



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 12 OF 2019**

**MARGARET WOTHAYA KIRWEYA.....1<sup>ST</sup> APPELLANT**

**DESIRE TRADERS LTD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JAMES MUCHAI MUCHIRI.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon. E. Muiro (SRM) in the Senior Magistrate’s Court at Kilungu, Civil Case No.99 of 2018, delivered on 14<sup>th</sup> February 2019)*

**JUDGMENT**

1. The Respondent filed a suit in the lower court seeking general damages for personal injuries sustained from a road accident on 17/05/2016 along the Nairobi-Mombasa highway. He also prayed for special damages, damages for loss of future earning capacity, costs of the suit and interest.

2. The Respondents filed a joint statement of defence denying the claim. After the preliminaries, the matter proceeded for hearing and Judgment was eventually delivered. The learned trial magistrate found the Appellants 100% liable-jointly and severally. On quantum, she awarded damages as follows;

General damages.....	Kshs.1,800,000/=
Loss of future earning capacity.....	...Kshs.4,800,000/=
Special damages.....	<u>Kshs 166,300/=</u>
<b>Total.....</b>	<b>Kshs. 6,766,300/=</b>

**The Appeal**

3. Aggrieved by the decision, the appellant filed this appeal and listed 7 grounds as follows;

- a) *The learned Magistrate erred in law and fact in assessing general damages at Kshs.1,800,000/= which is inordinately high in the circumstances.*
- b) *The learned Magistrate erred in law and fact in assessing loss of future earnings at Kshs.4,800,000/= which is inordinately high in the circumstances.*
- c) *The learned Magistrate erred in law and fact and ignored the submissions of the defendants on assessment of general damages and loss of future earnings.*
- d) *The learned Magistrate erred in law and departed from decided authorities relied upon by the defendants without justification.*
- e) *The learned Magistrate erred in law and fact in not considering the submissions that the plaintiff’s fracture of the right femur had united.*
- f) *The learned Magistrate erred in law and fact and departed from principles applied in award of general damages and loss of*

future earnings.

g) *The learned Magistrate erred in law and fact and awarded the plaintiff inordinately high general damages and loss of future earnings considering the submissions filed by the defendants.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions which they eventually highlighted.

5. With regard to grounds b, c, d, f & g (*loss of future earning capacity*), the Appellants submit that there is a difference between loss of future earnings and loss of future earning capacity. They rely *inter alia* on **SJ –vs- Francesco DiNello & Anor (2015) eKLR** where 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 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.”*

6. They also cited **Eldoret HCCC No. 19 of 1997; Mary Khayesi Awalo & Anor –vs- Mwilu Malungu & Anor (1999) eKLR** where Nambuye J stated as follows;

*“As regards the income of the deceased, there are no bank statements showing his earnings. Both Counsels have made an estimate of the same using no figures. In the Court’s opinion, that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books. In sum, I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obamba and Collins Ochieng’ Obamba the sum of Kshs.700,000/= each.”*

7. The Appellants submit that the trial court should have awarded loss of future earning capacity as part of general damages and that it erred by applying the multiplier approach without proof of earnings.

8. With regard to grounds **a, e, f & g (general damages)**, they submit that the learned trial Magistrate relied on a case where the plaintiff had more severe injuries than the Respondent in this Appeal thus making the award inordinately high.

9. They also submit that Dr. Wambugu’s opinion, in his report dated 26/07/2018, was that the fracture of the right femur had united. They submit that Dr. Wambugu’s opinion rebutted the initial one of Dr. Wokabi in which he opined that there was clinical and radiological evidence of failure to unite. According to them, the Respondent would be able to go back to work and perform his duties.

10. With regard to General damages, the Respondent submits that the physical examination by Dr. Wokabi revealed that his leg had shortened by 5 centimeters and assessed permanent incapacity at 45%. He contends that even Dr. Wambugu appreciated the seriousness of the injuries and assessed his permanent incapacity at 30%.

11. He also submits that he was admitted at the Kenyatta National Hospital for 3 months and continued to attend physiotherapy sessions for one year after discharge.

12. He contends that the authorities which he relied on in the trial Court were more relevant than the ones relied on by the Appellants. He cited the case of **Millicent Atieno Ochuonyo –vs- Katola Richard (2015) eKLR** where Onyancha J observed that; *“it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.”*

13. With regard to loss of future earning capacity, the Respondent submits that prior to the accident, he was working as a long distance driver with a monthly salary of Kshs.20,000/=. He defends the decision of the learned trial magistrate to use the amount as the multiplicand and contends that the minimum wage of a driver of a heavy commercial vehicle was set at Kshs.22,070.95/= by Legal Notice No. 197 of 2013.

