



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 138 OF 2011
MARY GATHONI NJOROGEAPPELLANT
VERSUS
HANIF MOHAMED LTD.....RESPONDENT

*(Appeal from the judgment and decree of Hon. P. Nditika (Mr.) delivered on 9th March, 2011 in Nairobi
CMCC No. 5623 of 2005)*

JUDGMENT

The Appellant herein was the Plaintiff in the Lower Court who filed a Plaint dated 3rd April, 2003 seeking;

- a. Special damages of Kshs. 445,510/=together with interest;
- b. General damages for pain, suffering and loss of amenities and earning capacity; and
- c. Costs and interest

In the Plaint, the Plaintiff claimed that on or about 11th day of April, 2000 the Plaintiff was a passenger in motor vehicle registration number KAJ 495T a Nissan matatu along the Kajiado-Namanga road when the Defendant, his driver, servant or agent so negligently drove, managed and controlled the Defendant's said motor vehicle along the said road that he caused or permitted the same violently to ram into the side of motor vehicle registration number KAJ 495T.

The particulars of negligence are enumerated in the Plaint. It was averred that as a result of the said accident the Plaintiff suffered severe injuries as contained in the plaint as a result of which she had her right hand amputated. At the time of the accident, the Plaintiff was aged 58 years and she pleaded that she was doing business and earning a monthly income of about Kshs. 35,000/=

The Respondent who was the Defendant in the Trial Court denied the claim and filed a Statement of Defence dated 14th May, 2003 in which he admitted that indeed an accident occurred on or about 11th April, 2000 involving motor vehicle registration number KAE 355P/27422 and a Nissan Matatu Registration Number KAJ 495T. The Respondent however denied that the alleged accident was caused by the alleged negligence on it's driver's part and neither was the Plaintiff a passenger in the said Vehicle.

It is the Respondents defence that the accident was occasioned by negligence on part of the driver of Motor Vehicle KAJ 495T. However he stated that he would seek leave to enjoin the said driver but no

leave was sought at all.

The case was heard and a judgment delivered by the trial court on 9th March, 2011 awarding the Plaintiff Special damages of Kshs. 383,236 and general damages of Kshs. 400,000/= plus interest and costs of the case.

The Plaintiff was not satisfied with the award and therefore filed this appeal on the following grounds:-,

- i. The Learned Senior Principal Magistrate erred in law and in fact in making an award of Kshs. 400,000/= as general damages for pain and suffering which award is manifestly low in light of the injuries suffered by the appellant.
- ii. The Learned Senior Principal Magistrate erred in law and in fact in failing to consider the appellants submissions.
- iii. The Learned Senior Principal Magistrate erred in law and in fact in failing to exercise his discretion judiciously while delivering his judgment.
- iv. The Learned Senior Principal Magistrate erred in law and in fact in failing to consider the appellants authorities in making his judgment.
- v. The Learned Senior Principal Magistrate erred in law and in fact in adopting wrong precedents to assess damages.
- vi. The Learned Senior Principal Magistrate erred in law and in fact in failing to award damages under the head of loss of amenities and earning capacity as prayed despite finding that the Respondent was 100 % liable.

This Court shall seek to determine two main issues which are ascertainable from the above grounds of appeal and which are :

d. Whether the award of Kshs. 400,000/= as general damages for pain and suffering was manifestly low in light of the injuries suffered by the appellant; and

e. Whether the Learned Senior Principal Magistrate erred in law and in fact in failing to award damages under the head of loss of amenities and earning capacity.

In determining the issues herein above, I will seek to re-evaluate the evidence tendered at the lower Court, this being the duty of the first appellate court as stated in the cases of **Jabane vs. Olenja [1986] KLR 661, Selle vs Associated Motor Boat Company Limited [1968] EA 123 and Peters vs. Sunday Post [1958] E.A. 424.**

On the first issue whether the award of Kshs. 400,000/= general damages for pain and suffering is manifestly low in light of the injuries suffered by the appellant, doctor J.C Mwangi (PW1) who examined the Plaintiff twice on 23/10/2000 and on 17/4/2002 testified that the Plaintiff had a road traffic accident and had an injury on the right upper limb which was severe to soft tissue and to bones and she got an infection.

