REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 67 OF 2016

Arising from the judgment of Hon S. MUNGAI (CM) delivered in ISIOLO CMCC NO 45 OF 2013 on 1ST December, 2015

(CORAM: GIKONYO J.)

ISAAC MWORIA M'NABEA…..……APPELLANT

-Versus-

DAVID GIKUNDA …….RESPONDENT

JUDGMENT.

Aggrieved by decision

[1] By a judgment delivered on 1st December, 2015 by Hon S. MUNGAI (CM) in ISIOLO CMCC NO 45 OF 2013, the Learned Trial Magistrate awarded the Appellant Kshs 600,000 being General Damages for pain and suffering as a result of a road accident that occurred on 10th September 2010, in which the Appellant was seriously injured.

[2] The Appellant was aggrieved by the said award and filed this appeal on 28th December 2016. The grounds thereof are set out in the Memorandum of Appeal as follows:

> ***1. The Learned Trial Magistrate erred in law and in fact in that he misconstructed and misunderstood the medical reports which were uncontroverted and as a result came to a wrong conclusion on the nature of the injuries sustained by the Appellant and their effect on his health and working life.***
>
> ***2. The Learned Trial Magistrate erred in law and fact in that he misunderstood the prayers by the appellant in the plaint and applied wrong principles of law and as a result prejudicing the Appellant.***
>
> ***3. The Learned Trial Magistrate erred in law and in fact in that he rejected the Appellant's evidence which was uncontroverted and went against the constitution and civil procedure law and case law by requiring a very high standard of proof and not caring about doing justice to the appellant.***
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> ***4. The Learned Trial Magistrate erred in law and fact in his assessment of both general and special damages and only looked at very old cases to guide him without considering the value of the shilling today and the general trend of inflation.***

5. The Learned Trial Magistrate totally erred in law and fact in that he failed to consider or sufficiently consider the material placed before him and as a result came to wrong conclusions and prejudiced the appellant.

[3] When the matter came up for hearing on 12th June 2017, it was agreed that the Appeal be disposed by way of written submissions. The submissions are discussed below.

Arguments by the Appellant

[4] In brief, Appellant's quarrel is with quantum of damages. He submitted that a medical report from Kijabe Hospital which was produced by consent showed that the Appellant had several surgeries but still there was delayed union at the fracture site. He further submitted that Dr. Otieno had said that the Appellant would no doubt require additional surgeries and there was possibility of amputation. The Appellant complained in his submissions that the Learned Trial Magistrate treated these injuries in a casual manner and failed to make a proper award for pain, suffering and loss of amenities. It was further submitted that the injuries suffered by the Appellant were permanent in nature and to minimize pains, suffering and discomfort, he required constant medication and checkups. Consequently, the Appellant contended that a sum of Kshs 700.000 would have been adequate compensation for costs of future medical care.

[5] On loss of past earnings, the Appellant submitted that he was a matatu driver. Such driver's minimum salary as at May 2010 was Kshs 8,400 per month. Therefore, using the said amount of salary, loss of past earnings for the period of 60 months- from the date of the accident i.e. September 10th 2010 to date- is worked as follows; Kshs 8,400*60=504,000

[6] More was submitted. He urged that loss of future earnings should be awarded. It was contended that the Appellant was 43 years old and that retirement age in Kenya is 60 years. Therefore, it is presuming that he would work for another 17 years. Accordingly, the final figure on loss of earnings will work out thus; Kshs 8,400*12*17=1,713,600.

Arguments by the Respondent

[7] On the other hand, it was submitted for the Respondent that the Appellant suffered mild head injury with decreased level of consciousness and compound fracture of the right tibia and fibula bones. And that it was a conventional principle of law that in claims for general damages for personal injury claims, courts should strive to maintain uniformity by ensuring that similar or comparable injuries attract similar or comparable awards in damages. The Respondent also addressed the c claim for loss of past earnings and future earnings; in his understanding, these claims must fail for they were neither specifically pleaded with clear particularity as required by law nor proved by evidence. More specifically, the Appellant did not tender any evidence to prove that he had ever worked as a driver as alleged or at all. He did not even state the registration number of the mototrvehicle he alleged to have been driving and which he claimed to be his.

[8] The claim for future medical expenses was also submitted upon; that it is a special damage claim which must be specifically pleaded and proved- something the Appellant had not done. Therefore, the sum of Kshs 700,000 suggested by the Appellant had been plucked from the air and should be disallowed.

DETERMINATION

[9] I have carefully considered this Appeal, the submissions by the parties and the authorities relied upon by the parties. This being a first appeal, the court shall carry out its task, to wit, analyze and re-assess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses testify. On this see the case of **LAKE FLOWERS vs. CILA FRANCKLYN ONYANGO NGONGA & ANOR [2008] e KLR** where it was stated:

"…being a first appeal, the principle upon which this court acts are well settled, in that the court

must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's findings of facts if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. *Selle v. Associated Motor Boat Company [1968] EA 123****."***

Legal test

[10] This Appeal is on the issue of quantum only as liability was apportioned by consent at 80; 20 in favour of the Appellant. I recognize that assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

''…the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be wholly erroneous estimate of the damages''.

See also the case of **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1 where it was stated that:-**

"a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle" *- see* ***EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278****.*

I will apply the foregoing test on the facts of the case.

[11] The trial magistrate stated that he had considered the injuries sustained by the Appellant as confirmed by the medical reports provided. He stated that, according to the medical report prepared by Doctor Mutuku Catherine, the Appellant suffered mild head injury on the head and neck with decreased level of consciousness and a compound fracture of the right tibia fibula bones. The Report was produced by PW1 in evidence before the trial court. For these injuries, the Learned Trial Magistrate awarded the Appellant a sum of Kshs 600,000 as General Damages for pain and suffering. The question which this court has to ask itself is whether the Learned Trial Magistrate in awarding damages of Kshs 600,000 took into account an irrelevant factor or left out a relevant factor, or acted on a wrong principle, and short of that, whether the award of damages was inordinately so high or low so as to be a wholly erroneous estimate of damages.

[12] It bears repeating that, in awarding damages, the Learned Trial Magistrate stated that he had considered the injuries suffered by the Appellant which injuries were confirmed by the medical report and noted that: (1) the sum of Kshs 3,000,000 in general damages was excessive; (2) the authorities cited by the Appellant far exceeded the injuries sustained by the Appellant; and (3) the authorities relied by the Respondent were decided more than a decade ago. In **EZEKIEL MASEK MUTHONGO vs. JOHN KAMINJA MUGNI AND ANOTHER, NBI HCC NO. 437 OF 1991**, the plaintiff then aged 40, suffered fractures of the right tibia and fibula, fracture of 3rd metacarpal bone of the left hand and blunt injury of the lumbar spine. He was admitted at Kenyatta National Hospital where he underwent an operation to immobilize the fracture of the right tibia. He was later admitted to the Mater Hospital after

developing post-traumatic osteomyelitis and underwent another operation to fix the fracture with a 9 holes plate. The fracture of the third metacarpal in the left hand healed with angulation and deformity. The injury to the spine resulted into tenderness at the back and restriction in movement in the spine. General damages of Kshs. 300,000/= for pain, suffering and loss of amenities was awarded in 1993. This case was decided long time ago.

[13] Coming back to this case, Dr. Mutuku as at 24th April 2013 found that the Appellant suffered severe injuries due to the accident and has been in and out of hospital due to complications of the injury. She opined that, as a result, the Appellant has a permanent incapacity and he was out of work and unable to carry out his normal activities. The good doctor concluded that the Appellant requires orthopaedic follow-up and physiotherapy with long term analgesics as well as use of assisted walking. These post-traumatic effects are severe, and more specifically, the fact that his injuries resulted into permanent incapacity to work is something that would have immense bearing on the award of general damages. I want to distinguish this from actual loss of future earnings which I shall deal with later. See the decision on the Court of Appeal in **BUTLER vs. BUTLER [1984] KLR 225** that;

> ***"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. [Underlining mine]***
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> ***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.***
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> ***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."***

Therefore, loss of earning capacity or earning power may and should be included as an item within general damages but not as stand-alone award. I will so proceed.

