



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

(Coram : F. Azangalala, J.)

CIVIL APPEAL NO. 149 OF 2007

BETWEEN

DISUNI ENTERPRISES HARDWARE.....1ST
APPELLANT
DANIEL MBUGUA MWANGI.....2ND
APPELLANT

AND

BENARD N.
MALOBA.....RESPONDENT

(Being an appeal from the decision of the Chief Magistrate Hon. A.O. Muchelule, dated 31st October, 2007

in Eldoret Chief Magistrate's Court Civil Case No. 292 of 2006)

JUDGMENT

This is an appeal by **Disuni Enterprises Hardware** and **Daniel Mbugua Mwangi**, the defendants in the original action, from the judgment and decree of the Chief Magistrate (**A. O. Muchelule** as he then was) at Eldoret in CMCC No. 292 of 2006: **Benard N. Maloba -Vs- Disuni Enterprises Hardware and Daniel Mbugua Mwangi** In that action the parties agreed on liability at 80%:20% ratio in favour of the respondent. After hearing evidence the Learned

Chief Magistrate made the following awards: -

(a)	Special damages -	Kshs. 239,117.00
(b)	General damages -	Kshs. 1,500,000.00
	(pain, suffering and loss of amenities)	
(c)	Loss of earning capacity -	<u>Kshs. 1,764,000.00</u>
Total	-	Kshs. 3,503,117.00
	Less agreed contribution of 20% percent	
	-	<u>Kshs. 700,623.00</u>

Net award - Kshs. 2,802,494.00

The appellants were not satisfied and have appealed to this court on three (3) grounds expressed as follows:-

1) That the Learned Magistrate erred in law in making an award in general damages that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the respondent.

2) That the Learned Magistrate erred in Law and fact in making an award for loss of earning capacity that was so excessive as to amount to an erroneous estimate of loss or damages suffered by the respondent.

3) That the Learned Magistrate erred in Law in awarding an amount for loss of earning capacity, which amount was not pleaded.

The appeal was canvassed before me on 25th October, 2011, by Mr. Songok, Learned Counsel for the appellants and **Mr. Namatsi**, Learned Counsel for the respondent. For the appellant, it was contended firstly that the Learned Magistrate had no jurisdiction to make an award beyond Kshs. 3,000,000/-. Secondly, it was contended that the respondent's earnings were uncertain and the figure of Kshs. 6,000/- per month should have been applied rather than the figure of Kshs. 18,000/- which was accepted by the Learned Magistrate. Thirdly, that the respondent did not strictly prove the special damages he was awarded.

In response, counsel for the respondent submitted that, the issue of jurisdiction was raised for the first time in counsel's submissions but was not in the appellants' grounds of appeal. In the premises, counsel urged that the same should accordingly be disregarded. With regard to loss of earning capacity, counsel argued that there was evidence at the trial upon which the learned magistrate based in applying the figure of Kshs. 18000/- as the average earnings of the respondent per month when he was injured. With regard to general damages for pain, suffering and loss of amenities, counsel submitted that there was no basis upon which the award made by the Learned Magistrate should be disturbed.

This is a first appeal. The court is therefore duty bound to reconsider the evidence which was adduced before the Lower court and make its own evaluation and draw its own conclusions. In doing so, the court should bear in mind that it has not had the advantage of seeing and hearing the witnesses testify and should give allowance for that (**see Selle -Vs- Associated Motor Boat Company Limited [1968] E.A. 123** and **Williamson Diamonds Limited -Vs- Brown [1970] E.A.**

It is also trite law that it is a very hard thing for an appellate court to interfere with the findings of fact by a trial court particularly if such findings are based on the demeanor of witnesses as observed by the trial court and its general appreciation of the evidence in the case. However, where a trial court has failed to appreciate the weight or bearing of circumstances admitted or proved then the appellate court is entitled to interfere even with findings of fact (**see Peter -Vs- Sunday Post Limited [1958] E.A. 423**)

