



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 107 OF 2019

DANCAN KINYUA.....1ST APPELLANT

ALEX GITHINJI.....2ND APPELLANT

VERSUS

BONIFACE KIGUNDARESPONDENT

(An appeal from the judgment and decree of the Hon S. Ndegwa PM made on 2/8/2019 in Githongo PMCC No. 94 of 2017).

J U D G M E N T

1. **BONIFACE KIGUNDA** (“the respondent”) sued the appellants in the trial Court seeking general damages for pain and suffering and loss of amenities. He claimed loss of amenities at Kshs.1,000/= per day for the rest of his life. He also sought future medical expenses for; a prosthesis limb costing Kshs.1,000,000/=, its maintenance at Kshs.50,000/= annually for the rest of his life, future medical expenses for the replacement of the prosthesis limb after 20-25 years at Kshs.1,000,000/= and Special damages of Kshs.457,585/-. He also sought costs of the suit and interest.

2. The claim was that on or about 22/5/2017, along the **Nyanyuki Road at Kairachene Area**, the respondent was a lawful pillion passenger in Motor cycle registration number **KMDP 380B** (“the said motor cycle”) along the said road. The 2nd appellant so negligently and carelessly drove and managed motor vehicle Registration Number **KCA 184P** (“the said vehicle”) that he hit and seriously wounded the respondent. The 1st appellant was vicariously liable for being the beneficial owner of the said vehicle.

3. The appellants filed a joint defence dated 14/12/2017 wherein they denied the claim in *toto*. They also contended that the respondent was to blame for the accident as he was negligent for encroaching the said motor vehicle and ramming into it.

4. The trial Court considered that the 2nd appellant had been convicted of the offence of reckless driving and sentenced to a fine of Kshs.30,000/= in default 6 months imprisonment. It also found that the appellants did not call any evidence to rebut the respondent’s case. In the premises, the trial Court held the appellants 100% liable for the accident and awarded the respondent damages as follows: -

i. General Damages	Kshs.1,800,000/=
ii. Loss of Future Earnings (1000 X 20 (days per month) X 12 x 20)	Kshs.4,800,000/=
iii. Future Medical Expenses for Replacement of Prosthesis	Kshs.1,000,000/=
iv. Future Medical Expenses	Kshs.2,000, 000/=
v. Special Damages	<u>Kshs.294,170/=</u>
Grand Total	Kshs. 9,894,170/=

5. Aggrieved by the said decision, the appellants preferred the present appeal raising six grounds of appeal as follows: -

“

i. THAT the learned magistrate erred in both law and in fact when she awarded Kshs.1,800,000/- as general damages an amount which is unreasonably high in the circumstances and connotes an erroneous estimate of the damages suffered.

ii. THAT the learned Magistrate erred in both law and fact in awarding Kshs.4,800,000/= as loss of future earning when the plaintiff did not prove his earnings, the award being contrary to the weight of evidence produced.

iii. THAT the learned magistrate erred in fact and in law by failing to follow the rules of precedent in awarding general damages.

iv. THAT the learned magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the defendant on record and the authorities annexed therein in support of the defendant's case.

v. THAT the learned magistrate erred in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent as against the appellants.

vi. THAT the learned magistrate erred in law and in fact for failing to consider relevant matters in arriving at the said decision in favour of the respondent as against the appellants. ”

6. The appeal was canvassed by way of written submissions which the Court has carefully considered. From the grounds of appeal and the submissions the only issue for consideration is the quantum.

7. As 1st appellate court, this Court is enjoined to reconsider the evidence afresh, evaluate the same and draw its own independent conclusions bearing in mind that the trial Court had the advantage of seeing the witnesses. (**Selle & Another v. Associated Motor Boat Company Ltd & Others [1968] EA 123**).

8. Pw1 Boniface Kigunda testified that he was a mason before the accident. His right leg was amputated as a result of the accident as was his right small finger. That he used his hands to handle tools such as hammer, spade etc but currently, he cannot climb a ladder. That he no longer works as a mason as it is manual work.

9. He stated that during his days of employment, he used to earn Kshs.1,000/= per day but he can no longer engage in the manual work as a result of the incapacitation. He produced as **PExh 1-7; Police Abstract, Medical Report, P.3. Form, Statutory notice, photographs of works done, Treatment notes & Discharge Summary form, receipts in support of special damages.**

10. Pw2 Henry Koome testified that he had hired Pw1 in the year 2013 as a mason to build a residential house. That he was paying him Kshs.1,000/= per day. **Pw3 Eliud Mutea** testified that he had contracted **Pw2** to build him a residential house in the year 2013. That the respondent worked on his house as a mason. That he would pay **Pw2** who would in turn pay his workers, **Pw1** included.

