IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.216 OF 2009

THOMAS MWANGI GICHUHI……...1ST APPELLANT

PETER WANDERI WAWERU……..…2ND APPELLANT

VERSUS

PETER NGUGI KAMAU……RESPONDENT

(An Appeal from the Judgment/Decree of Hon. W. N. Njagi, Principal Magistrate, in Narok P.M.C.C.No.25 of 2007 dated 29th September, 2009)

JUDGMENT

The respondent was travelling in motor vehicle registration No.KAQ 866K belonging to the 2nd appellant and driven at the time of the accident by the 1st appellant when the said motor vehicle was involved in a collision with another. In the process the respondent was injured. He sued the appellants claiming both general and special damages, the details of which will become clear in due course. Of course the appellants denied liability.

The learned trial magistrate found in favour of the respondent and awarded damages as follows:

a) Pain suffering – Kshs.300,000/=

b) Special damages – Kshs.35,380/=

c) Future medical expenses – Kshs.150,000/=

d) Loss of earning/earning capacity – Kshs.300,000/=

Total – **Kshs.785,380/=**

It is the award of damages that aggrieved the appellants who have challenged it in this appeal.

The appeal raises only three grounds, namely:

i) that the damages awarded were far excessive and incongruous to the nature, degree, severity and inconvenience of the respondent's injuries;

ii) that loss of earnings was awarded without any evidence;

iii) that the trial magistrate failed to appreciate and apply the principles applicable in assessment of damages.

In their written submissions, the appellant faulted the finding of the trial magistrate that the respondent suffered fracture of both tibia and fibula whereas the injury certified by all the medical reports was to the right tibia only. In awarding Kshs.300,000/= for tibia and fibula, the appellants argue, the learned trial magistrate misdirected himself.

Counsel for the appellants has proposed Kshs.150,000/=. It was further submitted that a global award of Kshs.300.000/= for loss of earnings and loss of earning capacity also amounted to a misdirection as they relate to two distinct heads. Besides, all the doctors, except one, had certified that the respondent had fully covered without any incapacity. Only Dr. Abakalwa found that he was unable to pursue his occupation at the time he examined him, some three years after the accident.

The learned trial magistrate contrary to the laid down principle, adopted a multiplier/multiplicand equation in awarding damages under this head. It was also submitted that Dr. Abakalwa's report having been made way after the suit had been filed was of no probative value as it was tailored for the purpose of the suit.

The appellants have urged this court to dismiss the claim under the head of loss of earning capacity and in its place award Kshs.42,000/= being loss of earnings. From those submissions, it is clear that no issue was raised about special damages in the sum of Kshs.35,380/= and future medical expenses at Kshs.150,000/=.

The respondent for his part through counsel has argued that the awards were based on the material presented before the trial court which material the appellants failed to call evidence in rebuttal. It was further submitted that the respondent did not require documentary evidence to prove loss of earnings or loss of earning capacity.

I have considered the foregoing arguments as well as the authorities cited by both sides. For the reason that the appellants have not challenged all the awards, I will only consider the three heads in contention, namely, general damages for pain and suffering, loss of earnings and loss of earning capacity.

In considering these awards, I am alive to the fact that an appellate court will not easily upset an award by the trial court. It can only disturb it if it is satisfied that the trial court, in assessing the damages took into account on irrelevant fact or left out a relevant one or where an award is so inordinately high or so inordinately low as to represent an entirely erroneous estimate. See **Kemfro** V. **A.M. Lubia & Another** (1982-1988) KAR 727. See also **Butt** V. **Khan** (1981) KLR 349.

The learned trial magistrate repeatedly found that the respondent suffered compound fracture to the right tibia and fibula, perhaps lifting that conclusion from the amended plaint. This was in contrast with the evidence presented by Dr. Abakalwa, the discharge summary from A.I.C. Kijabe Hospital, the medical examination report and Dr. Obed Omuyoma's report, all produced at the trial and unanimous that the fracture was only to the right tibia. It is apparent the learned trial magistrate relied on the authority of **Ezekiel Masek Muthongo** V. **John Kaminja Mugui & Another**, Nbi. HCCC No.1137/1991 (decided in 1993) cited by counsel for the respondent which involved the fracture of both tibia and fibula. The appellants also cited a case of similar injuries but where the award was only Kshs.120,000/= decided in 2002.

