



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 45 OF 2016

MATHEW MUSYOKA.....APPELLANT

VERSUS

KENYA PIPELINE CO. LTD.....RESPONDENT

J U D G M E N T

1. On 22.8.2014 the Appellant by a plaint dated 6/8/2017 sued the Respondent and sought general and special damages alleged to have been suffered by the Appellant on the 24/10/2013 when the Appellant while travelling in a motor vehicle registration number KAT 036E sustained bodily injuries occasioned by a collision between the motor vehicle KAT 036E and another KAV 895V alleged to belong to the Respondent.

2. Together with the plaint was filed a witness statement by the Plaintiff detailing the facts of the case. The Appellant equally filed a list and bundle of document which included a police abstract showing that the driver of motor vehicle Registration No. KAV 895V was charged in Mombasa CMCC TR. CASE NO. 6525/2013, was convicted and fined Kshs.20,000 on 8/11/2013. There were also other documents including a medical report prepared by DR. AJONI ADEDE all evidencing the extent of injuries suffered by the Appellant out of the accident as fracture of both tibia and fibula. Other documents were also filed to show the Appellant had a registered business name called MATSON AGENCIES and a schedule of what was termed '*rent received for the month of September and October 2013*'.

3. The suit was brought against the Respondent under the tort of negligence and on allegations that the accident was solely caused by the Appellants' driver and particulars of such negligence was pleaded at paragraph 5 just as particulars of injuries and special damages. The doctrine of RES IPSA LIQUIRE was then invoked.

4. The Appellant's suit was resisted by the Respondent who filed a statement of defense which essentially denied all the allegations in the plaint including the occurrence of the accident; the involvement of the plaintiff together with all particulars of negligence; particulars of injuries as well as particulars of special damages. A further pleading was advanced to the effect that the accident was inevitable to the Respondent and was caused by the driver of motor vehicle KAN 963T whose particulars of negligence were then given. It is of note that neither the owner nor driver of the motor vehicle KAN 963T was joined to the suit.

5. The matter then proceeded to trial during which trial only the Appellant PW 1, and DR ADEDE PW 2, gave evidence while the Repondent opted not to call any evidence. That decision was informed and influenced by the fact that on the 17.02.2016 the parties did record a consent apportioning liability

between the Appellant and the Respondent at 85:15 in favour of the Appellant.

6. Based on the evidence led and the consent recorded on liability and in a reserved judgment dated 6/4/2016, the trial court entered for the Appellant judgment against the Respondent in the aggregate sum of Kshs.738,604. That is the judgment the appellant now challenges as being too low and misery. The ground in the Memorandum of Appeal are worded as follows:-

1. THAT the learned Magistrate erred in law and fact by awarding general damages for pain and suffering without considering an award for amenities which is paid as arising from the same accident and awarded Kshs.720,000.00 which was excessively and unreasonably low in light of the injuries sustained by the appellant.

2. THAT the learned Magistrate seriously erred in law and fact by failing to make an appropriate award of damages for future medical expenses despite having noted that the appellant was in crutches in which case he would need to go for further medical check-up.

3. THAT the learned Magistrate seriously erred in law and fact by failing to award general damages for loss of future earning and earning capacity arising from permanent disability.

4. THAT the learned Magistrate seriously erred in law and fact by total failing to do justice on apportionment of liability against the appellant at 15.85% contrary to the fact that the appellant was a mere fare paying passenger.

5. THAT the learned Magistrate seriously erred in law and fact in that the Respondent/Defendant did not call any witness on its behalf in which case the appellant's claim was uncontroverted and the entire award of damages was a wrong assessment of injuries sustained by the appellant.

6. THAT the learned Magistrate seriously erred in law and fact by failing to appreciate the fact that the appellant was a rent collector and failed to make an award of damages for loss of earning.

