



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO.94 OF 2017**

KENNEDY MWANGI KAMANDE.....1<sup>ST</sup> APPELLANT

STEPHEN MWANGI KAMANDE.....2<sup>ND</sup> APPELLANT

NYAMBACHE JAMES.....3<sup>RD</sup> APPELLANT

**VERSUS**

YUSUF NOOR MOHAMUD.....RESPONDENT

*(Being an appeal against the Judgment by Hon. B. Mararo, Principal Magistrate*

*in Nakuru CMCC No.389 of 2016 delivered on 5<sup>th</sup> July, 2017)*

**JUDGMENT**

**BACKGROUND**

1. This appeal arise from civil claim filed in the lower court by the respondent seeking general damages, cost for future treatment and special damages from the defendants for the injuries he sustained when the defendants motor vehicle registration number KBC 095C hit him while he was travelling as a pillion passenger along Maasai road on 12<sup>th</sup> December 2015.

2. Parties recorded on liability. They agreed that the plaintiff do shoulder 25% liability and the defendant 75% liability. The trial magistrate assessed damages as follows: -

a. General damages.....kshs.1,000,000

b. Future medical expenses.....kshs.300,000

c. Loss of future earning capacity.....kshs.300,000

d. Special damages.....kshs.16,000

e. Cost and interest at court's rate

3. Appellant being aggrieved by the above assessment of damages filed this appeal on the following grounds: -

i. The trial magistrate erred in fact and in law in awarding excessive general damages of Kshs.1,000,000 for injuries that the Plaintiff sustained.

ii. The trial magistrate erred in fact and in law in awarding future medical expenses without basis or proof of the same.

iii. The trial magistrate erred in fact and in law in awarding loss of income and future earning capacity without basis of proof of the same.

iv. That the learned magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages.

4. Parties agreed to proceed by way of written submissions.

#### **APPELLANT'S SUBMISSIONS**

5. The appellant submitted that the trial court failed to exercise discretion fairly by taking into account irrelevant factors and awarding and awarding quantum that is inordinately high and excessive and urge the court to compare with authorities in support of the appeal.

6. Under general damages for pain and suffering, appellant submitted that an award of kshs.1,000,000 is inordinately high as compared to similar injuries. Appellant cited the case of **Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd [2013i]** and also in **Kigaraar Vs Aya[1982-88]1 KAR768** where the court held as follows:-

**“Damages must be within the limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”**

7. The appellants referred to recent authorities for award of damages for femur fracture. They cited the case of **Kenyatta University Vs Isaac Karumba Nairobi HCCA No.193 of 2012[2014] eKLR** where the plaintiff was awarded kshs.350,000 for fracture of the femur and **T A M ( a minor suing through her father next friend JOM) Vs Richard Kirimi Kinoti & Another NRB HCCA No.82 of 2008 [2015] eKLR** and **Bhachu Industries Limited v Peter Mutura NRB HCCA No.503 of 2009 [2015] eKLR** where the plaintiffs were granted kshs.250,000 and kshs.300,000 respectively.

8. On future medical expenses, the appellants submitted that an award of kshs.300,000 is inordinately high.

9. In respect to loss of income capacity, the appellants submitted that the plaintiff was relieved of field work but he was still working for the same company doing 90% of office work; that he was not fired neither was he expecting any dismissal as a result of the injuries.

10. Appellant cited the case of **William J Butler Vs Maura Kathleen Butler [1984] eKLR** where the court of appeal enumerated principles to be considered in respect of claim for loss of earning capacity as follows: -

**a. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in labour market or work, as well paid as before the accident are lessened by his injury.**

**b. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.**

**c. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.**

**d. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial.**

**e. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading.**

**f. The factors to be taken into account is considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life, his disabilities and previous service, if any.”**

11. Appellant submitted that the award under loss of earning capacity had no grounds and ought not to have been awarded.

#### **RESPONDENT'S SUBMISSIONS**

12. In respect to award of kshs.1,000,000 the respondent submitted that appellant's submission that the award is inordinately high and excessive is erroneous, unmeritorious and excessive for reason that the appellant has misapprehended the respondent's injuries; that the appellant postulate that the respondent suffered fracture of femur with contusions of the quadriceps muscles only but record show that in addition to those injuries, the respondent also suffered severe soft tissue injuries of the right knee joint which injuries were pleaded in the plaint, contained in respondent's evidence and confirmed by the magistrate at page 25 line 1 of the judgment; further the injuries suffered by respondent are not disputed.

