



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 141 OF 2013**

**KENYA POWER & LIGHTING COMPANY LTD.....PLAINTIFF**

**VERSUS**

**ANDREA OTIENO ODHIAMBO.....DEFENDANT**

**J U D G M E N T**

1. This appeal arises out of the judgment by Hon. Gacheru, SK, (PM) dated 4/10/2013. In that judgment the trial court found the Appellant wholly liable for the Respondent's injuries and awarded to the Respondent General damages in the sum of Kshs.1,189,900 and special damages in the sum of Kshs.6,900/- making an aggregate of Kshs.1,196,800/- together with costs and interests
2. Against that Judgment the appellant filed a memorandum of appeal setting out 5 grounds of Appeal and challenging the judgment as having been reached against the weight of evidence; that the principles used were erroneous and therefore the award was manifestly excessive regard being had to *stare decisis* and lastly that the submissions by the appellant on quantum were treated superficially.
3. On 01/10/2015, the court gave directions that the appeal be canvassed by way of written submissions pursuant to which directions the appellant filed submissions on 26/10/2015 while the Respondents' submissions were filed on 03/12/2015. The parties then attended court on 21/7/2016 to highlight the filed submissions. On that day Mr. Ajigo Advocate appeared for the appellant while Ms. Odhiang was for the Respondent.
4. Mr. Ajigo in his submissions did not argue the grounds of appeal separately but opted to consolidate all and argue them together. In his submissions he stressed the point that the trial court ran into an error by awarding to the respondent the sum of Kshs.400,000/- which he submitted was too exorbitant and manifestly excessive regard being had to the injuries admittedly suffered by the Respondent and the decided case cited to the trial court.
5. On loss of future income Mr. Ajigo submitted that the award was not available to the Respondent as calculated by the trial court and at all. He took the view that the medical report by the doctor said that the victim could drive a motor vehicle if the bones had united. In his submissions Mr. Ajigo said that having awarded to the Respondent general damages, it was not open for the court to again award lost future earnings. He thus prayed that the appeal be allowed and the judgment of the trial court set aside and in its place be substituted a judgment this court deems just and commensurate with the plaintiff injuries.
6. For Respondent, Ms. Odhiang urged the court to dismiss the appeal for lacking merits as the defendant did not call any evidence at the trial, to controvert the plaintiffs injuries as proved by the medical reports

which assessed the Respondents permanent partial disability at 15% and that the plaintiff was still in crutches at the time of hearing. She then cited to court decisions of the court of appeal on when a court of law would interfere with the decision of a trial court. Among them was the decision KEMFRO AFRICA LTD –VS- A.M RUBIA [1982 – 1986] 1KLR 727 and EPHANTUS MWANGI & ANOR VS DANCUM MWANGI WAMBUGU [1982 – 1988] 1 KLR 278 both for the proposition that an appellate court will not interfere with a decision of the trial court on assessment of damages and findings of fact unless it be demonstrated that in coming to the conclusion it did, the trial court took in account irrelevant factors and left out some relevant matters or that the sum awarded is so inordinately high to amount to a wholly erroneous estimate of damages.

7. On loss of future earnings, Ms. Odhiang submitted that as a result of the accident the Respondent was terminated from employment because he was unable to perform his duties. She submitted that the loss was specifically proved having been particularly pleaded. She pleaded with court to dismiss the appeal as lacking in merits.

### **Analysis and determination**

8. This being a first appeal, and there being no contestation on liability; this court is duty bound to re-evaluate the evidence on injuries sustained in entirety and come to own conclusions based on such evidence. The injuries suffered by the Respondent and which the trial court took into account, and had the duty to take account, were pleaded at paragraph 4 of the plaint and evidence led by the plaintiff and supported by the medical reports produced. As at the date the plaintiff testified in court on 24/5/2013, the record show that he was still using the aid of crutches to walk. The record equally show that he was admitted on three different occasions for an aggregate period of six (6) weeks and five days. The medical report by Dr. Adede was to the effect that the left leg had healed with an obvious curve and was 2cm shorter than the right limb and estimated permanent partial disability at 15%.

9. In her reserved judgement the trial court in assessing general damages said:-

**“The said injuries were severe as they have left the plaintiff a 15% permanent partial disability and a left leg which was 2cm shorter than the right leg. The plaintiff was now using crutches to aid him in walking....considering the injuries sustained by the plaintiff herein, the listed authorities as well as other relevant factors I find an award of Kshs.400,000/- as general for pains suffering and loss of amenities as fair and adequate compensation which I proceed to award to the plaintiff”.**

10. In his submissions before court, Mr. Ajigo concluded without saying or demonstrating the material facts which were ignored or the immaterial or irrelevant factors that the court unduly took into account so as to justify his urge that this court needs to interfere with the trial courts’ exercise of discretion is assessing damages. He however laid premium on the fact that the court ought to have considered and got guided by the decisions cited before it. Those decisions were HASSAN NOOR MOHAMMED -VS- TAE YOUN ANN wherein Angawa J, awarded to the plaintiff the sum of Kshs.200,000/- on 21/7/2001. While it is true that the trial court was bound by that decision, it is equally true that, that decision was some 12 & 50 years old by the time the trial court made its decision. Indeed that passage of time must have had some effect of eroding the value of money and therefore the trial court was not bound to follow the awards wholesome.