[14] The Appellant pleaded in paragraph 9 of the plaint that he was earning his living as a driver but cannot work anymore. This pleading is sufficient for purposes of loss of earning capacity. The doctor confirmed that the Appellant has permanent incapacity and is unable to work. The trial magistrate did not factor this aspect in the general damages awarded to the Appellant. As a general rule, where possible, *factors to be taken into account in considering damages for 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. But where these factors are not readily ascertainable, the court may award a global award as part of general damages for loss earning capacity. This should be the case here.* But before I conclude, let me determine the other items of this appeal.

[15] On loss of past and future earnings, the Appellant submitted that he had his own *matatu* registration number KAR 233C which he used to drive and earned a living from it. He did not, however produce any receipts to prove the income. He also stated that following the injuries herein he is not able to drive his said *matatu*. I have already shown the difference between loss of earning capacity and of past and future earnings. The Appellant did not show the basis of claiming a salary as a driver. The minimum salary of a matatu driver stated as Kshs 8,400 per month was also picked from the air. I therefore, disallow a claim of 504,000 for loss of past earnings as well as claim for loss of future earning Kshs 8,400*12*17=1,713,600.

[16] In so far as special damages are concerned, they must be strictly pleaded and proved. A careful perusal of the record clearly reveals that these two heads of damages were not strictly proved nor pleaded as required by law. In fact the Appellant only quantified them in his submissions. In **SANDE vs. KENYA CO-OPERATIVE CREAMERIES LTD (1992) LLR 314 (CAK)** the Court of Appeal held that:-

> ***"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."***
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> **Similarly, in DOUGLAS ODHIAMBO APEL & ANOR vs. TELKOM KENYA LTD CA NO.115 OF 2006 it was stated thus;**
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> ***.....a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed.....***
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> ***Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."***

[17] Future medical expenses of Kshs 700,000 was not supported by evidence. Except however, Dr. Mutuku and Orthopeadic Surgeon Dr. Otieno agreed that there will be need for future physiotherapy as well as Orthopeadic intervention including surgery with possible amputation of the right leg. Some argue that such should be pleaded and proved as special damages, whilst others argue that it is to be treated as part of general damages. The Appellant pleaded in paragraph 9(iii) of the Plaint that:-

> ***9. "The plaintiff who was earning his living as a driver but cannot work anymore and has to undergo further medical treatment also claims the following;***
>
> ***i. ……...***
>
> ***ii. ……...***
>
> ***iii. Drugs and future medical care over the same subject matter."***

But the specific details or particulars of cost thereof were not provided in the pleading or during the trial. This was quite a careless impleading and prosecution of a case. On this se*e* the case of **KENYA BUS SERVICES LTD. - V _ GITUMA, (2004) EA 91**, where the Court of Appeal sated:

> ***"And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows***

from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded".

See also **BONHAM CARTER vs. HYDE PARK HOTEL LTD. (1948) 64 T.R. 177**, where it was stated:

"The plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages. They have to provide it. (See Ouma – v- Nairobi City Council (1976) KLR 297, 304)"

For those reasons, the claim on cost of drugs and future medical care fails.

[18] I am aware that comparable injuries should attract similar awards, but there should be no mechanical application of one case upon another as each case should be determined on its own circumstances. The trial magistrate did not give any weight to the fact that the Appellant's injuries had permanent impairment on his working ability. Such should have been factored as part of general damages. Again, the trial magistrate did not consider that Doctors were agreed that he will need future physiotherapy as well as orthopeadic intervention. Although that claim has failed for lack of particulars or details on cost thereof, it is useful indicator about the severity of the injuries suffered. Therefore, the trial court left out of account relevant factors and acted on wrong principle, thereby, arriving at wholly erroneous estimation of damages. It was so inordinately low. Those are sufficient reasons to disturb the award by the Learned Trial Magistrate. Accordingly, I set aside the decision by the trial court and substitute thereof with an award of Kshs. 1,000,000 as general damages for pain, suffering and loss of amenities, and diminished ability to work.

[20] The appeal succeeds to the extent specifically stated above. Costs of the appeal as well as the trial court will go to the Appellant. Interest on the award and costs will be at court rates. It is so ordered.

Dated, signed and delivered in open court at Meru this 23rd day of November, 2017

F. GIKONYO

JUDGE

In the presence of:

M/s. Munga advocate for Appellants

Mr. Kaimba advocate for respondents

F. GIKONYO

JUDGE