



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 146 OF 2014

BETWEEN

KISUMU CONCRETE PRODUCTS LIMITED APPELLANT

AND

KENNEDY ONYANGO OLWA RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM in the Chief Magistrates Court at Kisumu in Civil Case No. 332 of 2014 dated 21st November 2014)

JUDGMENT

1. There is no dispute that on 30th September 2013, the respondent was injured while repairing a block making machine while working for the appellant. According to the evidence one of the appellant's employees turned the machine on without prior warning to the respondent causing the chain to pull his leg and crush it below the knee. The respondent filed suit seeking damages for negligence. The issue of liability was settled at 85:15 against the appellant.

2. After assessing damages, the learned magistrate made the following award;

General damages	Kshs. 750,000/-
Cost of artificial limb	Kshs. 250,000/-
Loss of future earnings (Kshs.9,000 x 12 x 30)	Kshs. 3,240,000/-
Less paid	(Kshs. 313,200/-)
Less 15%	(Kshs. 589,020/-)
TOTAL	KSHS. 3,337,780/-

3. The judgment precipitated this appeal. The thrust of the appeal set out in the memorandum of appeal dated 18th December 2014 is that the amount awarded was excessive in the circumstances. Mr Indimuli, learned counsel for the appellant, condensed his submissions to two issues. First, he contended that the multiplier of 30 years applied to the award of loss of earning capacity was made without taking into account the exigencies of life and imponderables. Second, that the award

of Kshs. 250,000/- for the cost of an artificial limb was neither pleaded nor proved and should be disallowed.

4. Mr Maube, learned counsel for the respondent, submitted that the award was fair and reasonable. He stated that the cost of a wheel chair was pleaded and subsumed under the rubric of general damages for pain and suffering and loss of amenities. He contended that the multiplier of 30 years was not unreasonable given the age, the nature of the injury and circumstances of the respondent.
5. As this an appeal on the issue of quantum the general principal is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where trial court, in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no 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).
6. The nature and extent of the respondent's injuries was not disputed. He suffered a traumatic amputation. The respondent testified that he was initially issued with an artificial leg which was fitted but it became very uncomfortable and caused him a lot of pain. He inquired about its cost and was told it would cost Kshs. 250,000/-. According to the medical report of Dr Onyimbi, who prepared the medical report presented in evidence, the respondent would need an artificial limb. He did not put a figure on the cost of an artificial limb but opined the further treatment over a period of several years would cost about Kshs. 3 million.
7. In my view a claim for the cost of an artificial limb is in the nature of future medical expenses and hence a matter of special damage which must be pleaded and proved. In ***Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees of Eldoret & Another*** ELD CA Civil Appeal No. 255 of 2013 [2016]eKLR, the Court of Appeal held as follows;

*[14] As Harvey McGregor, the author of **McGregor on Damages**, Sweet & Maxwell, 18th edition notes (see paras 44-007-024) stated, where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.*

*[15] Although prospective medical expenses that have not crystallized as disbursements may be claimed as general damages, [see **McGregor on Damages** at para 35-185] the same cannot be awarded without evidence. In this case, beyond the statement by the appellant in his testimony that the prosthesis would require replacement every three years, no other evidence was tendered to that effect. We are therefore unable to fault the learned Judge in that regard.*

8. I therefore find and hold that in so far as the sum of cost of an artificial limb was well known and ascertainable, it ought to have been pleaded. If indeed, as the respondent argues, it was part of general damages for loss of amenities, it ought not have been awarded under a separate head of damages as it would have been factored into the award of general damages. Since the same was not pleaded, I set aside the award of Kshs. 250,000/-.
9. As regards the loss of earning capacity, the learned magistrate was guided by the case of ***Butler vs Butler*** [1984] KLR 225 where the Court of Appeal identified the following principles;
 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.*

10. According to the pleadings and evidence, the respondent was 24 years working as a mason where he was earning Kshs. 900 per day. The learned magistrate considered that he would have worked until he was 60 years old hence a multiplier of 30 years would be reasonable. In his testimony, the respondent stated that he could not continue to do construction work as he had only one leg and used crutches to walk.

11. While the learned magistrate considered that the respondent would not be able to work in the same industry due to his injury, the court did not take into account the fact that the respondent was a young man who had a long life ahead of him and would in all likelihood be look for alternative employment. Moreover, the lump sum award would enable him invest and seek alternative opportunities. I would therefore reduce the multiplier to 24 years.

12. The appeal is therefore allowed to the extent the award for the cost of the artificial limb amounting to Kshs. 250,000/- is set aside and the multiplier is reduced to 24 years hence the judgment in the lower court is substituted with the following award;

General damages	Kshs. 750,000/-
Loss of future earnings	
(Kshs. 9,000 x 12 x 24)	Kshs. 2,592,000/-
Less paid	(Kshs. 313,200/-)
Less 15%	(Kshs. 454,320/-)
TOTAL	KSHS. 2,574,480/-

13. The appellant shall have the costs of this appeal.

DATED and DELIVERED at KISUMU this 30th day of June 2016.

D.S. MAJANJA

JUDGE

Mr Indimuli instructed by Rajni K. Somaia, Advocate for the appellant.

Mr Maube instructed by Bruce Odeny and Company Advocates for the respondent.