7. Evidently the appellant faults the trial court for having awarded to him too low damages for pains and suffering; for failing to make awards under the heads future medical expenses and loss of earning capacity. Even the consent on apportionment of liability was attacked on the basis that the Appellant was a mere passenger to whom no liability could attach.

8. Although the Memorandum of Appeal lists six (6) grounds of appeal in reality the grounds can be considered into 4. Ground 1, 5 & 6 can be dealt with together, while grounds 2,3 & 4 stand alone.

9. This being a first appeal the court proceeds by way of retrial and the only question that the court while seek to interrogate is whether the trial court made error as to entitle an appellate court to interfere and set aside its decision.

Did the trial court err in the apportionment of liability at 85:15?

10. The record of the file is self evident that on the 17/2/2016 a consent was recorded on liability by the advocates for the parties. The record show that it was the advocates for the plaintiff who dictated the terms of the consent to the court. In law, no appeal can be sustained against a consent judgment. Section 67(2) Civil Procedure Act provides:

“No appeal shall lie for a decree passed by court with the consent of the parties”.

11. In this appeal the Appellant contends that having been a passenger with no control over the manner the two motor vehicle were controlled no liability ought to attach on him. That could have been a valid and sound complaint had the apportionment of liability been determined by the court. In this matter the

court did not venture in that area. The court merely acceded to the agreement between the parties and no more.

12. It requires no citation of any decided case for the well established principle that parties are the custodians of their rights and for that reason are at liberty to enter into any bargain deemed appropriate.

13. It is equally well established that he who acts by his advocate acts by himself and is bound by the actions of the advocate who is at all times deemed to have ostensible authority to compromise, adjust or offset the client's case and claim.

14. In *Flore Wasike vs Destino Wamboko* [1982-1988], KAR the Court of Appeal said:-

“It is now settled law that a consent judgment or order has contractual effect and an only be set aside on grounds that would justify setting a contract aside, or if certain conditions remain to be fulfilled:...

Further more *Wough vs Clifford and Sons* [1982] CH 374 is a persuasive authority that a solicitor or counsel has ostensible authority to compromise a suit so far as the appointment is concerned....”

It is beyond argument that the apportionment on liability having been done by consent, it is beyond reproach nor attack least of all in the absence of any established vitiating factor known to Law. That ground of appeal fails and is dismissed.

15. Grounds 1, 5 & 6, of the record of appeal raises the issue of quantum of damages and the formula adopted in assessment. For an appellate court to disturb an award of damages, it ought to be satisfied that, in coming to the award it reached, the trial court took into account irrelevant factors, failed consider relevant factors or short of it, the award is manifestly too low or inordinately high as to manifest an outright and wholly erroneous estimate of damages. See *Paul Kipsang Koech & Another vs Titus Osule Osore* [2013] eKLR.

Loss of earning capacity

16. In this appeal the trial court declined to award to the Appellant damages for loss of earning capacity and delivered itself as follows:-

“Damages under this head is awarded for real assessable loss proved by evidence. The basis of this is the Plaintiff's known monthly earnings. In this evidence, the Plaintiff told the court that he was a rent collector earning Kshs.30,000/=. He never produced any document in support. I take judicial notice that for one to be a rent collector, his business has to be duly registered and both a PIN and VAT numbers given. The plaintiff did not tell the court the name in which he was trading as. No books of account or bankings were produced to show that he earned a commission of Kshs.30,000/= per month. Failure so to do in my view means that he was not in any gainful employment prior to the accident. Had this been demonstrated, it must be noted that according to the medical evidence, the Plaintiff suffered a permanent incapacity of 7%. He was 48 years at the time of the accident. All things being constant, he would have worked until the retirement age of 60 years. So, he would have been incapacitated at the rate of 7% for the remainder of 12 years before retirement. Taking his monthly income to be Kshs.30,000/= he would have lost 7% of it which in Kshs.2,100/= x 12 x 12 = 302,400/= which I would have awarded”.

