



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCCA. NO. 458 OF 2014**

**BENARD MULI KINYILI ..... APPELLANT**

**-VERSUS-**

**DHL WORLDWIDE EXPRESS ..... 1<sup>ST</sup> RESPONDENT**

**DAVID KEMULI ..... 2<sup>ND</sup> RESPONDENT**

***(Formerly Milimani Commercial Courts CMCC 6824 of 2010).***

**JUDGEMENT**

**INTRODUCTION**

1. The Plaintiff claimed special and general damages against Respondent s on the basis that on 07/10/2009 he was walking along Mombasa road when the 2<sup>nd</sup> Respondent driver of 1<sup>st</sup> Defendant/Respondent so negligently drove or controlled motorcycle No. KMCA 951S that it hit him occasioning him injuries.

2. The Defendant/Respondent lodged defence and denied the claim.

3. The matter was heard and the trial court made a judgement as follows:-

Liability	-	50:50%
Quantum	-	Kshs. 400,000/=
Less contribution	-	Kshs. 200,000/=
Balance	-	Kshs. 200,000/=
Special damages	-	Kshs. 16,550/=
Total	-	Kshs. 216,550/=

Plus costs and interest.

4. Thus Appellant being aggrieved by the above decision lodged instant appeal and set out the following grounds:-

***i. The Learned Trial Magistrate erred in law and fact in evaluation of the evidence before him and in reaching a wrong conclusion.***

***ii. The Learned Trial Magistrate erred in law and fact in apportionment of liability at 50% against the Appellant contrary to the evidence on record.***

***iii. The Learned Trial Magistrate erred in law and fact in failing to consider inflation in assessing general damages for pain suffering and loss of amenities.***

***iv. The Learned Trial Magistrate erred in law and fact in failing to consider the permanent incapacity and loss of earning***

*capacity of the Appellant in assessing general damages.*

*v. The Learned Trial Magistrate erred in law and fact and acted upon the wrong principle of law in awarding general damages herein and failed to consider the Appellant's serious injuries and residuals thereof and the rate of inflation.*

*vi. The Learned Trial Magistrate made the award of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) only as general damages and loss of amenities on an entirely erroneously and low estimate of damages to which the Appellant was entitled.*

*vii. The Learned Trial Magistrate erred in law and fact in not awarding damages for loss of earnings and/or loss of earning capacity proved and as submitted by the Appellant.*

*viii. The Learned Trial Magistrate erred in law and fact in disregarding the Plaintiff's evidence generally.*

5. Parties agreed to canvass appeal via submission but only Appellant filed the same.

#### **APPELLANT'S SUBMISSIONS**

6. The Appellant submitted that, the trial court failed to take into consideration at the 2<sup>nd</sup> Respondent herein, was guilty of negligence as pleaded in particulars in plaint and as testified by the Appellant.

7. Further it is contended that, the Defence Police Abstract which was produced as DEXH 1 confirmed that the driver of the said motor cycle registration number KMCA 951S was indeed blamed by the police who investigated the accident and was due to be charged with the offence of careless driving.

8. It is submitted that if above was given due consideration, the Respondent would have been held solely or substantially to blame for the accident.

9. It is contended that, from the reports and Dr. Okere's evidence it is not in dispute that the Appellant sustained a pleaded injuries which have left him with a permanent incapacity.

10. The Appellant relies on principles that guide an Appellate court in disturbing award of damages to wit;

***“An Appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”***

11. Thus Appellant submits that, the injuries disclosed in pleadings and evidence, were serious enough to warrant disturbing trial court award. The injuries were; Compound fracture of the left humerus, Bruises on the right shoulder, and multiple soft tissue injuries.

12. At the time of the examination by the said doctors and hearing hereof there were residual injuries which left permanent disability of 20% as per doctor's report.

13. Thus the Appellant cites authorities on the quantum of Damages for Pain and Suffering to persuade court of enhance the award.

14. He cites the case of **Joel Mulatya –Vs- Kenya Railways Corporation (2004) eKLR** for a commuted fracture of the humerus and head injury only, the court awarded Kshs. 400,000/= General damages for pain suffering and loss of amenities.

15. It is noted that this decision was made 10 years prior to the Trial Magistrate's decision. The Learned Trial Magistrate failed to take into consideration the rate of inflation since then in making his award herein. Inflation is one of the cornerstones in assessment of damages.

16. He also relies on the case of **Salome Mantai & Anor -Vs- Lucia Wanjiru Mwangi [2016] eKLR** it was a more recent case by the court where injuries were fracture on  $\frac{1}{3}$  humerus drop, fracture right clavicle, scapula comminuted fracture, haemopneumothorax where the court made an award of Kshs. 700,000/=.