13. The respondent further submitted that the authorities the appellant is using to challenge the decision were not put forward or canvassed, advanced, presented in the submissions in the lower court; that the only authority they relied on is that of **Elisha Okel Raga**; that the appellants have introduced new facts/materials/arguments to challenge the decision of the trial magistrate and argued that if the decision of

the trial magistrate is being challenged, it should be within the context he dealt with the matter. He cited the case of **Sila Tiren & Anothre Vs Simon Ombati Omiambo[2014] eKLR** where the court held as follows:-

**“...And in order for the appellate court to be fair to the trial court, it should determine the correctness or otherwise of the decision being challenged, using the same materials which had been placed before the trial court...To my mind, the exercise of parties placing wholly new authorities before the appellate court, and using them to either challenge or to otherwise support the decision of the trial court, is not a proper use of the mechanism of an appeal.”**

14. Respondent submitted that the acts of the appellant amounts to abuse of the appellate procedure which is purely meant to relook/reconsider the decision of the trial magistrate within the context of the materials placed before her/him but not opportunity for parties to fill gaps left during the hearing.

15. The respondent further submitted that in addition to the fact that the authorities were not relied on in the trial court, the same are distinguishable and hence not applicable in this case and have no probative value; further that injuries suffered by respondent are very serious in nature and an award of kshs.1,000,000 cannot be excessive or inordinately high. Respondent cited authorities with awards ranging from kshs.700,000 to kshs.1,500,000. He added that the appellants are not sure of themselves as they submitted for kshs.250,000 in the lower court and they are now submitting for kshs.300,000 and submitted that kshs.300,000 is untenable and inordinately low.

16. In respect to award for future treatment, the respondent submitted that it is not in dispute that the claim was pleaded, prayed for and evidence led to proof by both parties; that the appellant proposed kshs.40,000 while the respondent proposed kshs.300,000. The respondent submitted that **Dr. Kiamba** testified in support of the claim and the court was convinced by the evidence of Dr. Kiamba. Respondent submitted that **Dr. Kiamba** gave the estimate of the cost in private hospital while **Dr. Kahuthu** was of the view it would cost kshs.40,000 at a Government Hospital and submitted that respondent was treated in a private hospital.

17. Respondent submitted that where there is conflict in expert evidence, the trial court is bound to consider the said evidence and decide one way or the other with the credibility of witnesses being key determining factor and which the trial court did as exhibited in his judgment where he noted that the plaintiff was treated at Medical Hospital which is private.

18. Respondent cited the case of **Amosam Builders Developers Ltd v Betty Ngendo Gachie & 2 Others[2009]** where the court held as follows:-

**“There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it along with other evidence and from its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on facts and circumstances of the case before...”**

19. Respondent submitted the trial magistrate found the evidence of **Dr. Kiamba** more convincing than that of **Dr. Kahuthu** and cited the case of **Jonas Akuno O’kubasu v Republic** where the court held as follow:-

**” ... when the question arises which witness is to be believed rather the other and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness.”**

20. In respect to award on future earning capacity, the respondent submitted that the award was deserving and reasonable and the court awarded it on the basis of evidence and material on record and further the claim of loss of earning capacity falls within the realm of general damages. As opposed to loss of earnings/income which is special damage claim and cited the case of **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** where the court of appeal set out 5 key principles to be followed when considering an award under this head as follows:

**a) Loss of earning capacity is in the realm of general damages as opposed to loss of income which is special damage. However, such loss must be pleaded for it to be awarded. Loss of (future) earning capacity arises where plaintiff has suffered injuries affecting his ability to engage in gainful employment. Similarly, it will be awarded where a plaintiff has established that his capacity to earn a living has been diminished and/or reduced.**