17. In Proceeding the way the trial court did, I hold the view that the court misapprehended the evidence and principle applicable and took into account an irrelevant factor. Loss of earning capacity is not measured on the basis of the extent of the established permanent incapacity. That to this court is a consideration only due in assessment of pains and suffering and whether or not to award loss of earning capacity. Loss of earning capacity is awarded on the basis that owing to the injury, the claimant is unable

to continue with his engagements prior to the injury or unable to get a desired or suitable prospective job. The court of Appeal in *Mumias Sugar Company Ltd vs Francis Wanalo Laid* down the principles applied for award of loss of earning capacity and said:-

“...the justification for 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 apart of general damages for pains 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 the case. There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the current 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 the disability”.

18. In his evidence before the trial court the Appellant said:-

“Prior to the accident, I was working, as a rent collector earning around Kshs.30,000 per month. I do not do the work at present due to the injures”.

19. Indeed there is on record at page 66 and 67 a schedule of a document called cash receipts for months of September and October 2013.

There is equally at page 68 of the record a Certificate of Registration of Business name of MATTSONS AGENCIS in the appellants name effected in the year 2006. Based on those documents it is plain that the trial court could not have been right when it remarked that the plaintiff did not tell the court, in which name it was trading. I find that the trial court erred in ignoring available evidence and thus came to an erroneous conclusion.

20. I find that the plaintiffs evidence that he was unable to continue with his engagement done to the injuries to have been uncontroverted and thus sufficient, on a balance of probabilities, that he had had his ability to earn, as a rent collector, diminished. Again the loss is not limited to the extent of assessed permanent disability. The loss here is the actual loss suffered. I find that earnings must not be proved by documents only and that the proof availed was sufficient.

21. Having so found, I consider the only open and credible formula to adopt is the multiplier formula. I will take note of the Appellants age at on the date of accident at 48 and the statutory retirement age of 60 and adopt a multiplier of 12 and a multiplicand of Kshs.20,000pm.

Therefore $20,000 \times 12 \times 12 = 2,880,000.00$

I award this sum as the proved loss of earning capacity.

22. As the plaintiff acted in person during hearing of this appeal, I record that he always appeared in court with his crutches.

Assessment of damages for pains and suffering is indeed a difficult task and engages the exercise of judicial discretion. The trial court had the benefit of hearing the plaintiff testify and observing his demeanor a benefit I lacked because I did not take the evidence. Coupled with the fact that I have awarded damages for loss of earning capacity separately, and there being no demonstrated error on the trial court in coming to the award of Kshs.700,000.00 for pains, suffering and loss of amenities, I hesitate to find any reason to interfere with the award.

23. On future medical expenses, the trial court found correctly that the same are in the nature of special damages that ought to be specifically pleaded and strictly proved. I do find as the trial court did that there was never any evidence to support the pleading and claim of 90,000.00 for future medical expenses. This ground equally lack merit and it is dismissed.

24. All in all the judgment of the lower court dated 6/4/2016 is set aside to the limited extent of loss of earning capacity which I have assessed at Kshs.2,880,000/-

25. In summary the damages due to the plaintiff works our as follows:-

General damages for pains & sufferings	Kshs.700,000.00
General damages for loss of emergency capality	Kshs.2,880,000.00
Special damages	Kshs. <u>126,604.00</u>
TOTAL	Kshs. 3,706,604.00
Less 15% contribution	<u>Kshs. 555,990.00</u>
Net due	<u>Kshs. 3,150,613.00</u>

26. On costs, I award to the Appellant ½ the costs of this appeal since his success has not been on all the grounds of appeal.

27. The general damages will attract interest at court rates from the date of the judgment by the lower court till payment in full while special damage attract interest from the date of filling the suit.

28. It is so ordered.

Dated and delivered at Mombasa this 23rd day of March 2017.

HON. P.J.O. OTIENO

JUDGE