



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 14 OF 2013**

*(Appeal from the Ruling of Hon. V. W. WANDERA (SPM) dated and delivered on 11<sup>TH</sup> February, 2012, in the original KISII C.M.C.C No.125 of 2008)*

**JOYCE MORAA OYARO.....APPELLANT**

**VERSUS**

**HUSSEIN DAIRY LTD.....RESPONDENT**

**JUDGMENT**

1. In her amended plaint dated 20<sup>th</sup> October, 2008 filed before the lower court on 20<sup>th</sup> January, 2009, the plaintiff sought the following orders:

- a. **General damages.**
- b. **Special Damages for Kshs. 315,700.**
- c. **Costs of this suit.**
- d. **Interests on a, b and c above**
- e. **Any other further relief that this honorable court may deem fit and just to grant.**

2. The appellant herein was the plaintiff before the lower court.

3. The Plaintiff's claim was that on 30<sup>th</sup> August, 2007, she was a passenger in motor vehicle registration no. KAT 302Q travelling along Keroka – Kisii Road when the Respondents Motor Vehicle Registration number KAX 3082 –ZC 0032 which was also being driven along the same road, lost control and collided with the Motor Vehicle in which the plaintiff was a passenger thereby causing her serious injuries.

4. At the end of the trial, the lower court entered judgment in favour of the appellant as follows:

1. **That judgment be and is hereby entered for the plaintiff against the 1<sup>st</sup> defendant as follows:**

- |  |                         |
|--|-------------------------|
| a. <b>General damages for pain, suffering of loss of amenities</b> | <b>Kshs. 800,000/=.</b> |
| b. <b>Special damages</b>  | <b>Kshs. 98,049/=</b>   |

**Total = Kshs. 898,049/=.**

2. **The plaintiff be and is hereby awarded costs of the suit and interest at court rates, interest on general damages to accrue from the date of judgment and interest on special damages to accrue from the date of filing of this suit.**

3. **That the suit against the 2<sup>nd</sup> defendant be and is hereby dismissed with costs pursuant to the consent entered by the parties hereto on 10<sup>th</sup> December, 2009.**

5. It is the above decision that has triggered the instant appeal by the appellant through a memorandum of appeal dated 14<sup>th</sup> February, 2013 in which the appellant has set out the following grounds of appeal.
1. **THAT the learned trial magistrate erred in law and in fact in awarding a sum that was so inordinately low as to amount to an erroneous estimate of the damage suffered by the Appellant.**
  2. **The learned trial magistrate did not consider the fact that the Appellant had lost a leg and will need prosthesis, had lost earnings and will require future medical expenses.**
  3. **The learned trial magistrate disregarded entirely the record before him and proceeded to base his ruling on his imagination to the detriment of the applicant.**
6. When the appeal came up for directions on 15<sup>th</sup> October, 2015, counsels for both the appellant and respondent agreed to canvass their arguments on appeal by way of written submissions to be filed and exchanged within 45 days from that date.
7. As at 15<sup>th</sup> February, 2016, when the case was mentioned before the court for the purposes of fixing a date for judgment, only the appellant had filed her submissions on the appeal.

From the grounds of appeal enumerated hereinabove, it is crystal clear that this is purely an appeal on the quantum of damages only and therefore, this court will go straight to the injuries that the appellant sustained in the accident in order to establish whether or not the award of damages was commensurate with the said injuries bearing in mind the trite law, as held in numerous case law, that the appellate court should not interfere with the award of damages unless the damages awarded are so high or so low as to be wholly erroneous estimate and an error of principle must be inferred. (See Charles Mokuva vs Judy Wairimu Mirangu (1996) eKLR 2; and Butt vs Khan [1981]KLR 349).

8. The appellants evidence was that she sustained the following injuries in the accident in question.
- a. **Cerebral concussion.**
  - b. **Blunt injuries and Bruises to the forehead.**
  - c. **Deep cut wound to the right upper maxilla.**
  - d. **Cut-wound to the right aspect of the zygomatic process.**
  - e. **Blunt injury to the anterior aspect of the chest wall.**
  - f. **Cut-wound on the right breast.**
  - g. **Deep cut wound to the right shoulder.**
  - h. **Communuted fracture to the right humerus**
  - i. **Lacerations on the right forearm posterially**
  - j. **Deep cut-wound on the left leg to the medial aspect.**
  - k. **Deep cut wound to the lateral aspect of the left foot.**
  - l. **Deep cut wound to the posterior aspect of the left leg lower 1/3.**
  - m. **Communuted fracture on the right leg that resulted to amputation**
  - n. **Pelvic fracture.**
9. PW1 Doctor P.M. Ajuoga testified on the appellants injuries and produced a medical report that was marked as Pexhibit I had the following to say:

**“She developed elevated blood pressure and peptic ulcers during the treatment period, loss of the limb she had pain and swelling of the left lower limb..... The doctor assessed permanent functional disability at 62%”**

10. On re-examination by Mr. Ochoki for the appellant, Dr. Ajuoga stated:

**“The leg was amputated on 13/9/2008. She sustained compound fracture of the neck of the femur.”**

11. It is in respect to the above injuries that the appellant has submitted that the award of Kshs. 800,000/= made by the lower court was grossly on the lower side and she has instead prayed for an enhanced award while relying on the awards made in the following authorities:

**Edward Mzamili Katana vs CMC Motor Group Ltd & another [2006] eKLR; and Ahmed Mohamed Adam vs Jimmy Tomino & 2 others [2006] eKLR.**

12. The appellant further submitted that the injuries resulted in a disability that rendered her incapable of carrying out her normal business and therefore made her less competitive in the labour and employment market. The appellant therefore argued that she is entitled to compensation under the heading of loss of earning capacity. In this regard, the appellant relied on the findings in the celebrated case of **Mumias Sugar Co. Ltd vs Francis Wanala (2007eKLR)**.

### **Analysis and determination**

13. I have duly considered the grounds raised in the appeal, the lower court record and findings, the appellants submissions and the authorities cited.

14. I have already noted that the gist of the appeal is the award of quantum which the appellant contends is on the lower side taking into consideration the injuries that she suffered in the accident.

15. On quantum, the guidelines on the exercise of judicial discretion in making an award of damages were stated in the case of **Selle vs Associated Motor Boat Co. Ltd [1968] EA 123** to be; precedents of previous recent judgments, the nature of the injuries sustained together with their severity, the consequence of incapacity and/or deformity and, the influence of inflation on the value of the shilling.

16. The principles for assessment of damages were laid out by the Court of Appeal of East Africa and subsequently adopted by our Court of Appeal in the following cases:

a. **Kangu vs Manyoka [1961] EA 705, 709, 7013.**

b. **Lukenya Ranching and farming Coop. Society Ltd vs Kavoloto [1979] EA 414, 418 and 419.**

17. The Court of Appeal held, in the above authorities, that the Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court:

a. **Took into account an irrelevant fact or,**

b. **Left out of account a relevant fact or;**

c. **The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

18. Having regard to the above guidelines and principles to be considered in making awards of general damages, I find that the trial court did not, in making the award, address its mind to the precedents of previous recent judgments, the nature or the injuries and their severity, the resultant disability caused to the appellant and the effect of inflation on the Kenyan shilling.

19. In the instant case, the appellant was, at the time of the accident, a 41 year business woman operating a clothes selling shop at Keroka Town. Her life was literally turned around by the devastating effects of the injuries that she sustained in the accident that not only led to her long stay in different hospitals but left her with a permanent disability due to the amputation of her right leg. The injuries have also been stated to have caused her to develop high blood pressure and ulcers.

20. I have looked at the precedents of the previous recent judgments and noted that for similar injuries, the courts have made awards ranging **between Kshs. 1,300,000/= to Kshs. 2,000,000/=**. (See **Edward Mzamili Katana vs CMC Motor Group & Another (supra)**, **Mehari Tewolodge T/A Mehari Transporters Ltd vs – Muasya Maingi [2013] eKLR**; **Loise Njoki Kariuki vs Bendricon Wamboka Waswa & Another [2013]eKLR**).

21. **Halisburys Laws of England 4<sup>th</sup> Edition, vol 12 (1) page 348** explains the reasoning for the award of damages for pain and suffering in the following words:

**“883- Pain and suffering: - Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future, as a result of the injury. This includes pain caused by the injury itself and any treatment intended to alleviate it; the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff’s condition may seriously deteriorate. It may also include cases where the plaintiff is distressed at not being able to perform services for a sick relative or at the knowledge that she will leave her young child motherless. Pain and suffering must be proved and, where the plaintiff has died as a result of his injuries, identified as an element separate from the death itself. An award under this head depends on the plaintiff’s awareness of his suffering: pain and suffering, unlike loss of amenity, is a subjective loss. Where the plaintiff’s life expectancy has been reduced by reason of his injuries, the courts must, in assessing damages for pain and suffering, take into account any suffering caused or likely to be caused to the plaintiff by awareness that his expectation of life has been reduced.”**

22.I have noted that the appellant must have undergone excruciating pain and anguish as a result of the injuries she suffered in accident that even the doctor contends have caused her other complication such as ulcers and high blood pressure. The devastating effect of an amputation of a leg on a young lady’s self esteem cannot be gain said. The appellant was hospitalized for a long time and incurred large hospital bills which she has not settled todate. Taking the nature of the injuries and the resultant incapacity into account, the precedents of recent local awards and the inflationary trends, I find that the sum of Kshs. 1,300,000/= to be reasonable award for general damages for pain, suffering and loss of amenities.

**Loss of earning capacity.**

23.The appellant pleaded this claim in the plaint and had the following to say about her diminished earning capacity in her testimony before the lower court:

**“I was also operating a shop at Keroka where I was selling both new and second hand clothes. I started this business in 1992. On the material date I had gone to Daraja Mbili market to sell clothes. I produce the business licence business licence from Kerok Town Council- Marked PExhibit 13.**

**Although I still operate my shop, the stock is depleted. I had employed young boys who were selling in the shop. I used to go to Mombasa and Nairobi to collect merchandise. Since the date of the accident, I cannot travel to Nairobi to collect merchandise.....**

**I have engaged a house help to attend to me and my children by cooking and attending to my needs which I cannot do on my own due to the injuries I sustained.”**

24.The trial magistrate on the other hand, had the following to say with regard to the claim for loss of earning capacity:

**“As regards the claim for loss of earnings, the plaintiff did not adduce any evidence to prove his (sic) income before the accident and after the accident. She told the court she continues to operate her shop where she sells new and second hand clothes after she sustained injuries in the accident. In the absence of evidence to prove loss of income in her business I find that the plaintiff is not entitled to damages for loss of earnings or loss of earning capacity.”**

25.The medical evidence showed that the appellant’s resultant incapacity was assessed at 62% and the appellant’s own testimony proved her loss and or reduced earning capacity. It is my finding that trial magistrate misapprehended the evidence and erred in his findings that the appellant was

not entitled to damage for loss of earning capacity. The appellant was categorical that she was no longer able to effectively carry out her clothes business and household chores which she had to hire someone else to do for her. The appellant's testimony was that she was not even able to take care of herself due to her disability.

26. The appellant did not have to prove that what she earned from her business or that she was in a salaried employment to qualify for the award of loss of earning capacity.

27. In **Butler vs Butler [1984] KLR Nyarangi J.** held:

**“It was immaterial at the time, that the respondent had not been in salaried or similar employment.”**

28. The above decision clearly shows that a claimant for loss of earning capacity need not necessarily prove the actual earning lost.

29. The court of appeal had the following to say on the assessment of damages for loss of earning capacity in the case of **Mumias Sugar company Ltd vs Francis Wanalo [2007] eKLR:**

**“The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the 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 part of general damages or as separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case.**

**There is no formula for assessing loss of earning capacity. Nevertheless, the judge has to apply the correct 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 disability.”**

30. In view of the decisions in the above quoted authorities and the testimony tendered by the appellant and the doctor, I find that the trial magistrate ought to have made an award to the appellant for loss of earning capacity. The legal position is that the court has a discretion to make any appropriate award for general damages for loss of earning capacity depending on the circumstances of the case.

31. In this case, therefore, after fully re-evaluating the evidence on record, the circumstances of the case and after taking due consideration of the fact that the appellant has already been awarded Kshs. 1,300,000/= general damages for pain, suffering and loss of amenities, I find that an award of Kshs. 350,000/= general damages for loss of earning capacity would be adequate compensation for the appellant under this heading.

32. On special damages, I find that the trial magistrate was justified to award only that which had been proved by the appellant which was Kshs. 98,049/=. I therefore find no reason to interfere with the award made for special damages.

33. In the end therefore, I allow the appellants appeal, set aside the judgment of the trial court dated 11<sup>th</sup> February 2011 and substitute the same judgment with judgment for the appellant against the respondent for Kshs. 1,748,049 made up as follows:

a. General damages for pain, suffering and loss of amenities	Kshs. 1,300,000/=
b. Damages for loss of earning capacity	Kshs. 350,000/=

(c) Special damages	<u>Kshs. 98,049/=</u>
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<b>TOTAL</b>	<b><u>Kshs. 1,748,049/=</u></b>
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34. Interest shall accrue on the said amount from the date of this judgment until payment is made in

full.  
35. The appellant will have the costs of this appeal and the costs of the lower court case.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of April, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Anyona for Ochoki for the Appellant
- Mr. Nyasimi for Okongo for Respondent
- Omwoyo court clerk