I should therefore examine with care whether the findings of fact by the Learned Magistrate were not based on evidence adduced before him or whether there was a misapprehension of the evidence or whether the Learned Magistrate acted on wrong principles in arriving at those findings of fact. In this case the trial, the respondent testified that he was a truck driver and used to drive between Mombasa and Uganda, Rwanda, Sudan and other destinations. At the time of the accident he testified that he was driving on contract with **Ekina Agencies Limited** and used to be paid per trip amounts ranging between Kshs. 6,000/- and Kshs. 10,000/- depending on the destination. He produced payment vouchers for trips

undertaken between Mombasa and Malaba Uganda. **Josephat Ekina Wechuli** (PW4) confirmed that he had hired the respondent at the material time and that he would be entitled to an allowance per trip depending on the destination. The respondent would however make an average of Kshs. 18000/- in allowances per month. The Learned Magistrate accepted that evidence and as the respondent could no longer work as a driver, the Learned Magistrate determined that he lost 8 years of earning capacity after of course considering exigencies of life.

I find no basis to fault the Learned Magistrate. The figure of Kshs. 1,764,000/- for loss of earning capacity cannot therefore be said to be based on no evidence or a misapprehension of the evidence nor can I say that he acted on wrong principles in arriving at that figure. I cannot also say that the figure is so high that it represents an erroneous estimate of the damages suffered by the respondent.

There is however, one matter which the Learned Magistrate never considered probably because counsel failed to alert him of the same since no submissions were made thereon. For the period of eight years applied by the Learned Magistrate the respondent would have had to pay tax thereon. Besides, the respondent would be paid an immediate lump sum. These two factors were not and should have been considered by the Learned Magistrate. Taking all the surrounding circumstances into consideration, I think the take home figure would probably have been less than Kshs. 18000/- per month. In my view a figure of Kshs. 15,000/- would be a reasonable estimate of the “take-home” amount per month. Accordingly for loss of earning capacity I would assess the total loss at Kshs. 15,000 x 12 x 8 making in all Kshs. 1,440,000/-.

This conclusion takes care of grounds 2 and 3 of the appellant’s memorandum of appeal. Whereas I do find that the respondent specifically pleaded loss of earning capacity, I have only interfered with the Learned Magistrate’s award thereon because he failed to take account of factors which he ought to have taken into account.

The Learned Magistrate awarded to the respondent Kshs. 1,500,000/- as damages for pain, suffering and loss of amenities. The appellant has submitted that the award is so excessive as to amount to an erroneous estimate of the damage suffered by the respondent. The record of the Learned Magistrate shows that he meticulously considered the injuries suffered by the respondent on the basis of the respondent’s own testimony before him and the medical evidence which was tendered. In his own words:-

“on being brought to hospital he was taken to theatre for resuscitation. He had suffered crushed pelvis and right hip with profused haemorrhage. He had cut wounds over the scalp and fore head, abrasions of the chest wall, cut wounds of the 2nd and 3rd fingers of the right hands, bruises on the right elbow joint region left forearm, forehead and left leg.

He was admitted for 15 days. Treatment included blood transfusion (7 pints) and amputation of the right lower limb at the pelvis joint level.....

The amputation of the lower limb has left him with permanent physical disablement of 70%. He will need a prosthetic limb estimated to cost 200,000/-

On the limbs he had 3cm scar on the dorsum of the right index finger and 33cm long surgical scar extending from the right buttock to the right injured (sic) region”

Those findings were not without basis. There were before him: the respondent’s own testimony, PW2, **Dr. Charles Masinde Andayi’s** testimony, PW3 **Dr. Joseph Embenzi’s** testimony, the estimated cost of the prosthetic limb made by **L.B.M Tinga**, then an Orthopaedic Technologist at **APDK Rehabilitation Clinic** at **Port Reitz Mombasa** and the medical report of **Dr. Vladimir Chtchoukin**. The latter concluded his report at follows:-

“Benard N. Maloba 44 years was injured by passing motor car while repairing the care he was travelling in and sustained serious injuries of the body and limbs with massive blood loss on 20/12/2005.

