



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL CASE NO.131 OF 2016

PONDROSA LOGISTICS LIMITED.....APPELLANT

VERSUS

EVANS NEHEMIAH KIMOI.....RESPONDENT

(An appeal arising from the judgment dated 27th September 2016

by Honorable Wendy Kagendo in Molo Cmcc 213 of 2014)

JUDGMENT

1. The appellant was dissatisfied with the trial court awards on general damages in Molo CMCC No. 213 of 2014 following injuries the Respondent sustained in a traffic road accident 11th May 2014 along the Nakuru-Eldoret Road.

2. This appeal seeks to set aside the award on and re-assess the appropriate and consumerate damages to the injuries sustained.

3. Medical records provided to the trial court, being the P3 Form, treatment notes and medical reports by Dr. J.C. Wambore dated 16th September 2014 and Dr. Wokabi dated 25th August 2015, stated the injuries as

- Compression fracture of the 9th thoracic vertebra (T9)
- Soft tissue injuries of the neck, abdomen and chest.
- Generalised body aches and weakness
- Back painful, stiff and spastic, cannot bend
- No dislocation between vertebra, no neurological deficit
- Possibility of post traumatic osteoarthritis
- Pains may affect normal work in the farm
- Due to the injury especially affecting the spinal vertebra from neck to lumbar region, total permanent incapacitation of 12 weeks and 15% total permanent incapacitation.

4. Trial court's awards were:

- Liability 100%:
- General damages - Kshs.1,000,000/=
- Loss of future earning

Capacity	- Kshs. 533,236/=
Special damages	- <u>Kshs. 37,120/=</u>
Total	- <u>Kshs.1,570,536/=</u>

5. It is the duty of the first appellate court, as stated in the case **Selle & Another –vs- Associated Motor Boat Col. Ltd (1968) EA 123** to

“Briefly ---- reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it neither saw or heard the witnesses testify.

In particular this court is not bound necessarily to follow the trial judges’ findings of fact if it appears either that he has clearly failed on some point to take account of circumstances or probabilities materially to estimate the evidence...”

6. The principles upon which an appellate court may interfere with the trial court’s discretion in assessment of damages was stated in **Kemfro Africa Ltd t/a Meru Express Service (1976) & Another –vs- Lubia & Another (1985) e KLR, and Bashir Ahmed Butt –vs- Khan (1982-88) KAR 5** that

“...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...”

7. The nature and extent of injuries is a material aspect to be considered, as well as comparable awards made in the past – **Simon Taveta V. Mercy Mutitu Njeri – CA Civil Appeal 26/13(2014) e KLR.**

As observed in **West (H) and Son Ltd –vs- Shephard (1964) AC 326**, it is to be kept in mind that

“...money cannot review a physical frame that has been battered and shattered. All that judges can do is to award sums, which must be regarded as giving reasonable compensation --- awards must be reasonable and must be assessed with moderation ---- and as far as possible comparable injuries should be compensated by comparable awards-----”.

8. It is upon the above principles that this appeal must be anchored on. In its appeal and submissions, the appellant faults the trial court for what it terms as departing from precedent and comparable awards thus arriving at an inordinately high award on general damage and cited the case **Ramogi –vs- Mokaya (2004) e KLR**, and in particular submits that there was no basis for awarding damages for loss of future earnings as the respondent was not permanently incapacitated. An award of Kshs.250,000/=, was thus proposed.

9. The Respondent supports the awards by the trial court and asserts that the injuries shattered the physical frame of the respondent and affected his productivity, from which injuries he died on 10th November 2016.

10. On the general damages, the nature and extent of the injuries inform the *quantum*.

Dr. Wabore’s opinion was clear that

“-----In view of these injuries, especially affecting the spinal vertebra from the neck to the lumber region, Kimoi suffered grievous bodily harm...”

I would assess him to have suffered fifteen percent (15%) total permanent incapacity.”

On the other hand, Dr. Wokabi for the appellant opined that

“the complaints that he has are genuine but he is overplaying them somehow”.

During the hearing, the trial court observed the respondent and stated

“Witness can not speak fluently. Speaks with difficulty and the right arm looks incapacitated”

From the above, it is evident that the Respondent had sustained serious injuries that no doubt affected his well being and capacity to earn a living, to the extent assessed by the doctor.

12. General damages inordinately high?

The appellant’s proposed a sum of Kshs.250,000/= and cited only one authority in support, being **Ramogi –vs- Mokaya (2004) e KLR**

where, on appeal a sum of Kshs.200,000/= was awarded on 8th October 2004. *Injuries therein were fracture of the 7th vertebrae involving the spine, and was unable to carry heavy loads.* This authority was 12 years old at the time of the trial court's decision.

13. The Respondent's submission was for Kshs.2,000,000/= and was guided by the following one decision, a 2008 decision **Sammy Machoka Oira –vs- Josephat Mwangi Kihuro & Another (2008) e KLR** wherein a sum of Kshs.1,750,000/= was awarded. I have seen the injuries. They were more serious.

14. I have looked at more recent and comparable decisions,

(1) **Abdi Haji Gulleid –vs- Auto Selection (K) Ltd & Another (2015) e KLR**

For comparable injuries, a sum of Kshs.750,000/= was awarded on appeal in October 2015.

(2) **Sammy Machoka Oira** (Supra) is a relevant decision. Injuries sustained were comparable, with a 12% incapacitation. Kshs.750,000/= was awarded.

(3) **Patrick Muisyo Kitonyi –vs- Kangundo Town Council, Nairobi HCCC No. 3738/1992** – injuries to the neck, spine, fracture of several vertebrae, an award of Kshs.1,500,000/= in November 1992.

15. Upon the above, I am persuaded that the trial magistrate considered the principles stated above while assessing the damages and did not misdirect her mind on the evidence, nor did she fail to consider, or take into account any relevant factor – See **Court of Appeal in Kivati – Coastal Bottlers Ltd Civil Appeal No. 69 of 1984.**

I therefore come to a finding that the award of Kshs.750,000/= is not too high as to call for the court's interference.

It is upheld.

16. **Damages for loss of future earning capacity**

Loss of earning capacity is the reduction of capacity to earn, in simple terms. It is compensatable by an award under general damages once proved.

The **Court of Appeal in Mumias Sugar Company Limited –vs- Francis Wanalo (2007) e KLR** rendered that

“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 alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is too compensate the plaintiff for the risk that he will not get employment or suitable 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, 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 relevant factors into account in order to ascertain the real or approximate financial loss the plaintiff has suffered as a result of disability.”

17. In the present matter, the respondent's testimony before the trial court was that he was a mason and carpenter, and used to do farming, with young school going children, for whom as a result of the injuries was not able to pay school fees. His evidence was that he used to earn Kshs.20,000/= to Kshs.30,000/= per month but that all was a dream, unable to perform any duties, more so bending and using his hands.

The Respondent pleaded the loss of future earning capacity in his plaint.

18. Applying the Principles stated in the **Mumias Sugar Co. Ltd (Supra)**, it was within the trial Court's discretion to assess the loss as a separate head of damage, upon the evidence presented before it.

19. For those reasons, I find no merit in the appeal. There is no gain saying that the respondent was not incapacitated. The trial Court itself made such observations, and the respondent testified to his inability to use his arm, which incapacitated his ability to perform his duties as a mason and carpenter. There was therefore justification for the award, which is modest and reasonable. I uphold the said award as within reasonable limits.

It is dismissed with costs.

Orders accordingly.

Delivered, signed and dated at Nakuru this 20th Day of February 2020.

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J.N. MULWA

JUDGE