



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 81 OF 2012**

**ALPHARAMA LIMITED.....APPELLANT**

**VERSUS**

**JOSEPH KARIUKI CEBRON.....RESPONDENT**

**(An appeal arising out of the Judgment of Hon. P. N. Gesora SPM delivered on 3<sup>rd</sup> July 2012 in Machakos Chief Magistrate's Court Civil Case No. 484 of 2010)**

**JUDGMENT**

The Respondent sued the Appellant in the original trial in Machakos Chief Magistrate's Court Civil Case No. 484 of 2010 by way of a Plaint dated 10<sup>th</sup> March 2010. The Respondent in the said Plaint sought general damages, special damages, reduced earning capacity and future medical expenses on account of the Appellant's breach of its contractual duty to provide him with a safe working environment. The learned trial magistrate made a total award of Kshs 1,248,372/= to the Respondent in a judgment delivered on 3<sup>rd</sup> July 2012 after taking into account 20% contribution by the Respondent and payments already made by the Appellant of Kshs 290,000/=.

The Appellant being dissatisfied with the said judgment, filed a Memorandum of Appeal dated 5<sup>th</sup> July 2012 appealing against the judgment on quantum of damages. The grounds of appeal are as follows:

1. The trial Magistrate erred in law and in fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous.
2. The trial Magistrate erred in law and in fact by awarding damages for reduced earning capacity when no evidence was adduced to support the same.
3. The trial Magistrate erred in law and in fact in using the Plaintiff's gross earnings in calculating the reduced earning capacity instead of using the net earnings.
4. The trial Magistrate erred both in law and in fact by not properly considering the medical reports on record and hence arrived at a wrong assessment of damages that are so manifestly excessive as to be erroneous.
5. The trial Magistrate erred both in law and in fact in ignoring the evidence of the Defendant's expert witness in calculating the future medical expenses.
6. The trial Magistrate erred both in law and in fact by failing to consider the Defendant's submissions and thus arrived at an erroneous finding on quantum.

The Appellant is praying for orders that the appeal be allowed, the whole of the judgment delivered on 3rd day of July, 2012 on the quantum of damages and reduced earning capacity be set aside, and that this Court does assess the proper damages payable to the Respondent by reducing the lower Court award substantially. The Appellant also sought to be awarded the costs of the appeal.

### **The Facts**

The Respondent in the Plaint filed in the trial Court claimed that he was at the material time employed by the Appellant as a machine operator, and was lawfully working as such in the course of his employment on 16<sup>th</sup> October 2009 when the Appellant by its director or supervisor in breach of its statutory duties assigned him the duties of operating a fish skinning machine, and he was cut and as a consequence of which he sustained severe bodily injuries, loss and damage. The Respondent gave the particulars of breach of the Appellant's contractual and statutory duties, and stated that he suffered amputation of his left hand at the wrist, blood loss, and physical and psychological pain.

The Appellant filed a defence in the trial Court dated 21<sup>st</sup> May 2010 in which it denied that the accident occurred as alleged, or that it was in breach of any contractual duty towards the Respondent or was negligent, and that the Appellant suffered any damage loss and injury as alleged. The Appellant stated that if any injury was suffered by the Respondent, it was solely caused by his own negligence and want of care, and gave the particulars thereof. Further, that the Respondent voluntarily accepted the risk and waived any right to claim in respect of any injuries arising from the nature of his employment, and the Appellant in this regard relied on the doctrine of *volenti non fit injuria*.

On 22nd May 2012, when the suit came up for hearing in the trial Court, the Respondent and the Appellant recorded a consent on liability at the ratio of 80:20 in favour of the Respondent. The Respondent gave evidence as PW1 and stated that he was injured at work on 16<sup>th</sup> October 2009 while working for the Appellant as a machine operator as a result of which he was hospitalized, and later laid off from work in 2010 as he was not able to continue working.