17. In view of the foregoing and high rate of inflation and residual injuries suffered by the Appellant herein, the Appellate court to re-evaluate the medical evidence on record, similar authorities cited and re assess the award for pain and suffering to the Appellant thus proposes an award of Kshs. 800,000/=.

18. The Trial Magistrate failed to address himself to the issue of loss of earnings and/or loss of earning of earning capacity to the Appellant therefore erred in law and fact in this regard.

19. The Appellant submits that, the principle of award of damages for loss of earning capacity was set down in the case of **Butler -Vs- Butler (1984) KLR 225 (Nbi Civil Appeal No. 49 of 1983)** where the Court of Appeal held and Justice Kneller JA observed that;

***“A Plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.”***

20. The court further and observed and held that;

***“Compensation for diminution of earning capacity is part of general damages....the question is the present value of the risk that a future date or time the Plaintiff will suffer financial disadvantage in the labour market because of his injuries?.....The factors to be taken into account, will vary with the circumstances of each case.***

***Examples include, age, the qualifications of the Plaintiff, his disabilities.....”***

21. A claim for loss of earning capacity is a general damages claim as such it is deemed to flow directly from the claim and need not be pleaded. This was the holding of the court of Appeal in the case of **Mumias Sugar Company Ltd -Vs- Francis Wanalo [2007] eKLR** where it laid down the principles for the award for loss of earning capacity as follows:-

***“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.”***

22. The position was further and clearly spelt out in the case by the Court of Appeal in the case of **Sophina Co. Ltd & Anor –Vs- Daniel Ngang Kanyi Nakuru Civil Appeal No. 315 of 2001 reported at (2006) eKLR**, the Court of Appeal held that;

***“.....the loss of earning capacity is prospective financial loss and which is awarded as part of general damages and which does not have to be specifically pleaded..... which justified an award in the form of general damages.”***

23. The court upheld an award of Kshs. 420,000/= for loss of earning capacity. In upholding the said award, the court of Appeal further held that;

***“the Respondent testified that he was a farmer.....the evidence was not challenged at the trial. ....there was ample medical evidence that his earning capacity had been reduced as a result of the accident.....”***

24. In this instant case the Appellant gave evidence and produced Medical evidence on record do support his prayer for loss of earning capacity. It is not in dispute that his earning capacity has been permanently incapacitated as a result of the road accident....he has a permanent incapacity of 20%.

25. At the time of the accident and filing of the suit herein, the Appellant was an active young man of 30 years of age who was a cart pusher. See discharge summaries, P3 medical report PExhibits. From the evidence on record the Appellant was earning approximately Kenya Shillings One Thousand (Kshs. 1,200/=) per day give or take.

26. The evidence on record clearly shows that, as a result of the accident, the Appellant was not been able to do his work or at all.

27. Indeed the medical evidence confirms that the Appellant is incapable of doing any heavy manual work at all due to the weakening of his left arm. Dr. Okere gives him a permanent disability of 20%.

28. In the decision by the Court of Appeal in **Jacob Ayiga Maruja & Francis Karani -Vs- Simeon Obayo (suing as the Administrator of the Estate of Thomas Ndaya Obayo Kisumu Civil Appeal No. 167 of 2002 reported at (2005) eKLR**, in which the Court of Appeal held;

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally production of documents. That kind of stand would do a lot of injustice to very many Kenyans.....” (pg 3-4)***

29. The Appellate court to hold that on a balance of probabilities the Appellant proved his claim for loss earnings and/or loss of earning capacity. This is borne out both from the Medical records and reports and oral evidence.

30. The Appellant sought to rely on formula set out under the **Butler -Vs- Butler** Supra as hereunder:

- Age 30 years.
- Multiplier 30 years

***(Retirement age is 60 years).***

- **Multiplicand**                      **Kshs. 1,200/= per day.**
- **Permanent incapacity**    **20%**
- **Total** (Kshs. 1,200 x 26days x 12 months x 30 years x

20% permanent incapacity) **Kshs. 2,464,000/=**

31. The future medical expenses are part and parcel of general damages and do not have to be specifically pleaded.

32. The medical report by Dr. Byakika for the defence, DEXH1, puts the same at Kshs. 50,000/= which the court failed to take into consideration in his assessment of general damages and/or award as part of general damages.

### **DUTY OF 1<sup>ST</sup> APPELLATE COURT**

33. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

### **EVIDENCE**

34. PW1 examined Benard Muli Kinyili and confirmed he sustained a compound comminuted of the left humerus. The patient also suffered fracture on the left parietal region, bruises on the right shoulder, and left flank of the abdomen. The patient suffered 20% permanent incapacity. PW1 relied on a case summary form Kenyatta National Hospital and a duly filled P3 form.

