a canter. There emerged 3 men and he hit one who was on the road. He was on the tarmac road. He did not stop as there were motor cycle riders pursuing him. He reported the accident and was not charged.

The trial magistrate after weighing the evidence, awarded Kshs. 1,900,000 as general damages, loss of future earnings at Kshs. 1,428,000/- cost of artificial limb at Kshs. 50,000/- and special damages at Kshs. 100,176.20, giving a total of Kshs. 3,478,176.20.

The appellant dissatisfied with the said decision lodged an appeal on the grounds that:-

- (1) The learned trial magistrate erred in law and in fact in entering judgment in favour of the respondent for loss of future earnings without evidence in support of such claim.
- (2) The trial magistrate erred in law and fact in failing to appreciate that the claim for future earnings unlike that of loss of earning capacity must not only be specifically pleaded but also proved, being a claim in the nature of a special damage.
- (3) The learned trial magistrate erred in law by applying the wrong principles in the assessment of quantum of damages.

This appeal is not about liability but quantum of damages, more so for loss of future earnings in which the court awarded to the respondent a total of 1,428,000/-. The Respondent pleaded it under particulars of special damages, in paragraph 9, where he alleges that as a result of the said accident he suffered permanent disability of up to 40% hence he cannot engage in any meaningful employment to earn a living and thus he had lost his future earning capacity. He was aged 38 years then and was earning 25,000/- monthly.

In his evidence-in-chief he stated that he was a salesman and used to earn 25,000/-. He did not produce any document in support of the claim. It is not clear whether he was employed as a salesman or was selling his own merchandise. No sales receipts nor purchase receipts were produced. Even a bank statement was not produced to show that at least he had some income. If employed no employment letter was produced and a payslip to show the income. He just made a mere allegation. In ***Fairley –vs- John Thomson Ltd [1973] 2 LLOYD’S Law Reports 40 at page 14, Lord Denning*** made it clear when he held:-

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of 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”.

It therefore follows that loss of future earnings is a special damage claim which must be specifically pleaded and strictly proved. Though the respondent pleaded it, he did not prove it. The court therefore used its discretion, and given the permanent disability suffered by the Respondent placed the diminution in earning capacity at 7,000/- and used a multiplier of 17 years to get 1,428,000/-.

In the case of ***Mbogo and Another –vs- Shah, (1968) EA 93***, the court indicate that an appellate court will not ordinarily interfere with the exercise of discretion by the trial judge unless it is shown that the trial judge misdirected himself in some matter and as a result arrived a wrong decision, or it is manifest from the case as a whole that the judge was clearly wrong in exercise of his discretion, thereby occasioning an injustice.

The trial court in exercise of its discretion fairly found that a normal person in Kenya can at least earn 7,000/- per month. By doing so, the court arrived at meeting the ends of justice in the matter. Holding it otherwise would have been unfair to the Respondent who lost the use of his left leg in the said accident and the decision does not occasion an injustice. I, for the reason find the appeal unmerited and is dismissed with cost to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of November, 2018

In the presence of:

Mr. Manani holding brief for Ms Adhiambo for the appellant

Mr. Mwelem – Court assistant