He produced the hospital discharge summary, hospital cards and filled LD104 forms as exhibits. Dr. Kimani Waweru testified as PW2 and produced a medical report he prepared as an exhibit. His testimony was that he examined the Respondent on 10<sup>th</sup> May 2012 and noted that the Respondent was amputated on the left hand at the wrist after a work injury, and could not use his left hand. Further that the hand had healed and the Respondent would need an artificial arm costing 150,000/= and was 60% disabled.

The Appellant called one witness, Dr. R. P Shah, who confirmed that the Respondent had complete loss of his hand at wrist level and had suffered 60% incapacity. He recommended a hook artificial lamb which costs about Kshs 10,000/=, and produced his medical report and supplementary reports as exhibits.

### **The Determination**

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, Wangai Nyuthe & Co. Advocates, filed submissions dated 23<sup>rd</sup> January 2017, while the submissions filed by Respondent's Advocates, Mwaura Kamau & Co. Advocates, are dated 20<sup>th</sup> January 2017.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellant is only contesting the findings of the trial Court on quantum of damages, as the issue of liability was settled by the parties by consent in the trial Court. The issue before this Court for determination therefore is whether the trial magistrate applied the correct principles of law in assessing the damages payable to the Respondent.

It is an established principle of law that that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment

is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727**, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

In the present appeal, I have read the trial court's decision on quantum, and note that the trial magistrate awarded Kshs 900,000/= as general damages for pain and suffering; Kshs 150,000/= for future medical expenses (artificial limb); Kshs 870,840/= for reduced earning capacity and Kshs 2,000/= as special damages.

On the award of general damages, the Appellant relied on the Court of Appeal decision in **Tayab vs. Kinau (1982-1988) 1 KAR 90** cited in **Elizabeth Wanjira Ngure & Another VS. Nyaka Agencies Limited & Another, Nairobi High Court Civil Appeal Number 903 of 2004** for the position that it was not a wrongdoer but only vicariously liable, and submitted that an award of sum of Kshs. 300,000/ will adequately compensate the Respondent for the injury he sustained. The decision in **Mohamed Somo Bwana vs. Kenya Cargo Handling Service Limited, Nairobi HCCC No. 255 of 1991** wherein general damages for pain and suffering and loss of amenities was assessed at Kshs. 280,000/- was cited in support of this award.

The Respondent on the other hand relied on the decisions in **Umoja Rubber Products vs Bobson Rimba, Malindi Civil Appeal No. 51 OF 2015** where an award of Kshs. 2,200,000/ as general damages for an amputation of the left forearm below the elbow was upheld, and **Titus Musyimi vs Dakawou Transport Limited, Kakamega HCCC No. 38 of 2006** where the claimant sustained an amputation of the right forearm and was awarded damages of Kshs. 1,200,000/-. The Respondent submitted that the awards in the cited cases are much higher than what the learned magistrate awarded.

I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard **Kemp & Kemp on The Quantum of Damages, Volume 1** at paragraph 1-003. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

In the present appeal it is not disputed that the Respondent suffered injuries leading to the amputation of his left hand from the wrist. I note that the injuries suffered in **Mohamed Somo Bwana vs. Kenya Cargo Handling Service Limited (supra)** that was relied upon by the Appellant were a crush injury to the right hand which resulted in multiple fractures and dislocations and did not result in amputation of the hand. In addition the said decision was decided in 1991, almost twenty years before the accident giving rise to the present appeal. It cannot therefore be a comparable decision.

I find the decision in **Titus Musyimi vs Dakawou Transport Limited, (supra)** that was relied upon by the Respondent to be more comparable, and the award by the trial magistrate of Kshs 900,000/= as general damages for the injuries suffered by the Respondent was therefore reasonable in the circumstances.

On the award of reduced earnings, the Appellant submitted that both doctors testified that the Respondent's injuries had healed, therefore the Respondent can still engage in some form of economic activity. Further, that the trial court erred while making an award under reduced earnings as it used the gross salary instead of net sum. The Appellant proposed the basic minimum wage of Kshs 3,500/= as the applicable multiplicand, and a multiplier of 5 years considering other contingencies of life including the fact that the Respondent could have stopped working prematurely of a cause other than this accident. The Appellant submitted that the appropriate sum to be awarded should be Kshs. 210,000/-, and that the Respondent has already received a sum of Kshs. 290,040/- which should be deducted from the sum awarded to him to prevent unjust enrichment as well as double compensation.

The Respondent on his part contended that the evidence of the two expert witnesses was that he had suffered 60% permanent incapacity, and it was also not disputed that he had lost his employment with the Appellant immediately after he sustained the injuries. Further, that the Appellant never called any witnesses or produced any document to controvert the Respondent's evidence on his monthly earning of Kshs. 12,095/-, which was the net earnings and not the gross earnings, as no evidence tendered before the court on any deductions of the respondent's salary.

To assess loss of earning capacity in the future, the court must consider to what extent the claimant's ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the "multiplicand"), which is the annual loss of earnings. The multiplicand will then be multiplied by a "multiplier". The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired.

In the present appeal, the trial Court used a multiplicand of Kshs 12,095/= and a multiplier of 10 years which it estimated was the period it would take for the Respondent to be fully rehabilitated. The trial to this extent erred by starting with the period of rehabilitation as a multiplier, when it was clear from the evidence that any rehabilitation would still result in 60% disability. I also note that the form produced by the Respondent at the trial as his Exhibit 3, which was a notice by his employer (the Appellant) of an occupational accident, showed that he earned Kshs 12,085/= and not Kshs 12,095/= per month. This was the only evidence he produced as to his salary which was not disputed by the Appellant. There was no indication of any deductions made from the said salary.

Given that both experts were agreed that the Respondent would suffer 60% disability, and it was not disputed that the Respondent was 41 years at the time of the accident and would have retired at about the age of 60 years, a multiplier of 15 years is reasonable in the circumstances taking into account that the Respondent will receive an early capital sum to compensate his loss which can be invested to produce an income, and his career might have been interrupted as a result of the normal risks of life. I therefore find that the loss of future earnings was Kshs 12,085 x 12 x 15 = 2,175,200/=. Any rehabilitation of the Respondent would only result in 40% functionality and therefore reducing the future earnings by 40% would result in Kshs 1,305,180/=.

Lastly, on the future medical costs, the medical experts were in agreement that the Respondent would need an artificial limb but differed on the type. Dr. Mwaura was of the view that the Respondent would need an artificial hand that costs Kshs 150,000/= or more, and testified that this is the functional limb and a hook limb is only used to lift objects. Dr. Shah was of the view that a hook or claw type upper limb prosthesis that costs Kshs. 9,000/- would be most appropriate as it is easier to maintain. In his report he noted that the more expensive artificial hands give more function.

The principle behind any award of compensation (damages) is to put the injured person back in the position he would have been in, had the injury not occurred, and having taken into account his limited functionality in the award of future earnings, it is only fair and reasonable that the Respondent is awarded future medical costs that would result in him being functional. To this extent I find that the award of future medical costs of Kshs 150,000/= by the trial Court was reasonable.

Lastly, the award of special damages was not contested by the Appellant.

The Appellant's appeal therefore only succeeds to the extent that the wrong principles were applied by the trial Court in assessing the loss of future earnings. I accordingly set aside the judgment of the trial court and substitute it with a total award of damages of Kshs 1,595,704/= to the Respondent, which has been computed as follows:

(a) General damages for

Pain and suffering	900,000.00
(b) Reduced earning capacity	1,305,180.00
(c) Future medical expenses	150,000.00
(d) Special damages	<u>2,000.00</u>
	<u>2,357,180.00</u>
Less 20% contribution	1,885,744.00
Less amount paid	<u>290,040.00</u>
<b>Total</b>	<b><u>1,595,704. 00</u></b>

The Appellant shall meet 80% of the costs of this appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 20<sup>TH</sup> DAY OF NOVEMBER 2017.**

**P. NYAMWEYA**

**JUDGE**