35. According to PW1 on examining the patient complained of weakness of the left arm with difficulty in using the arm and pain on the left parietal region. He was a businessman. The patient could not rely on manual work. PW3 charged Kshs. 1,500/= for the medical report and Kshs. 5,000/= for the attendance. By consent, Special damages was agreed at Kshs. 16,550/= as pleaded in the Plaintiff.

36. PW2 recalled that on 7<sup>th</sup> October 2009 he was pulling a handcart along Mombasa-Nairobi Highway from the Airport towards Kyang'ombe.

37. When he reached the highway, he stopped and checked the Nairobi and Mombasa directions where there were no vehicles. He crossed and stopped at the pavement but before he reached the end he was knocked by a motor bike off the road.

38. PW2 never saw the motor bike. The place was U-turn and vehicles use. The motor bike approached the area at a high speed. The accident occurred at around 7.30 p.m.; PW2 saw no lights as he crossed. He believed it was safe to cross but the motor bike must have had its lights off.

39. PW2 was injured badly in the left hand thus can no longer pull the handcart. It was his source of livelihood. That day he was ferrying cement. His daily earnings was above Kshs. 1,200/= though doesn't get licences to pull handcarts. Since then he had never gone back to his work.

40. Upon cross examination in court, PW2 stated that the place of impact was the dual carriageway facing Nairobi direction. He was crossing where there was a U-turn. That it was for vehicles from Nairobi turning back to Nairobi direction. That he made a U-turn, and moved like a vehicle.

41. Before he crossed he never saw any vehicles and it was safe to cross and that he was very careful. He was ahead of the motorcycle and it was up to the cyclist to see him. At that time he was alone at around 7.00 p.m.

42. DW1 recalls that on 7<sup>th</sup> October 2009 he was from their airport office around 7.30 – 8.00 p.m. It was very dark night. The Mombasa road was under repair and the third lane had just been completed. There were no lights/street lamps as at that time. He was riding around a speed of 50kph. He was on the farthest lane (outer lane). He was going to their head office around Nyayo National Stadium.

43. DW1 further stated that he saw some people pulling a handcart. They were three in number. Two were on the sides and the other in front pulling. All of a sudden, they turned and crossed into his lane. He slowed down so they could pass. They did not pass. Two of the guys left the pushcart and ran into his left. One of them remained in the middle of the road with the handcart laden with cement. There was a vehicle behind him on the 1<sup>st</sup> lane.

44. He could not swerve to his right. He could not swerve to his left because of the 2 guys running. The motorbike hit the handcart and he rolled several times on the road. He was badly injured. The vehicle behind him stopped and he was pulled off the road.

45. DW1 blames the handcart pusher since he never gave any warning. He saw them only less than 60 meters ahead of him suddenly since the road was dark.

### **ISSUES, ANALYSIS AND DETERMINATION**

46. After going through the evidence on record and the submissions, I find the issues are;

*i. Whether the assessment by Trial Court at 50:50% was justified in the circumstances?*

*ii. Whether the award made was inordinately low to warrant this court to disturb the same?*

*iii. What is the order as to the costs?*

47. On liability the claimant testified that he was pulling a handcart along Mombasa-Nairobi Highway from the Airport towards Kyang'ombe. When he reached the highway, he stopped and checked the Nairobi and Mombasa directions where there were no vehicles. He crossed and stopped at the pavement but before he reached the end he was knocked by a motor bike off the road.

48. He never saw the motor bike. The place was U-turn and vehicles use. The motor bike approached the area at a high speed. The accident occurred at around 7.30 p.m.; PW2 saw no lights as he crossed. He believed it was safe to cross but the motor bike must have had its lights off.

49. DW1 on his part testified that It was very dark night. The Mombasa road was under repair and the third lane had just been completed. There were no lights/street lamps as at that time. He was riding around a speed of 50kph. He was on the farthest lane (outer lane). He was going to their head office around Nyayo National Stadium.

50. DW1 further stated that he saw some people pulling a handcart. They were three in number. Two were on the sides and the other in front pulling. All of a sudden, they turned and crossed into his lane. He slowed down so they could pass. They did not pass.

51. Two of the guys left the pushcart and ran into his left. One of them remained in the middle of the road with the handcart laden with cement. There was a vehicle behind him on the 1st lane.

52. He could not swerve to his right. He could not swerve to his left because of the 2 guys running. The motorbike hit the handcart and he rolled several times on the road. He was badly injured.

53. The DW1 says he saw PW1 though he does say at what distances Though he says he slowed for PW2 and his 2 other two friends to pass, he hit the cart and he rolled several times implying that he was at a very high speed.