PW1 further testified that after she was treated, the Plaintiff continued to suffer from pain, her nerves got affected and the right hand was there after amputated. That the Plaintiff is right-handed and he gave her a disability of 68%. He concluded that the Plaintiff developed diabetes as a result of stress related to the injury. The Plaintiff testified as PW2 and she testified that as a result of the accident she developed diabetes and hypertension. That after treatment she continued with clinic for a period of 1 year and 8 months and she has not healed completely. That her children are depending on her and she used to earn around Kshs. 30,000 per month.

DW1, the driver of M/V KAE 355P/27422 mercede benz Trailer, Kepho Nyambenga, testified that he was driving the subject vehicle and at the scene of the accident there were 2 matatus and the 1st matatu that hit the trailer did not have lights on the side of the driver.

The Appeal was canvassed by way of written submissions which I have considered.

My re-evaluation of the evidence on record reveals that in deed the alleged accident occurred and the Plaintiff suffered injury which led to amputation of her right hand. This is an appeal challenging the legal principles which ought to have been applied in awarding damages to the Plaintiff who feels that an award of Kshs. 400,000 in general damages for pain and suffering was manifestly low.. In **JOSEPH IBRAHIM ALASAU –VS- STEERING SHIP CONTRACTORS & ANOTHER**, Civil Appeal No. 170 of 2004, the appellant suffered a crush injury on his right hand in the year 1998 leading to amputation of the same from the shoulder. The Court of Appeal awarded general damages for pain, suffering and loss of amenities at Kshs. 1,300,000/=.

In **NAOMI WANJIRU ROMANO –VS- ALICE WANJIKU ROMANO & ANOTHER**, HCCC No. 223 of 1996 at Nairobi (unreported) the plaintiff suffered a crush injury to her right arm leading to above elbow amputation. The court awarded general damages for pain, suffering and loss of amenities at Kshs. 1,350,000/=.

The second issue for determination by this Court is whether the Learned Senior Principal Magistrate erred in law and in fact in failing to award damages under the head of loss of amenities and earning capacity. The principles to be considered in determining whether an injured person is entitled to damages under this head were settled in the Court of Appeal in **Butler Vs Butler [1984] KLR 225**. It was held as follows -

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

2. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

3. Damages under the heads of loss of earning capacity and loss of future earnings, which in English were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

4. Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.

5. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not proper to award it under its own heading.

6. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”

In the case of **SOFIA YUSUF KANYARE v ALI ABDI SABRE & another [2008] eKLR**, the Court awarded a total of Kshs.1,970,000.00 as general damages for pain, suffering and loss of amenities covering compensation for serious soft tissue injuries, loss of 10 teeth, loss of right upper hand.

Taking into account the extent of the Appellant's injuries, the rate of inflation on the Kenya shilling in comparison with decided authorities at the time, I find that the award by the learned Magistrate was excessively low and I do enhance the same to Ksh. 1,500,000/=. The award on special damages will remain at Kshs. 383,236.

I concur with the learned Magistrate that the claim for loss of earning capacity was not proved on a balance of probability as there was no prove of earnings.

I would like to point out that the Appeal herein was filed by the Appellant against the quantum of damages. This court was called upon by the Respondent to re-evaluate the evidence on both liability and the quantum of damages. The Respondent did not file a cross Appeal against the finding of the court on liability and since it is not an issue in the Appeal, this court cannot interfere with the finding of the learned Magistrate in that regard because I have not been called upon to do so in the grounds of Appeal. The Appellant is awarded the costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd Day of September, 2017.

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent