



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.11 OF 2013

PETER KIMANI MARINGO 1ST APPELLANT

STEPHEN NGIGI 2ND APPELLANT

- V E R S U S -

PAUL KILUNGYA MWOLOLO.....RESPONDENT

(Being an appeal from the judgement of Hon. C. Obulutsa (Mr)Senior Principal Magistrate delivered on 18thDecember 2012 in Milimani Civil Suit no. 7728of 2010)

JUDGEMENT

1) Paul KilungyaMwololo, the respondent herein by way of amended plaint dated 16th March 2012, instituted a suit against Peter Kimani Maringo and Stephen Ngigi, the 1st and 2nd appellants herein respectively in Nairobi CMCC No. 7728 of 2010 in regard to a road traffic accident that occurred on 15/05/2010 involving the appellants motor vehicle registration no. KAA 819E that knocked the respondent when he and others were crossing Limiru road.

2) The respondent prayed for general damages, special damages, future medical costs, costs of physiotherapyand costs of the suit. The appellants field a memorandum of appearance aswell as a defence. On 29/2/2012, a consent judgement was recorded on liability at 70% : 30% in favourof the respondent. The case was heard on various dates, parties then filed submissions and judgment was delivered on 18/12/12 in which the trial court awarded the respondent:

- | | |
|----------------------------|----------------|
| i) General damages | ksh.1,500,00/= |
| ii) Special damages | ksh.11,450/= |
| iii) Loss of past earnings | ksh.246,500/= |
| iv) Future medical costs | ksh.150,000/= |
| v) Loss of future earnings | ksh.612,000/= |

3) The appellants being dissatisfied with the said judgment, filed a memorandum of appeal on 14/01/13 which set out three grounds of appeal namely;

1. That the learned trial magistrate erred in law and fact in not taking into account the submissions before him on the issues of quantum and particularly on the award on general

damages and the authorities in support.

2. That the learned trial magistrate erred in law and fact by awarding damages that were excessive and incommensurate with the injuries suffered.

3. That the learned trial magistrate erred in law and in fact in making an award on lost earnings and loss of future earnings when there was no documentary proof of the respondent's earning before the court.

4) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submission. I have re-evaluated the case that was before the trial court. I have also taken into account the rival submissions. Though the appellants put forward a total of 3 grounds, they may be summarised into two main grounds namely:

i. Whether or not the trial magistrate erred in law and in fact on his award on general damages. (ground 1 and 2)

ii. Whether or not the trial magistrate erred in law and in fact on his award on lost earning. (ground 3)

5) The first ground of appeal is whether or not the trial magistrate erred in law and in fact on his award on general damages. The learned Senior Resident Magistrate awarded ksh.1,500,000/= as general damages. The appellants are of the view that the aforesaid figure is high and excessive in the circumstances of this case, and should be reduced to a sum of kshs.400,000/=.

6) The respondent submit that the appellant's submissions were considered by the trial court, which found their proposed ksh.400,000/= to be inordinately low and took into account inflation. As such assessment of damages is discretionary and the trial court award was not so inordinately high to be upset looking at the injuries, management, operations, disabilities suffered by the respondent in his present condition and in the future.

There is no dispute that the respondent sustained the following injuries:

- Compound fracture of the right femur
- Fracture of the left femur which required internal fixation
- Deep avulsion wound on the left heel

7) I have considered past decisions over cases of similar injuries and it is apparent that this court made awards ranging between ksh.700,000/= and ksh.1,500,000/=. I find the award of kshs.1,500,000/= awarded as general damages not high nor excessive. I think the award is reasonable.

8) The second ground of appeal whether or not the trial magistrate erred in law and in fact on his award on lost earnings. The learned trial magistrate awarded ksh.612,000/= for loss of future earnings and ksh.246,500/= for loss of past earnings. The appellants are of the view that the trial court should not have awarded the sums because the same was not specifically proven. That proof of work of the respondent is necessary because he stated to have been earning ksh.10,000/=. As such the evidentiary burden in deed lies with the respondent. The appellants state that this is by virtue of Section 107 of the Evidence Act (Cap 80 Laws of Kenya) that requires that he who alleges a fact to prove it. The appellants cited the case of **Mbaku Nguru and another –vs- James George Rakwa, Nairobi Civil Appeal 133 of 88** where the Court of Appeal held that loss of future earning is a special damage claim, which must be pleaded and strictly proved.

9) The respondent submits that the awards made for past earnings and loss for future earnings were well founded and should therefore not be faulted and cited the case of **Wambua –vs- Patel and another**

(1980) KLR 336 which held that “..... our courts have accepted oral evidence of earnings, holding that to insist on written evidence as the only means of proof would do injustice to many Kenyans.” The respondent told court that he was employed as a driver. He produced his driving licence. He named his past employer, including the one he was working for when the accident happened. He had letters from previous employers but not from the current one.

10) I think the trial magistrate was right to apply ksh.10,000/= monthly earning to arrive at her computations for loss of earnings and loss of future earnings. The finding of the trial court therefore cannot be faulted.

11) In the end and on the basis of the above reasons, this appeal is found to be without merit. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent