



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 1 OF 2014

(Being an appeal from a Judgment of the CM'S Court Naivasha by S. Mwinzi (Ag. SRM) in Civil Case No. 567of 2013)

KINGSHOLME LIMITED.....1ST APPELLANT

HOMEGROWN (K) LIMITED.....2ND APPELLANT

JOHN CYRUS KAMAU.....3RD APPELLANT

-VERSUS-

MARY WANGUI.....RESPONDENT

J U D G M E N T

1. The Plaintiff's claim in the lower court was founded on negligence. The Plaintiff averred that she was an employee of the 2nd Defendant and on 5th September 2010 was travelling in the 1st and 2nd Defendants' vehicle **KA A 209V**, at the time driven by an employee of the 2nd Defendant, one **John Cyrus Kamau**, the 3rd Defendant.

2. The Plaintiff further averred that the 3rd Defendant drove the said vehicle in a negligent manner along Moi South Lake road, as a result of which, the vehicle lost control and overturned, occasioning the Plaintiff severe injuries resulting in the traumatic amputation of the right hand, below the elbow joint. The Plaintiff sought general damages, special damages and future medical expenses.

3. In their defence, the Defendants denied ownership of the accident vehicle or that the 3rd Defendant was their authorized driver. Further, they denied the occurrence of the accident and the presence of the Plaintiff in the vehicle, and injuries pleaded. In the alternative, the Defendants averred that if any accident occurred at all, they denied the alleged negligence of the driver and asserted that the accident was inevitable.

4. Before the trial commenced, however the parties recorded a consent on liability in the ratio of 80:20% in favour of the Plaintiff. Subsequently, the issue of quantum went to trial. On 17th June, 2014 the court awarded general and special damages, including loss of future earning capacity in the net sum of Shs. 1,520,764.48.

5. On 9th July, 2014 the Defendants, now Appellants filed an appeal challenging the quantum, on the basis that:-

“1) The Learned Magistrate erred in Law and in fact in totally failing to take into account the Appellant’s submissions and authorities relied thereon to give a clear and concise analysis of the judgment.

2) The Learned Magistrate erred in law and in fact in finding that the nature of injury suffered by the Respondent merited general damages of Kshs 1,500,000/= and Loss of Future earnings of Kshs. 395,445/=.

3) The Learned Magistrate erred in law and in fact by failing to consider the evidence on record on Loss of earnings and consequently used the Gross salary in his calculation instead of the Net Salary in granting the award.

4) The Learned Magistrate erred in law and in fact by considering the Respondents authorities in awarding general damages contrary to the courts confirmation and conclusion in its judgment that the quoted authorities bore multiple injuries.”

6. For her part, the Plaintiff, now Respondent, filed a Cross-appeal, on grounds that, the trial Magistrate erred in law and fact by failing to award the cost of prosthesis despite medical evidence adduced on the issue; and further that, the trial court erred in law and fact by failing to award future medical expenses in spite of evidence tendered thereon. The appeal was disposed of by way of written submissions.

7. Arguing the second ground, the Appellants submitted that the court erroneously based its award on extra non-existent injuries rather than the single proven traumatic amputation of the hand. The Appellants also complained that the trial court considered inappropriate authorities tendered by the Respondent while ignoring the Appellants’ submissions.

8. Regarding the 3rd ground the Appellants argue that the award for lost future earnings was erroneously computed on the basis of the Respondent’s gross salary of Shs 8,539/=-, rather than the net sum of Shs 4,715/=-. No submissions were made in respect of grounds 1 and 4, which on the face of it are subsumed under the argued grounds.

9. In her written submissions, the Respondent defended the lower court judgment and submitted that in reaching awards in respect of general damages and lost future earnings, the court considered, the evidence submissions and authorities of both parties. Regarding the applicable salary of the Respondent, it was argued that the trial court was entitled to rely on the gross salary. However it is admitted that the Respondent’s salary was subject to statutory deductions excluding SACCO loans.

10. Further, the Respondent asserted that regarding the award of general damages, the court considered all relevant matters and relied on authorities wherein the claimants’ injuries were comparable to the instant cases. In that regard the cases of **Rosemary Wanjiru Kungu –Vs- Elijah Macharia Githinji & Another [2014] KLR** and **Simon TAveta –Vs- Mercy Mutitu Njeru [2014] eKLR** *inter alia* were cited.

11. In support of her Cross-appeal, the Respondent argued that there was unchallenged medical evidence that she would require a prosthesis every five years at a cost of Kshs 160,000/= and the claim thereunder should have been awarded. The decision of **Musinga J. In Kisii HCCC No. 36 of 2008 Loise Awuor Maseno –Vs- Deasons (K) Limited T/A Suncity Bus Services [2009] eKLR** was relied on. The Respondent contends her entitlement to the sum of Shs 480,000/= being the cost of three sets of prosthesis. She asserted, that her evidence in support of future medical expenses at Shs 900,000/= was not controverted and should have been granted.

12. The duty of the first appellate court is to re-evaluate the evidence, analyse it and come to its own conclusions, but in doing so give allowance for the fact that it did not see or hear the witnesses. (See **Peters –Vs Sunday [1958] EA 424, Selle –Vs- Associated Boat Co Ltd. [1968] EA 123**).

13. Further in **Ephantus Mwangi & Another –Vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278** the court stated:

“A Court of Appeal will not normally interfere with a finding of 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 principles in reaching the findings he did.”

In the above case, the court held *interalia* that;

“The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if:

a) It appears that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or

b)”

14. During the trial, only the Respondent adduced evidence. To the effect that, she lost her right hand through a traumatic amputation in the accident. She was admitted in hospital for five days and thereafter fitted with a prosthetic hand at a cost of Shs 160,000/=. Her degree of permanent disability was assessed at 70%. Further she would require constant medication for pain and a change of prosthetic hand every five years. Being right handed, she was rendered incapable of doing her house-hold chores while aesthetically; the prosthetic is a source of stigma.

15. I have considered the evidence tendered at the trial and the parties’ respective submissions. The complaint that the trial magistrate did not consider **“at length all the evidence tabled on behalf of the Appellant”** has no basis. The Appellants did not tender any evidence. Secondly, submissions that the lower court erroneously stated that the Respondent had suffered other injuries, in addition to the traumatic amputation are not borne out by the record.

16. The record, at **Page 56** cited by the Appellants indicates that the trial magistrate stated otherwise. What the court stated at Paragraph 7 of the said Judgment was *interalia*:

“I have looked at authorities cited in both cases supplied by the Plaintiff the claimant had suffered other injuries besides the traumatic amputation of the arms and have borne this in mind. In view of that, and have considered the rival submission, I find the sum of Kshs 1,500,000/= would be sufficient compensation.” (emphasis added)

17. Before making the conclusions above, the trial magistrate in preceding paragraphs compared the injuries of the claimants in the respective authorities supplied both by the Respondent and the Appellant. The two authorities by the Plaintiff namely **Sabina Adhiambo Odongo –Vs- Ruth Wangui & Another 2012 eKLR** and **Loise Awuor Maseno –Vs- Deasons (K) Limited t/a Suncity Bus Services** were 2 years and 5 years older, respectively from the instant case.

18. As for the Appellants’ authority, **Joseph Maraka Adoro (Minor suing through uncle and next friend Andrew Adoro Maraka) –Vs- Paul Njogo Kihara [2005] eKLR** the comparison ends with the degree of injury. The said Plaintiff was a minor aged 9 years. While the case in my opinion provided some guidance, it cannot be the basis of an award in respect of injuries of a similar nature suffered by an adult working woman. It is also an older authority. Upon my own evaluation of the evidence and the submissions, I cannot find any reason to fault the award of general damages by the trial magistrate.

