



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 8 OF 2016

BENARD ONDIEKI.....APPELLANT

VERSUS

BONIFACE NDEGE ORAYO..... RESPONDENT

(Being an appeal from the Judgment of Hon. J.M Njoroge - SPM (as he then was) dated 21st January 2016 in Kisii CMCC No. 201 of 2013)

JUDGEMENT

1. The respondent was walking along the Kisii – Keroka road around Welcome area on 10th February 2013 when he was hit by the appellant's motor vehicle registration number KAA 987Y. He sustained injuries and filed suit for damages. The issue of liability was agreed in the ratio 75:25 against the appellant. The matter proceeded for assessment of damages and the trial magistrate awarded Kshs. 2,500,000/- as general damages, Kshs. 320,000/- for loss of earning capacity and Kshs. 194,100/- as special damages making a total of Kshs. 3,014,100/- subject to the agreed liability. It is this award that has precipitated this appeal.

2. The Appellant raised the following grounds of appeal in their Memorandum of Appeal dated 18th February 2016;

- 1. That the learned trial magistrate erred in law and in fact in finding that the appellant do pay the respondent a gross sum Kshs 2,500,000/- (subject to 25% liability) in General Damages which award is arbitrary and unwarranted in the circumstances.*
- 2. That the learned trial magistrate erred in law and in fact by awarding the respondent a gross sum of Kshs 320,000.00 (subject to 25%) liability in loss of earning capacity when no evidence whatsoever was led thereto and in complete disregard of the appellant's submissions.*
- 3. That the learned trial magistrate erred in law and fact by awarding the respondent Kshs 194,100 in special damages when the same had not been strictly proven and /or in disregard of the respondent's pleadings.*
- 4. That the learned trial magistrate erred in law ad fact by awarding the plaintiff gross global award of Kshs 3,014,000.00 which award is manifestly high as to amount to an erroneous estimate of the damages suffered by the respondent, in light of the nature and degree of injuries allegedly sustained by the respondent, as well as the evidence led in proof thereof.*

3. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

4. The Appellant in his submissions contests the injuries sustained by the respondents and advances that the medical reports, p3 form and plaint were not consistent on the injuries sustained by the respondent. On the issue of loss of earning capacity the appellant submits that the award was not justified as the respondent failed to plead any income lost in his plaint and no evidence was led on the loss of earning capacity.

5. On their part, the Respondents submitted that the injuries were confirmed by both the appellant and the doctors' reports. They supported the finding by the trial court and submitted that the award of Kshs 2,500,000/- cannot be said to be too high. The Respondent replicated their decision used before the trial court and in addition cited the case of *Peter Mwai Mureithi v Kimama Mbugua & 2 Others (2016) eKLR*. On the loss of earning capacity he urged court that the justification for the award of loss of earning capacity where the plaintiff is not employed at the date of trial is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future and cited the case of *Mumias Sugar Ltd v Francis Wanalo (2007) eKLR*.

6. The Court of Appeal in the case of Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia & Another (1982 - 88)1 KAR 727 discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

7. The Plaintiff pleaded that she suffered the following injuries:

- a) Fracture of the tibia/fibula right side
- b) Multiple cut wounds on the scalp
- c) Depressed skull fracture occasioning loss of consciousness for some time
- d) Contusion on the right mid femur
- e) Fracture of the cervical bone C3 and C4.
- f) Loss of two upper incisors.

8. From the discharge summary dated 4th March 2013 it is clear that the respondent had a scalp wound and a depressed skull fracture, fracture of tibia and fibula. At the point of discharge it was noted that cervical bone c3 and c4 were stable. The medical report by Dr Ezekiel Ogando Zoga on 25th April 2013 found that the respondent sustained multiple severe injuries, a fracture of the tibia and fibula, fracture of the cervical bone, depressed skull fracture and soft tissue injuries and he confirmed the respondent’s injuries in his oral testimony before the trial court. There was a second medical report by Dr. M.S Malik who formed the opinion that the respondent sustained serious head injury, compound fractures of his right tibia and fibula, loss of two teeth and soft tissue injuries. The respondent was examined by Dr M S Malik on 6th March 2015, two years after the respondent was injured and he found that the cervical spine was normal and further noted that x-rays for the cervical spine were not availed and thus made no comments in regard to injuries on the cervical spine. I therefore find that the respondent sufficiently proved the injuries in his claim.