11. The trial was court was equally cited to other decisions of the High Court by the Respondent and one of such decisions which the trial court evidently seem to have taken into account was the decision in Mombasa HCC No. 318 of 1991, FRASTUS N. SHEM -VS- KENYA PORTS AUTHORITY in which Mbaluto J awarded to a plaintiff, who had suffered relatively severe injuries, the sum of Kshs.400,000 in 1993. Equally cited to court was the decision by Wambilyaga J in Mombasa HCC No. 255 of 1992 SHAFFI MOHAMED SHAFFI -VS- EXPRESS (K) LTD in which a sum of Kshs.600,000/- was awarded to a plaintiff who suffered comparable injuries.

12. My view is that having been referred to such varying decisions the trial court had the discretion to choose which of the decisions to rely upon noting that it is a principal of law that comparable injuries should attract comparable awards. The court equally had the duty to consider the comparability of the injuries in the case before it and relate same with the decided cases as well as the ages of the decisions.

13. But even then, the duty of assessing damages is an exercise of discretion that is vested in the trial court and should not normally be interfered with or disturbed unless outright error is demonstrated that results into an injustice.

14. In **UGENYA BUS SERVICE VS GACHIKI [1976-1985] EA 575**

Madan JA had this to say on the task of a trial court in assessing damages:-

**“General damages for personal injuries are difficult to assess accurately and so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim at precision. I know I am placed in inescapable situation for criticism by one party or the other, sometimes by both sides. I also do not aim to give complete satisfaction but to do the best I can”.**

15. For this appeal, I have not seen any error on the part of the trial Court. If anything, had I sat on the matter, I would have award a sum higher than that awarded by the trial court. However, I am not permitted to substitute my discretion for that of the trial court. I lack the benefit enjoyed by the trial court in hearing the witnesses, particularly the plaintiff, testify and observing his demeanor. This ground of appeal lacks merit, it fails and is thus dismissed.

**See CECILIA MWANGI -VS- RUTH WI MWANGI C.A.C.A No. 251 of 1996.**

16. On loss of income, the record show that the plaintiff, by a letter dated 9/2/2012, had his salary stopped as his sick leave had exceeded the 12 months permitted by the law. When he gave evidence he was still using the aid of crutches to walk. The evidence adduced by the Respondent was never rebutted as the Appellant opted not to call any evidence. Even on cross examination, the Respondent remained steadfast. There was to this court ample evidence that the plaintiff lost his employment due to the injuries suffered. Prior to the injuries he was gainfully employed by grain Bulk Ltd at a monthly salary of Kshs.26,300/-. It is equally evident for the Record of Appeal that at the time he was injured the Respondent was aged 43 years and he would have, save for vicissitudes of life, worked upto the retirement age of 60 years.

17. In his determination, the trial court adopted a multiplier of 5 years and multiplic and of Kshs.13,165/- as the monthly net salary disclosed in the payslip for July 2011 and came with a sum of Kshs.789,900/-. Indeed lost earnings are ascertainable at the time of filing suit and are therefore in the category of special damages. They are calculated on the basis of known parameters being determined by the actual income and projected over a period of time fixed by the court in its sole discretion.

18. In this appeal, I have no jurisdiction to interfere with the trial courts discretion in the choice of a multiplier of 5 years even though had I sat I would have opted to a higher number of year. I would have done so taking into account that as at the time the salary was stopped he was just 44 years old or thereabout. That to me means that he still had some 16 years to work prior to retirement. However, it was a discretion and nothing is so erroneous in that exercise to entitle me to interfere.

19. However, there is clearly an error in the figure adopted by the trial court as the multiplicand. The salary slips produced for the months of April to July 2011 show that the Respondents gross salary was Kshs.26,300/- which was subjected to various statutory deductions like PAYE, NHIF, NSSF Pension, Salary Advance and Savings with a Co-operative Society. To this court only PAYE, NHIF and NSSF were to be excluded for the benefit the Respondent was entitled to. The rest were indeed sum that were deducted to his benefit and were in reality due to him as income. It therefore follows that it was an error

to disentitle the plaintiff to such benefits and adopt the net income. The only sum that was never due to the Respondent from the gross salary were the three (3) statutory deductions all totaling to Kshs.2,819.80 and no more. It was that sum that the court ought to have reduced from the gross income to get the actual lost income. In failing to give the matter this approach, the trial court erred in a material way and this being a first appellate court, it is duty bound to correct that error. I will interfere with the award under the heading lost income and rework it afresh. It is worked out as follows:-

**(Kshs.26,300/= less Kshs.2,819.80/= ) x 12 months x 5 years.**

**Therefore Kshs.23,490.20 x 12 x 5 = Kshs.1,409,412/=**

20. Consequently the Respondent ought to have been awarded lost income of Kshs.1,409,412/- which I award to him now. The upshot is that the appeal by the appellant fails and instead, I uphold the finding by the trial court that the Respondent was entitled to both general damages for pains & suffering and loss of amenities as well as damages for loss of income. While I don't disturb, the assessment of general damages for pains and suffering and loss of amenities, I do interfere with the calculation for damages for loss of income for which I award to the Respondent the sum of Kshs.1,409,412.20.

21. The particulars and total of the sum due to the plaintiff works as follows:-

**Damages for pains, suffering and**

<b>loss of amenities</b>	<b>Kshs. 400,000.00</b>
<b>Loss of earnings</b>	<b>Kshs. 1,409,412.20</b>
<b>Special damages</b>	<b><u>Kshs. 6,900.00</u></b>
<b>Total</b>	<b><u>Kshs. 1,816,312.20</u></b>

22. I also award to the plaintiff the costs of this appeal.

Dated at Mombasa this 18<sup>th</sup> day of **November 2016.**

**HON. P.J.O. OTIENO**

**JUDGE**