REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL APPEAL NO.140 OF 2009

-BETWEEN-

ALI ISSA..APPELLANT

-AND-

CHINA ROAD & BRIDGE CORPORATION...RESPONDENT

(Being an appeal from the Judgment and decree of Chief Magistrate Ms. Catherine Mwangi dated 8th July, 2009

in CMCC No. 2923 of 2007 at Mombasa Law Courts)

JUDGEMENT

The learned Chief Magistrate had heard and disposed of the suit based on a plaint dated ***17th September, 2007***. The suit was founded on the principle of vicarious liability, the specific assertion being that 2nd defendant, who was at all material time 1st defendant's driver, on ***12th July, 2007*** drove 1st defendant's motor vehicle, Reg. No. KAV 905V, carelessly and negligently; failing to slow down, swerve, stop or exercise control; failing to keep sufficient look-out; failing to observe traffic rules and regulations; failing to take necessary precautions for the safety of pedestrians – and hit the plaintiff, a lawful pedestrian at Mazeras, walking along the Mombasa-Nairobi Road.

The learned Magistrate had set out the critical part of the Judgment as follows:

"The Court finds that in this case, the plaintiff said he lost his left leg in the accident. It was amputated at knee-level and even the doctor (PW3) says he will need a prosthesis which will cost Kshs.200,000/=.

"This Court also observes that the plaintiff was a welder prior to the accident, but now can't do the same. He earned 9000/= per month, according to him and PW2. He was 25 years [old] at the time of the accident – so probably he would have worked for yet another 15 years.

"The Court finds that a total award of Kshs.1,000,000/= under the said heading, having considered the

current rate of inflation, [would be appropriate]…[I] think the plaintiff needs a prosthesis and thus award him Kshs.200,000/=..…"

The appellant was dissatisfied with the Judgment, contending as follows:

(i) the trial Court erred in law and fact, in failing to award the plaintiff damages for loss of earning capacity, "against the weight of the evidence and legal authorities cited";

(ii) the trial Court erred in law and fact: while finding that the plaintiff was earning Kshs.9000/= per month and adopting a multiplier of 15, the learned Magistrate omitted this finding in the Judgment.

Learned counsel ***Mr. Nyabena***, for the appellant, urged that the trial Court had overlooked a specific element in the pleading and proof, to the detriment of the plaintiff: at para.7 of the plaint it was pleaded that "*the plaintiff, then an able-bodied man aged 25 years, earning Kshs.9000/= per month, had his leg amputated and, as a consequence, [he] has suffered loss of earning capacity, and the plaintiff claims damages for loss of earning capacity,"* and this claim was supported by the evidence of PW1, PW2 and PW3 (pp.13-16 of the record of appeal). Counsel submitted that the trial Court, though conscious of the propriety of this claim for lost earning capacity, failed to make an award in respect of the same: *"[the learned Magistrate] proceeds and makes an award of Kshs.1,000,000/= for pain and suffering and leaves out the claim for loss of earning capacity without allowing or dismissing the same."*

To reinforce his argument, counsel cited a passage from the Court of Appeal decision in ***Butler v. Butler*** [1984] KLR 225 (at p.235***, Chesoni, Ag. JA***):

"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 improper to award it under its own heading… Indeed, the judge should have said 'general damages' for pain, suffering including loss of earning capacity, Kenya Pounds 44,000/=, a figure, in view of the result of the injuries suffered in this case, I would not consider [so] excessive as to justify this Court's interference. What a victim whose earning capacity is diminished through an accident loses is an interest which, if not saleable on the labour market, has an assessable value. It is therefore an economic loss of the same class as the 'lost years', for which the wrongdoer should fairly compensate the victim. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite heading of general damages or as an item on its own, as loss of earning capacity."

Counsel urged that in the instant case, the failure to make an award for lost earning capacity, was "*an error which this Court should rectify by awarding the appellant damages."*

Counsel proceeded to propose Kshs.1,620,000/= as an award for loss of earning capacity, thus made up: 9000/= x 12 x 15 years – and that the same be reduced by 25%, to accommodate a consent reached by the parties. The net award would then be Kshs.1,215,000/=.