9. In the Terry Kanyua Marangu case cited by the Respondent the plaintiff sustained injuries to the forehead, nose, eyes; lost two teeth, injuries to the left arm, injuries to the right leg and general injuries to the head. It was proved that the plaintiff in that case continued to suffer memory loss, visual impairment, recurrent tearing and eye irritation, frontal skull defect making the plaintiff susceptible to injury, psychological trauma due to facial deformity and recurrent headaches. The respondent further cited the case of Hassan Noor Mohammed v Tae Youna Ann (2008) eKLR; Hamisi Gunga v Salt Manufacturers & Another (1995) eKLR; Eliskar Ole Murindo v Raybinder Singh HCCC No. 1772 of 1995.

10. In Samwel Mwangi Kamau vs Joseph M. Kimemia & Another (2004)eKLR where Kshs 1,000,000/= was awarded as general damages where the Plaintiff therein sustained a depressed fracture of the skull; fractures of the right tibia and fibula; and a permanent disability of paralysis of the left upper limb whose degree was assessed at 50%.

11. In Joseph MuseeMwa vs. Julius MbogoMugi& 3 Others [2013] eKLR, the claimant sustained an injury to the left leg, on the head, and face. The left leg tibia and fibula were fractured. He had two broken upper jaw teeth i.e. one molar and one canine tooth. He had chest injury. He had right shoulder injury as well as bruises on the left elbow. The left leg was shortened due to the injury and the treatment procedures undertaken. The nerves therein were also affected. The Court awarded **KShs.1,300,000/-** general damages. The damages suffered by the respondent in this case are much more severe than the plaintiffs in the Samwel Mwaniki Kamau case (case) and Joseph Musee Mwa case (supra) and having considered the authorities I find that the award by the trial magistrate court was excessive and therefore set aside the finding of the trial magistrate and substitute it with an award of Kshs 1,750,000/-.

12. I now turn to loss of earning capacity. In this case even though there was no documentary proof of the respondents’ earnings, damages were deserved. **The Court of Appeal in Jacob Ayiga Maruja & Francis Karani versus Simeon Obayo (2005) eKLR held that documentary evidence is not always necessary to prove loss of earnings. The Court held that;**

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

13. The respondent at paragraph 5 of his plaint pleaded that he was farming but as a result of the accident he can no longer sustain his vocation and sought future earning capacity. The respondent further testified that he uses a stick when walking. Though there was no documentation that he was a farmer, the respondent gave oral testimony that he does not work. The Court of Appeal in Mumias Sugar Company Limited vs. Francis Wanalo Kisumu HCCA No. 91 of 2003 [2007] eKLR discussed the decision in the decision of this Court in Butler v Butler as follows;

“From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following

principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

14. The respondent only needed to prove that his chances of getting an alternative job in the labour market are diminished. However the Court of Appeal in the *Mumias Sugar Company Limited supra* also distinguished between loss of earning from loss of future earning capacity. The court of Appeal found that;

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

15. The plaintiff sought loss of future earning capacity which has been proved. As a result of the injuries he suffers pains and walks with the help of a walking stick. He thus cannot get meaningful employment.

16. Having re-analyzed the receipts for special damages the respondent only proved special damages for the amount of Kshs. 107,100/=.

17. I make the following award;

1. General damages for pain and suffering Kshs. 1,750,000/=.
2. Loss of earning capacity Kshs. 320,000/=.
3. Special damages Kshs. 107,100/=
- Net Total** **Kshs. 1,632,825/=**

4. The respondent shall have half the costs of the appeal.

Dated, Signed and Delivered at KISII this 19th day of February 2020.

A. K NDUNG'U

JUDGE

Bosire Nicholas, Advocate for the appellant

M/s Wanjohi holding brief Kisa, Advocate for the respondent