54. If he sufficiently slowed down and or stopped he could have avoided the accident. On the other hand, the PW2 seem to have swerved suddenly confusing the DW1 thus hitting his cart and injuring PW2 and himself as he rolled.

55. Both sides were to blame for their negligent acts in the circumstances though with varying degrees of blame.

56. DW1 is more to blame as he had first opportunity to avoid the accident as he saw PW2 turn. If he was more careful and especially this time of the night and taking to account that the road was being constructed, he would not have been ridding at a high speed.

57. It is also to be noted that the Defence Police Abstract which was produced as DEXH 1 confirms that the driver of the said motor cycle registration number KMCA 951S was indeed blamed by the police who investigated the accident and was due to be charged with the offence of careless driving.

58. The court therefore sets aside liability findings by trial court and apportions the same at a ratio of 70; 30% in PW2's favour.

59. On damages, the principles that guide an Appellate court in handling a complaint on award of damages are clear and well settled;

***“An Appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”***

60. The claimant sustained Compound fracture of the left humerus and multiple soft tissues injuries. The doctor noted disability at degree of 20%. Similar injuries in the case of Joel Mulatya Vs KRC 2004 eKLR, the claimant for comunitated fracture of humerous was awarded Kshs. 400,000/= for pain and suffering. This over 10 years ago.

61. In a more recent case of Mantai & Anor -Vs- Lucia Wanjiru Mwangi [2016] eKLR on almost similar injuries where the court made an award of Kshs. 700,000/=. However in this latter case, the court injuries were fracture on <sup>1</sup>/<sub>3</sub> humerous drop, fracture right clavicle, scapula comminuted fracture, haemopneumothorax. These were more serious comparing to the instant case inflicted on PW2.

62. In view of the foregoing and high rate of inflation and residual injuries suffered by the Appellant herein, this court has re-evaluated the medical evidence on record, similar authorities cited and has found that it has to re-assess the award for pain and suffering to the Appellant. Doing the best in the circumstances, the court assesses the award on pain and suffering at Kshs. 600,000/=.

63. On the claim for loss of earning capacity, See the case of Sophina Co. Ltd & Anor -Vs- Daniel Ngang Kanyi Nakuru Civil Appeal No. 315 of 200, where the court held;

***“.....the loss of earning capacity is prospective financial loss and which is awarded as part of general damages and which does not have to be specifically pleaded..... which justified an award in the form of general damages.”***

64. The court upheld an award of Kshs. 420,000/= for loss of earning capacity.

65. Also see the case of **Butler -Vs- Butler (1984) KLR 225 (Nbi Civil Appeal No. 49 of 1983)** where the Court of Appeal held and Justice Kneller JA observed that;

***“A Plaintiff’s loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury.”***

66. The court further and observed and held that;

***“Compensation for diminution of earning capacity is part of general damages....the question is the present value of the risk that a future date or time the Plaintiff will suffer financial disadvantage in the labour market because of his injuries?.....The factors to be taken into account, will vary with the circumstances of each case. Examples include, age, the qualifications of the Plaintiff, his disabilities.....”***

67. In this instant case the Appellant gave evidence and produced Medical evidence on record do support his prayer for loss of earning capacity. It is not in dispute that his earning capacity has been permanently incapacitated as a result of the road accident.....he has a permanent incapacity of 20%.

68. The court of Appeal in the case of **Mumias Sugar Company Ltd -Vs- Francis Wanalo [2007] eKLR** up held an award of Kshs. 420,000/=. At the time of the accident and filing of the suit herein, the Appellant was an active young man of 30 years of age who was a cart pusher.

69. See discharge summaries, P3 medical report PExhibits. From the evidence on record the Appellant was earning approximately Kenya Shillings One Thousand (Kshs. 1,200/=) per day give or take.

70. I taking into to account the claimant income and age and also taking to account vicissitudes of life I would award him Kshs. 600,000/= for loss of earning capacity.

71. On the issue of the future medical expenses, the court notes that the same was not pleaded nor supported by claimant’s evidence. It was only mentioned by the defence doctor.

72. The court thus declines to add same in the computation for the general damages.

73. Thus the appeal partially succeeds as follows;

- i. Liability - 70:30% in Appellant favour.**
- ii. Pain and suffering - Kshs. 600,000/=**
- iii. Loss of earning capacity - Kshs. 600,000/=**
- iv. Special damages - Kshs. 16,550/=**
- v. Total - Kshs. 1,201,655/=**
- vi. Less contribution 30% - Kshs. 360497/=**
- vii. Balance - Kshs. 84158/=**
- viii. Plus costs and interest.**

**SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**