



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM; R. MWONGO, J.

CIVIL APPEAL NO. 40 OF 2016

KWERI PETER.....1ST APPELLANT

PETER KIONGO.....2ND APPELLANT

MICHAEL MUTHI BUNDI.....3RD APPELLANT

VERSUS

MNG.....RESPONDENT

(Being an appeal from the judgment and/or decree of Hon P Gesora, CM in Naivasha CMCC Civil Suit No. 816 of 2013, delivered on 31st January, 2014.)

JUDGMENT

Background

1. In this appeal, the appellants challenge only the quantum of damages awarded, the issue of liability having been determined in a previous case emanating from the same cause of action. The appellants assert that the trial court erred and misdirected itself as to the exact nature of the respondents' injuries and arrived at the wrong and excessive assessment of damages thereon.

2. The case emanates from a motor vehicle accident in which the respondent suffered injuries indicated as grievous harm and set out in the medical report of Dr. Obed Omuoyoma as follows:

Mild head injury with intracerebral haemorrhage

Left partial sub-arachnoid haemorrhage

Compound fracture left tibia

At the time of examination, the respondent had pains in her left leg, multiple scars on the head, and was walking with the aid of crutches.

3. The hearing proceeded with only the plaintiff and the doctor giving evidence. The respondents did not avail any witnesses. In his evidence, the doctor stated that the head injury may give post traumatic epilepsy. He said he saw the respondent 8 months after the accident, and stated that she would not suffer any incapacitation.

4. At the close of hearing the trial court made an award as follows:

General damages	Shs 1,500,000.00
Loss of future savings (sic, earnings?)	Shs 1,016,040.00
Special damages	Shs <u>21,829.00</u>
Total	Shs 2,537,869.00

General damages

5. The appellants allege that the medical report had inconsistencies and should be disregarded; that the respondent has had no post traumatic epilepsy – as suggested or anticipated by the doctor – since he had not indicated any permanent disability in the report.
6. The trial court awarded general damages on the strength of **HCCC 221 of 2007 Maureen Mary Wamwitha Nduru suing Through Mary Wamwitha Nduru v Hilltop Primary School and High School** cited by the plaintiff/respondent. In that case, the court awarded Kshs 1,600,000/= for severe injuries to the head with compound fracture to the right parietal scalp. The court noted that the respondent may in future suffer post traumatic epilepsy.
7. The appellants did not avail any authorities in respect of the head injuries although they submitted authorities on the fractures of the tibia and fibula. On appeal, the appellants again failed to cite any authorities covering comparable awards on the head injuries. They however impugned the trial court's suggestion that the respondent may suffer post traumatic epilepsy.
8. I do not read the trial court's judgment to indicate that the learned magistrate's determination was predicated on the fact that the respondent would suffer post traumatic epilepsy. He merely repeated what the medical report stated, which was that:

“The head injury might in future lead to post traumatic epilepsy”

There was no evidence to counter the medical report, and there were no authorities availed to counter the authority relied on by the trial magistrate.

9. Accordingly, and in the absence of any evidence or authority to challenge the trial court's determination, there is no basis for this court to intervene. The court will only intervene if an award is demonstrated to be inordinately high or inordinately low, or that the trial court misdirected himself on the law or legal principles.

Loss of future earnings

10. The trial court's award under this head was arrived at by taking the net salary of the respondent as Shs 8,467/= and a multiplier of 10 years which the applicant could have continued working until retirement and multiplicand of 12 = 1,016,040/=. The basis appears to be that the respondent's future earnings were lost.
11. The plaintiff's submissions in the lower court were for a net salary of 8,847 and a multiplier of 17 years x 12months = Shs 1,804,788/=. The appellants suggested a lump sum of Shs 450,000/= for general damages in total. On appeal, the appellants seek dismissal of the entire award on loss of future earnings asserting that there was no evidential basis for it.
12. It is clear in her plaint, that the respondent pleaded loss of future earnings in the particulars of special damages. Further, at paragraph 10 of the plaint she stated:

“The plaintiff avers that prior and at the time of the accident, she had been employed at Panda Flowers general worker earning a basic salary of Ksh 7,121/= per month and she had to resign from her employment as a result of the incapacitating injuries she sustained in the accident and she claims damages for lost earnings and diminished earning capacity.”

13. In giving her testimony, as PW2, the respondent stated that:

“I used to work at [particulars withheld] as a general worker, but I am not able to work....I still experience pain and am not able to walk or bend for long. I use a walking stick.”

14. In her evidence, the respondent stated that as a general worker, she was earning shs 8,000/=. In cross examination she stated that she used to get a net pay of Shs 3,407/=. She submitted her payslip which showed her gross salary as 8,847/= with deductions of 5,440/=. including statutory deductions, namely NSSF and NHIF which amount to Shs 380/=. The other deductions are for her loans and sacco contributions, and, as noted by the trial court, are voluntary expenses for her own benefit, thus cannot be deducted as statutory deductions.
15. On this, aspect of her inability to work, there is only her oral evidence. There is no medical evidence of her incapacity to work. Nor is there indication from the evidence availed that the respondent was asked to leave her employment due to injuries sustained, or that she had sought to go back to work and that the same was declined.
16. There is a distinction between loss of earning capacity and loss of future earnings. See the case of **SJ vs. Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley V John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss

of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

17. In awarding the plaintiff loss of future earnings, the trial court did not consider any evidence demonstrating that there had indeed been loss of future earnings. The learned magistrate appears to have merely assumed such loss and thus took the plaintiff's net salary as 8,847/= less 380/= as statutory deductions, giving 8,647/=. A pay-slip had been provided.

18. He then made the calculation as if the respondent would never be able to work again, without any such evidence being adduced other than the plaintiff's statement that ***"I used to work at [particulars withheld].... but I am not able to work"***

19. The trial court appears not to have considered the cross examination evidence of the plaintiff that:"

"I am not fully healed but I have no documents to prove the same"

The trial court did not state that it made a finding of fact that the respondent was incapacitated or unable to work due to the injuries. At the end of his judgment, the trial magistrate stated that he could not make an award for diminished earnings, having made an award for loss of future earnings.

20. On consideration of the evidence adduced by the respondent, I do not think that a case was made out on balance of probability for loss of future earnings. Too many questions and issues remain unanswered. How did she lose her job? Did she go back and was dismissed? Has she since the accident attempted to go back to her job or sought any other job which was declined? These gaps, in addition to the fact that there is no medical evidence of her inability to work, do in my mind, militate against an award for loss of future earnings. I do not think the threshold for proof under this head was met, and there was no basis for the award.

21. I would therefore dismiss the claim for loss of future earnings and allow the appeal on this ground. In the result, the appeal succeeds to that extent.

22. Accordingly, I set aside the award of the lower court and substitute for it an award in favour of the plaintiff/respondent as follows:

General damages	Shs 1,500,000.00
Loss of future earnings	Shs Nil
Special damages	Shs <u>21,829.00</u>
Total	Shs 1,521,829.00

23. The appellant shall have the costs of the appeal.

24. Orders accordingly

Dated and Delivered at Naivasha this 12th Day of February, 2020.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu K. holding brief for Geno for the Appellants
2. Tombe holding brief for Wanga Amboko for the Respondent
3. Court Clerk - Quinter Ogutu