Learned counsel submitted that a similar position had been taken by the High Court (***Maraga, J***) in ***Kadi Kitsao Ngoa v. Amin Said Salim t/a Amin B. Enterprises & Hardware Accessories***, Mombasa HCCC No. 139 of 2005; the relevant passage thus reads:

"As I have said, where the plaintiff was in a salaried employment or was engaged in some income-earning activity before the accident that employment or engagement and the period he would have worked, were it not for the injuries he suffered, should be taken into account in assessing the damages he is entitled to for loss of earning capacity."

Mr. Njenga, learned counsel for the respondent, submitted that the appeal lacked merit: because in the pleadings, the appellant herein had sought general damages for pain, suffering and loss of earning

capacity *under one head*; the trial Court had awarded the sum of Kshs.1,000,000/= under that one head – hence it "*included loss of earning capacity as an item within the general damages";* and so, "*it is not true…that no damages for loss of earning capacity were awarded to the appellant."*

Counsel argued further that *"assuming that the appellant was not awarded damages for loss of earning capacity…, he did not prove on a balance of probability that he is entitled to such damages as required by law*". In aid of this argument, counsel invoked the Court of Appeal decision in ***Cecilia Mwangi & Another v. Ruth W. Mwangi,*** Civil Appeal No. 251 of 1996, in which the following passage occurs:

"…the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special [damages] claim. It must be specifically pleaded and strictly proved. The damages under the head 'loss of earning capacity' can be classified as general damages but these have also to be proved on a balance of probability."

Counsel, in effect, contests the appeal on two grounds: firstly he doubts that the claim for loss of earning capacity has been proved on a balance of probability; and secondly, he contends that the basis for the computation of "*loss of earnings*", specifically the monthly income of Kshs.9000/=, had not been properly laid. On the latter point, counsel submits:

"There is nothing that was exhibited in the form of a pay-slip or bank statement, or cheques, to prove that the appellant was indeed earning a salary of Kshs.9000/= per month. The only document that was produced was a letter which letter purported that the appellant was earning Kshs.9000/- as a welder. It is however not sufficient evidence to prove that the appellant was earning Kshs.9000/= and the Court could not proceed to award damages for loss of earning capacity on the basis of this kind of evidence."

To reinforce the argument on the importance of evidence in the form of pay-slips, counsel relied on the Court of Appeal decision, ***Jimnah Munene Macharia v. John Kamau Erera***, Civ. Appeal No. 218 of 1998, in which the following passage occurs:

"This witness produced no pay-slips; he was not able to say how much was deducted from the salary as PAYE and other outgoings normally shown in a pay-slip. He produced a letter (not authored by him) …which letter purported to show that the appellant was an assistant to the proprietor, holding the position of Audit and Tax Manager earning Shs.25,000 (basic pay) plus monthly travelling expenses of Shs.2,500/= and allowances for up-country audits. The absence of pay-slips is important in this case. It is doubtful if the appellant was employed as an Audit and Tax Manager when he is not a qualified accountant….

"The appellant himself gave evidence to the effect that his net salary was Shs.22,000/= per month and that although pay-slips were available he did not bring them to Court.

"The manner in which the appellant attempted to prove his claim for loss of earnings (salary) left a lot to be desired. It appears to us that his real earnings were being kept secret and his case was being bolstered by [the] production of a letter (not through its author) showing his salary whilst the pay-slips were being kept away from [the] Court. We are in the circumstances constrained to disallow the claim under this head of damages wholly."

Counsel relies on the foregoing statement of principle regarding proof of a plaintiff's regular income; and he submits that, just as in the ***Jimnah Munene Macharia*** case, the evidence emanating from the plaintiff's side, in the instant matter, was contradictory.

The appellant herein, when cross-examined as PW1, on ***25th June, 2008***, thus testified:

"I have no pains now. It's only the leg that I am now lacking. I used to get [Kshs.] 9,000/=. I never used to be taxed."
But ***Bernard Kadenge Nzaro*** (PW2) thus said in the evidence-in-chief:

"I work at Mariakani…I know the plaintiff. He used to work with me. Now he does not work there because he [was involved in] an accident. He used to earn [Kshs.] 10,000/=. I wrote this letter. We used to pay him [Shs.] 9000/=. I produce the letter as an exhibit."