Treated in Moi Teaching and Referral Hospital and remained with the permanent defect such as absence of the lower limb on the hip joint level and deformation of the pelvis. After due examination I would recommend seventy percent of (sic) permanent disability.”

Dr. Charles Masinde Andayi (PW2), on his part testified that on examination of the respondent, he observed that he had suffered, among other injuries, a traumatic crush injury to the right lower limb. He concluded that the respondent suffered life threatening injuries and the amputation of the right lower limb had left him with a permanent disability of 70% by continental scale. In his view, the respondent required a prosthetic limb which he estimated would cost Kshs. 200,000/-

Dr. Joseph Embenzi (PW3) on his part testified that the respondent had a right thigh amputation among other injuries and could not continue driving. He estimated that the prosthetic limb would cost about Kshs. 400,000/-.

The respondent’s testimony and the above medical evidence, clearly demonstrate that the respondent suffered very severe injuries which included the loss of his right lower limb. The Learned Magistrate minutely analysed the medical evidence and concluded, rightly in my view, that the respondent’s injuries were grave.

The Learned Magistrate further considered comparable awards made in cases cited before him and concluded as follows:-

“I have considered these authorities in the present case. I am aware that ultimately each case has to be decided on its own peculiar facts. I consider an amount of Kshs. 1,500,000/- in general damages for pain, suffering and loss of amenities will meet the interest of justice in this case and I order it.”

The Learned Magistrate clearly had the correct principles in mind. in **Bashir Ahmed Butt -Vs- Uwais Ahmed Khan [1982 – 88] KAR 5**, the Court of Appeal held as follows:-

“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 high or low.”

The appellants have not persuaded me that I should disturb the Learned Magistrate’s said award of the sum of Kshs. 1,500,000/- as it is not so inordinately high as to represent an entirely erroneous estimate of the damages suffered by the respondent. I also do not detect the application of wrong principles or any misapprehension of the evidence by the Learned Magistrate. Ground I of the Memorandum of Appeal is accordingly without merit and is dismissed.

There is no challenge to the special damages awarded to the respondent. It was therefore not open to the appellants to argue the same in their submissions before the court.

Another ground introduced in the submissions before the court was with respect to the jurisdiction of the Learned Magistrate. It was argued that the Learned Magistrate had a monetary jurisdiction of upto Kshs. 3,000,000/- and could not therefore make the award he made herein. It is trite that a jurisdictional issue may be raised at anytime. Counsel for the respondent objected to the challenge on the single ground that the same was not contained in the appellants’ Memorandum of Appeal. He did not otherwise suggest

that the Learned Magistrate could award sums beyond Kshs. 3,000,000/-. In the premises, I set aside the extra sum of Kshs. 503,117/- as the same was made without jurisdiction.

I have also found that the Learned Magistrate's award for loss of earning capacity should be interfered with for the reasons already given. Accordingly the award of Kshs. 1,764,000/- is hereby set aside and is substituted with an award of Kshs. 1,440,000/- as damages for loss of earning capacity. The new total is therefore Kshs. 2,676,000/-. Taking into account the agreed apportionment of 80% : 20% in favour of the respondent, the net award to the respondent is Kshs. 2,140,800/-. Judgment is entered for the respondent in the said sum.

Interest at court rates on special damages shall be applied from the date the suit was filed in the Chief Magistrate's Court, while interest at the same rate on the rest of the award shall be applied from the date of the judgment of the Chief Magistrate.

As the appellant has succeeded only to a limited extent, and the substantial sum set aside has been for want of jurisdiction, the order that commends itself to me on costs is that each party bears its own costs of the appeal.

Those are the orders in this appeal.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER, 2011

F. AZANGALALA
JUDGE

Read in the presence of:

Mr. Songok for the Respondent.

F. AZANGALALA
JUDGE

6TH DECEMBER, 2011.