19. As stated, in the case of **Butt –Vs- Khan [1981] KLR 349** the appellate court will not interfere with an award of damages by the lower court merely because the former court would have awarded a lesser or higher sum. In that case, the court stated:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately too high or low.” (See also

Idi Ayub Shabani and Yusuufu Juma –Vs- City Council of Nairobi & Another [1985] 1 KAR 681.

20. With regard to the award of Kshs 395,445/= as damages for lost future earnings, what the Appellants are aggrieved about is the use of the gross salary in calculations. In this regard, the Respondent had produced her payslip for January 2012. The payslip (**Exhibit 14**) indicated that her gross pay was Shs 8,538.80. Statutory deductions included NSSF at 200/=; NHIF at Shs 180/=.

21. I agree with the Respondent that SACCO and funeral contributions are not statutory payments but voluntary payments made by the employee for her eventual benefit. Thus, only a sum, of Shs 380/- ought to have been deducted from the gross salary leaving a net of Shs 8,158.80. The net salary of Shs 4,715/= proposed in the Appellants' submission has ignored the voluntary nature of the Respondent's deductions to the SACCO and the Funeral Benefits.

22. No other variable in the calculation of damages for loss of future earnings is contested. Thus based on the new net salary, the damages for loss of future earnings are adjusted as follows:

$$\text{Kshs } 8,180.0 \times 66 \text{ months} \times 70/100$$

$$= \text{Kshs } 376,936.56$$

23. The appeal before me only succeeds in the latter respect. Otherwise, there is no merit in the grounds of appeal and I will dismiss it with costs to the Respondent.

24. The Cross-appeal relates to the dismissal of the Respondent's claim to the cost of prosthesis every five years and future medical expenses. In this regard, the learned magistrate correctly observed that:

“There is the issue of cost of prosthesis. PW1 proposed a sum of Kshs 160,000/= every five years. No evidence has been provided to show how much this costs.....special damages must be pleaded and proved and the judgment (authority of Sabina Adhiambo) does not show what documents had been filed in that case to prove the costs of prosthesis.....I therefore have no figure on this head.....

Also claim for pain killers at Kshs 5,000/= per month is not supported by any evidence. The doctor estimates the cost of pain killers at Shs 5,000 per month while Plaintiff in her evidence says she has been buying the same at Kshs 2,000/=. She said she had no single receipt for the pain killers”

25. A perusal of the testimony by the Respondent and her witness **Dr. Obed Omuyoma** justifies the above findings. The Plaintiff did not tender any plausible proof of the two claims, one of which involves a tidy sum of money. I agree with the sentiments of the learned magistrate that he could not, as it were, pluck figures from the air in respect to the claim for the cost prosthesis. Equally, the Respondent did not tender any material to support an award under the claim for future medical expenses.

26. In particular, Dr. Omuyoma's evidence on this score seems casual. The Respondent cannot blame the trial court for her own omission to bring relevant and credible evidence in support of the two dismissed claims. Thus, even though no submissions were made by the Appellants in relation to the Cross-appeal, it is my considered view that it has no merit and will dismiss it with costs.

27. In the result, the award in respect of general damages is sustained, while the award for loss of future earnings is adjusted to KShs 376,936.56. Judgment in favour of the Respondent is confirmed as follows:

General damages for pain and suffering	-	1,500,000.00
Damages for lost future earnings	-	376,936.56

Special damages	-	<u>5,500.00</u>
Total	-	1,882,436.56
Less 20% Contribution		
Net award	-	<u>1,505,949.248</u>

28. The costs will be as ordered in the lower court; and in respect of this appeal as per the orders herein.

Delivered and signed at Naivasha this **29th** day of **July, 2016**.

In the presence of:

For Appellants : Ms Ndungu

For Respondent: N/A

Court Assistant : Barasa

C. W. MEOLI

JUDGE