PW2 has not stated his own standing in the relevant employ [of ***Hanabo Enterprises***] and how he related to the appellant herein; he does not state by what authority he wrote a letter of testimony on the earnings of the appellant; and he has attributed to the appellant two differing earning-statistics.

When cross-examined, on ***25th June, 2008,*** PW2 thus testified:

"The plaintiff worked with us from 5th to 12th July, 2007. We sacked him [thereafter]. If he gets well, we would give him a job. If he got [an] artificial leg we [could] employ him. We were not giving him [a] pay-slip..… We used to pay him [Shs.] 9000/= but we have [increased] the salary to [Kshs] 10,000…."

It is noted that both parties were represented at the trial by counsel [***Mr. Nyabena*** for the plaintiff, and ***Mr. Njenga*** for the defendant], even though the communication of potentially important evidence, as emerges from the foregoing excerpts, remained hazy.

What are the *merits* of the appeal? It is an established fact that the appellant herein, as a pedestrian, was injured by a motor vehicle driven by 2nd defendant, and on behalf of 1st respondent, on ***12th July, 2007;*** and the driver bore the bulk of the responsibility for the incident. Thereafter, the appellant filed suit, seeking *"general damages for pain and suffering, loss of earning capacity and future medical care,"* among others. The learned Chief Magistrate, on the basis of the evidence, found the respondents substantially liable, and awarded, under one head, *"general damages for pain and suffering."* The real gravamen in this appeal is whether the element of "*loss of earning capacity"* was incorporated.

Although a second gravamen was raised – that while finding that the plaintiff was earning ***Kshs.9000/= per month*** and adopting a multiplier of 15 the trial Court omitted this finding in the Judgment – the entire record and the Judgment itself, just as the respondent has urged, do not show that a proper basis was laid for adopting that figure as a basis of calculations. Accordingly, I disallow this particular contention on appeal.

But that inevitably touches on the remaining gravamen, regarding ***loss of earning capacity.***

Although it is not possible to make a reliable estimate of future earning capacity, in view of the state of the evidence on record, it is a certainty that the appellant who was at the material time aged 25, ***did*** lose future earning capacity. The Court's proper options are limited: either to refuse the prayer in respect of loss of future earnings, only because the foundation of proof of the same was feeble; or to award a modest sum, purely on the basis of the Court's ***discretion***. In my considered opinion, the latter option best expresses the discharge of the judicial mandate; and I am, I believe, fortified in this conviction by distinguished authority: ***Butler v. Butler*** [1984] KLR 225; ***Kadi Kitsao Ngoa v. Amin Said t/a Amin B. Enterprises & Hardware Accessories,*** Mombasa HCCC No. 139 of 2005; and ***Cecilia Mwangi & Another v. Ruth W. Mwangi***, Civil Appeal No. 251 of 1996.

There is still a stronger case for the option I am inclined to take, arising from a new obligation reposed in this Court by the **Constitution of Kenya, 2010**; **Article 159 (2)** of this constitutive instrument of governance thus stipulates:

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles – ………

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

The "*purpose and principles of this Constitution*," so far as is relevant herein, are as stated in **Article 10(2)(b)** of the Constitution: *"equity, social justice…, equality, human rights, non-discrimination and protection of the marginalized."*

The sense of *equity* dictates that, in this case, a certain basic award be made in favour of the appellant, under the head "*loss of future earning capacity*"; and I hereby grant the sum of Kshs.200,000/=.

I will make a decree, consequently, as follows:

(1) The award of the trial Court dated 8th July, 2009 is upheld, with costs as ordered by that Court.

(2) In addition, the appellant wins the sum of Kshs.200,000/= under the head "loss of future earnings", this amount to bear interest at Court rates as from the date hereof.

(3) The respondent shall pay half the costs of the appeal – and the same shall bear interest at Court rate as from the date of filing the appeal.

Orders accordingly.

SIGNED at **NAIROBI** ……………………………….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 21st day of November, 2011.

H.M. OKWENGU
JUDGE