**b) The award can be both when the plaintiff is employed at the time of trial and even when he is not so employed ...**

**c) The award for loss of earning capacity can be claimed as part of general damages for pain, suffering and loss of amenities or as a separate head of damages.**

**d) 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 and where it is not possible mathematically to arrive at any figure, the court will give a lump sum under this head since in the circumstances, justice cannot be done without some sort amount of educated impressive guess**

**e) 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 that the plaintiff has suffered as a result of the disability**

21. The respondent submitted that this was a proper case for awarding damages for loss of earning capacity just like the trial magistrate did; and the level of permanent disability comes into play when determining quantum damages for loss of earning capacity.

22. Further the respondent submitted that the appellant has relied on the case of **Buttler Vs Buttler** where the court held that loss of earning capacity are awardable in cases where the claimant is in employment or not and a global award of kshs.300,000 awarded by the trial magistrate is not inordinately high taking into account level of permanent disability of the respondent which was assessed at 20%.

23. In respect to the last ground of appeal that the trial magistrate failed to accord due regard to the appellants, the respondent stated that the appellant did not submit on it and should be treated as abandoned.

24. In conclusion the respondent submitted that this appeal do not meet threshold for interference and urged this court to dismiss it with costs to the respondent.

### **ANALYSIS AND DETERMINATION**

25. This being an appeal on quantum, I am guided by determination in the case of **Butt v Khan** where the court of appeal held that an appellate court will not disturb an award of damages unless it is so inordinately high or low as represent an entirely erroneous estimate; it must be shown that the trial judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was inordinately high or low.

26. While reevaluating evidence adduced before the trial to make determination as to whether the award is inordinately low or high or whether the trial magistrate misapprehended evidence, I am minded of the fact that unlike the trial court I never got the opportunity to take evidence first hand or observe demeanor of witnesses. For that I give due allowance.

27. On award for general damages for pain and suffering, I note that the two authorities cited by plaintiff which the trial court noted that injuries were similar kshs.700,000 and kshs.1,500,000 were awarded respectively and in the authority cited by the appellant kshs.450,000 was awarded. I have perused the submissions and note both cases cited by the respondent were decided in the year 2011. In the case of **Charles Mathenge Wahome**, permanent disability was assessed at 25% and kshs.1,500,000 awarded. In this case plaintiff's permanent disability was assessed at 20%. This matter was determined in the lower court in the year 2017; 6 years after the award of kshs.1,500,000 was made. In my view the award of kshs.1,000,000 was reasonable in view of the injuries sustained and lapse of time from awards made in the cited authorities.

28. In respect to damages for future medical expenses, it is not disputed that the respondent would require future treatment. It is the experts who know the costs. The court cannot guess cost for future treatment. I note that the difference in figures given by the two doctors was as result of one giving estimate for treatment in a private facility and the other in a government facility. The trial magistrate noted in the judgment that the respondent was treated in a private facility. In my view the reason he gave for taking up the figure by **Doctor Kiamba** is valid. Evidence showed respondent was treated in a private facility. No other figure was given to challenge the estimated cost in a private facility. For that reason, I will not interfere with award under that head.

29. In respect to loss of earning capacity, it is not disputed that the respondent could not perform duties that he performed prior to the accident. There is no doubt that his incapacitation of 20% which was not challenged reduced his earning capacity; and as shown from the case of **Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR** the claim is payable whether the claimant is employed at the time of trial or not; further a lump sum figure can be awarded where it is difficult to come up with a figure mathematically.

30. From the foregoing, I see no merit in appeal against damages awarded by the trial magistrate.

### **31. FINAL ORDERS**

**1. Appeal herein is dismissed.**

**2. Each party to bear own costs of appeal.**

**Judgment dated, signed and delivered via zoom at Nakuru**

**This 7<sup>th</sup> day of May, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Mr. J. Ndungu Njuguna Counsel for Respondent

No appearance for Counsel for Appellant