11. From the Medical Report prepared by **Dr. Koome Guantai**, the respondent sustained the following injuries; Brain contusion with loss of consciousness for 48 hours. Crush injury of the right lower limb extending from the distal femur to the ankle joint. Traumatic amputation of the right little finger, fracture proximal phalanx right ring finger, right 4th carpo-metacarpal joint dislocation, right forearm lacerations and facial bruises right side.

12. Dr Koome formed the opinion that the respondent would require a myoelectric above the knee prosthesis costing approximately Kshs.1,000,000/= with an annual maintenance cost of Kshs. 50,000/=. The prosthesis also requires replacement after 20-25 years of use. The respondent is unable to use his right hand and has not been able to pursue his livelihood as a stone mason since the time of the accident.

13. He assessed the degree of injury as grievous harm with permanent disability of approximately 80%. He also opined that at the time the respondent was due for an operation to reduce the carpo-metacarpal dislocation at a cost of Kshs.100,000/=.

14. The respondent's claim was under three heads i.e. general damages, loss of future earnings and future medical expenses.

15. As an appellate court, this Court will not interfere with an award of damages unless the award is so inordinately high or low as to represent an erroneous estimate. Or, if the trial court took into consideration an irrelevant material or failed to consider a relevant matter. See **Butt v Khan [1982-88] KAR 5**.

16. I will consider the grounds 1, 3, 5 & 6 together and determine grounds no. 2 and 4 separately.

17. On ground 1, the appellants contended that the award of Kshs.1,800,000 as general damages was inordinately high. They submitted for Kshs.800,000/= and relied on the case of **Silvanus Ondieki Ochola v Delta Haulage Services Ltd & Another [2009] eKLR**. In that case, the plaintiff suffered amputation of the right lower limb above the knee, deep cut on the medial aspect of the left knee, severe injury to the left eye, blunt injury on the chest.

18. They also relied on the case of **Charles Oriwo Odeyo v Appollo Justus Andabwa & Another [2017] eKLR** where the Court awarded a sum of Kshs.800,000/ for an amputation of below knee.

19. In the present case, the trial Court relied on the case of **Kenya Wildlife Services vs Geodfrey Mwiti Kirimi – Meru Civil Appeal No. 47 of 2017**. In that case, the plaintiff had suffered amputation of the left leg, lost 9 teeth, partial loss of sight among other injuries. The degree of permanent incapacity was assessed at 25% the Court awarded Kshs. 2,000,000/= on account of general damages.

20. In **Kurawa Industries Limited v Dama Kiti & another [2017] eKLR, Chitembwe J.** maintained an award of Kshs. 2,000,000/= for an amputation above the knee, fracture shaft left radius, compound comminute fracture left femur and fracture of 4 ribs.

21. In **Frodak Cleaning Services & Another v Daniel Meshack Shikanga [2017] eKLR** the Court maintained an award of Kshs.1,500,000/- for amputation above the knee. In the said case, the Court observed that:-

“I accept the reasoning by the learned trial magistrate, leading to the award of Kshs1,500,000/= as general damages for the injuries suffered by the respondent. I would also like to point out that the Silvanus case (supra) on which the appellant’s wish to rely for their proposal to reduce the quantum was made at a time when the value of the Kenya shilling was at its strongest. That position has drastically changed over the last 10 years, and it would be unreasonable to say that the sum of kshs.800,000/= in 2007 had the same value in 2015.”

22. I will reiterate the foregoing here. In the present case, the injuries suffered by the respondent as set out above were near fatal as observed by **Dr. Koome**. The respondent was unconscious in ICU for 48 hours and HDU for 24 hours. His permanent incapacity was assessed at 80%.

23. In view of the foregoing, I do find that the award of Kshs.1,800,000/- was reasonable and was not inordinately high. The trial Court did rely on precedent and did not consider irrelevant matters as alleged. I reject ground nos. 1, 3, 5 & 6.

24. The second ground was that the trial Court erred in awarding Kshs.4,800,000/- for loss of future earnings while the respondent had not proved the same. That the same was against the weight of evidence and the trial Court ought to have relied on the **Regulation of Wages (General) (Amendment) Order 2017** in which the wage of a mason as general labourer was Kshs. 11,926.40/=.

25. At the trial, the respondent told the Court that before the accident, he was a mason. That he used to earn Kshs.1,000/- per day. The testimony of **Pw2 and Pw3** was that **Pw2** had in 2013 hired the respondent as a mason paying him Kshs. 1,000/= per day. Although the appellants cross-examined **Pw2** on that aspect, his evidence remained unshaken.

26. In **SJ vs Francesco Di Nello & Another [2015] Eklr**, the Court of Appeal held: -

“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 LLYOD’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.’

27. The respondent was at the time of the accident a mason. There was no evidence that he was in permanent employment. It was not clear whether his employment with **Pw2** was on permanent basis. What was proved was that, in 2013, **Pw3** contracted **Pw2** to construct a house for him and **Pw2** was paying the respondent Kshs.1,000/- per day. This may have been a one off contract.

28. The question to be answered is whether in circumstances where there is no evidence of possibility of continuous income, the claim for loss of future earnings is sustainable. This is so pronounced in the informal sector where employment is intermittent, viz once and when a contract for masonry work is available.

29. In the case relied on by the appellants of **Juma Kigambwi v. Loise Wambui Kahenya [2017] Eklr**, the Court applied the minimum wage guidelines because there was no evidence of income. In the present case, although there was income proved, there was no evidence that it would be continuous and uninterrupted.

30. The appellants proposed that the Court adopts the **Regulation of Wages (General) (Amendment) Order 2017**. This would be safer as the claim for Kshs.1000/= per day was not on a permanent basis. The appellants proposed a figure of Kshs.11,926.40 (being the minimum wage for a mason in Meru) and a multiplicand of 15 years.

31. In my view, considering the age of the respondent (30 years), the nature of the work he was undertaking, the accelerated payment as well as the vicissitudes of life, that multiplicand would be fair. I would therefore award the respondent Kshs.11,926/40 × 12 × 15 × 80/100= Kshs.1,717,401/60.

32. As for the costs of future medical expenses, the respondent had pleaded for Kshs.1,000,000/= for a prosthesis limb, annual maintenance of the prosthesis limb at Kshs.50,000/=. He further pleaded for an additional Kshs.1,000,000/= for replacement of the prosthesis after 20-25 years. This was in accordance with the report of **Dr Koome**.

33. The trial Court awarded Kshs.2,000,000/= for future medical expenses and kshs.1,000,000/= for the replacement of the prosthesis.

34. The appellants submitted that on the authorities of **Patrick Mbatha Kyengo v. Bayusuf Freighters Ltd [2013] Eklr** and **James Maina Muriithi My Beauty Transporters Ltd & 2 Others [2018] Eklr**, an award of Kshs.470,000/- would be adequate. I have considered the said cases. The courts made the awards based on the evidence before them regarding the costs of the subject prosthesis and the evidence of the medical reports produced.

35. In the present case, the respondent produced evidence that the required Myoelectric prosthesis would cost Kshs.1,000,000/-. The said evidence was neither denied nor challenged. The appellants did not produce any alternative with which the trial Court would have compared with. The trial Court was therefore left without an alternative other than to rely on the uncontroverted evidence of the respondent. Given the evidence on record, as buttressed by the medical report of **Dr. Koome**, I will maintain that award.

36. As regards the claim for Kshs.50,000/- annually for maintenance of the Myoelectric Prosthesis, the trial Court awarded the said amount for 20 years. I find that to be reasonable.

37. However, the trial Court erred when it made an award of Kshs.1,000,000/- for the prosthesis and then Kshs.2,000,000/- for maintenance. It is clear that Kshs.50,000/- by 20 years will amount to Kshs.1,000,000/- and not Kshs.2,000,000/- as found by the trial Court. Accordingly, the figure for maintenance should be Kshs.1,000,000/-.

38. As regards the complaint that the trial Court failed to consider the appellants' submissions, nothing could be far from the truth. A careful consideration of the judgment of the trial Court would show that the submissions of the parties were well considered. Accordingly, I hold that the judgment was in accordance with the evidence tendered and that the submissions of the parties were well considered. Those grounds also fail.

39. Accordingly, the appeal partly succeeds in respect of loss of future earnings and future medical expenses. I therefore set aside the judgment of the trial Court. I substitute therefor with judgment in favour of the respondent as follows: -

(i) Liability	-	100%
(ii) General Damages	-	Kshs.1,800,000/-
(iii) Loss of Future Earnings	-	Kshs.1,717,401/60
(iv) Future Medical Expenses for		
replacement of Prosthesis	Kshs.1,000,000/-	
(v) Maintenance of Prosthesis	Kshs.1,000,000/-	
(vi) Special Damages	-	<u>Kshs. 294,170/-</u>
Grand Total	-	<u>Kshs.5,811,571/60</u>

40. The said sum is to attract interest at Court rate from the date of judgment in the trial Court.

41. Since the appellants have been partially successful in the appeal, I order that each party bears own costs of the appeal. The respondent shall however have the costs before the trial Court.

It is so decreed.

DATED and DELIVERED at Meru this 14th day of April, 2020.

A. MABEYA

JUDGE