In the assessment of damages, the general method of approach must always be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards on similar cases.

Before me, the respondent maintained that the award of pain and suffering was commensurate with the injury sustained. The appellants, on the other hand cited **Mulwa Musyoka** V. **Wandia Construction**, HCCC No.1321 of 1997 in which Ang\'awa, J awarded Kshs.150,000/= for bruises on the face and head,

fracture of mid shaft femur and fracture of the left tibia. The plaintiff in this case was unconscious for 30 minute. These injuries were clearly more serious. The appellant also relied on **Peter Njangara Karanja** V. **George Wainaina Njenga & Another,** HCCC No.2348 of 1995, also a decision of Ang'awa, J in which Kshs.100,000/= was awarded for a compound fracture of the right tibia.

What the appellate court considers before disturbing an award of damages is whether the trial court misapprehended the evidence and as a result arrived at a figure which was either inordinately high or low.

Although the award of Kshs.300,000/= was based on the assumption that the respondent suffered the fracture of both the tibia and fibula, the authority relied on was decided in 1993. Furthermore, the award of Kshs.300,000/= cannot be described as inordinately high in the circumstances. That ground fails.

Turning to the award on the head of loss of earnings and loss of earning capacity, there is no doubt that the two are distinct as was explained in **Mwangi & Another** V. **Mwangi** (1996) LLR 2859 CAK:

"In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "*loss of earning capacity*" can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just "*throw figures*" at the judge and ask him to assess such damages……."

The respondent pleaded both heads as if they were synonymous. The learned trial magistrate similarly fell into the same error and awarded a global figure for the two heads.

For loss of earnings, the respondent testified and indeed pleaded that prior to the occurrence of the accident, he earned Kshs.400/= per day as a cook. He added in his testimony that while his leg was in a plaster, he did not work for six months.

In the amended plaint, however, he pleaded Kshs.42,000/= for the period between 25th July, 2006 and 13th March, 2007 at Kshs.400/= per day. That is what should have been awarded by the trial magistrate and is what I award him. Regarding loss of earning capacity, the principles on which it is assessed, were considered more comprehensively in **Moeliker** V. **Rayrolle & Company Limited** (1977) 1WLR 132 where Browne L.J. explained that:

"This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial."

It was therefore for the respondent to prove that as a result of the accident he was at risk of loosing his employment or that his chances of employment are diminished as a result of the accident. The respondent did not make such a claim in his testimony. But Dr. Abakalwa in his report of 3rd July, 2009 seemed to suggest that the respondent was *"…..unable to pursue his occupation even at the time of examination"* some three years later. The respondent had testified earlier on 17th March, 2009 and did not suggest that he had not worked beyond the six months his foot was in plaster.

Dr. Abakalwa's report was contradictory for asserting in the first instance that the respondent was "*in good general condition, coherent in speech and walking without support but in antalgic gait (slight limp). Vital signs were within normal ranges*" but turned around to say that the respondent was unable to pursue his occupation. The report, having been prepared well after the commencement of the trial was exaggerated and one cannot help but conclude that it was intended to influence the award in this matter. The claim for loss of earning capacity fails too.

In the result, the appeal partially succeeds on quantum which is reduced as follows:

i) Pain and suffering - Kshs.300,000/=

ii) Special damage - Kshs. 35,380/=

iii) Future medical expenses - Kshs.150,000/=

iv) Loss of earnings - Kshs. 42,000/=

Total **- Kshs.527,380/=**

I award half (1/2) of the costs of this appeal to the appellant.

Dated, signed and Delivered at Nakuru this 22nd day of February, 2012.

W. OUKO

JUDGE