14. On the issue of proof of earnings, he relies on the Court of Appeal decision in **Jacob Ayiga Maruja & Anor. –vs- Simeon Obayo (2005) eKLR** where it was held that documentary evidence is not always necessary to prove earnings.

15. He submits that the principles to be considered with respect to a claim under this head were also enumerated by the Court of Appeal in **Mumias Sugar Company Ltd –vs- Francis Wanalo (2007) eKLR**. That according to the said principles, an award can be made when the plaintiff is employed at the time of trial and even when he is not employed. Further, he submits that the damages can be awarded as part of general damages for pain and suffering or as a separate head.

16. He further submits that the factors to be taken into consideration, as per the **Mumias case (supra)**, include age, claimant’s qualifications, remaining length of his working life, his disabilities and previous employment if any. He contends that all those factors are applicable in this case. Further, he submits that the sum of Kshs.100,000/= proposed by the Appellants would only be justifiable if he had never worked prior to the accident.

17. He argues that uniting of the fracture is beside the point and the real reason why he may never work as a driver again is the permanent deformity and the true shortening of the leg by 5 cm. He contends that driving requires a fully functional leg and one that does not get numb due to prolonged sitting periods.

18. The Respondent (**Pw1**) was the only witness and he said that he was not working at the time of testifying. He produced the abstract, P3 form and receipts from Kenyatta National Hospital (KNH) as exhibits 1, 2 and 3 respectively. He said that he was admitted at KNH for 4 months and produced the discharge summary as exhibit 4. A radiology report from the same hospital and attendance card were produced as exhibits 5 and 6 respectively. Other receipts from KNH were produced as exhibits 7 and 8.

19. Dr. Wokabi's Medical Report was produced as exhibit 9a and the receipt as 9b. A bundle of receipts from AIC Kijabe were produced as exhibit 10 and physiotherapy attendance cards from Tigon District Hospital were produced as exhibit 11. EXB 12 was a bundle of receipts for cab fare.

20. The Respondent was re-examined by Dr. Wambugu and the medical report was produced as exhibit 14 while EXB 15 was the demand letter.

21. The Respondent testified that he sustained a fracture of the right leg below the knee and at the hip and was inserted with a metal plate which was to be removed at a cost of Kshs.300,000/=. He said that his right leg was shorter, would get numb and could not bend. Further, standing a lot would cause it to hurt while walking and climbing stairs was a problem. He could not drive a motor vehicle and could not sit for long due to shortness of the leg.

22. He said that he was 38 years old at the time of the accident and would have worked till 65 years. Further, he said that his monthly salary was Kshs.20,000/=.

23. In cross examination, he said that he had been employed by West Coast but agreed that he had not provided any documents to prove employment.

24. The Appellants closed their case without calling a witness.

### **Analysis and determination**

25. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123**.

26. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issue for determination is whether the quantum of damages should be disturbed, since liability is not contested.

27. Award of damages is largely a question of discretion and the principles which should guide an appellate Court in deciding whether to interfere with such an award are well settled. The appellate Court should be satisfied that in assessing the damages, the trial magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate. See **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) –vs- Kiarie Shoe Stores Ltd (2015), Civil Appeal No. 22/2014**.

28. The injuries sustained were pleaded as follows;

*a) Fracture of the right femur (intertrochanteric fracture).*

*b) Fracture of the right fibula.*

29. There is no dispute about the injuries sustained. The Appellants' contention is that the fracture of the right femur has united thus making it possible for the Respondent to resume work.

30. Dr. Wokabi examined the Respondent on 19/01/2017 and his opinion was as follows;

*“Clinically, the outcome is not as was to be expected. There is clinical and radiological evidence of failure to unite. There is also displacement of the fractures and the implants. Considering the long time since the injury and the surgery and that he is as he is, it is safe to conclude that these fractures will never unite. Left alone, he will remain quite disabled and unable to walk. Ideally, he should undergo surgery to correct what is wrong. The most ideal and favorable outcome would be a total hip replacement using a long stem artificial hip joint. If done today, it would cost Kshs.500,000/=. . . I assess disability now at 45%.”*

31. The Respondent was re-examined by Dr. Wambugu on 26/07/2018, approximately one year and 6 months after the examination by Dr. Wokabi. His physical findings were that the Respondent walks with a right sided limping gait though unaided and has a 3.0 cm true shortening deformity of his leg. He proceeded to opine that;

*“The fracture right femur has now united but with residual shortening of the limb and stiffness across the knee and hip joints. I do not hesitate to award him 30% as the degree of permanent incapacitation. The need for future total hip joint replacement remains and a provision should be made for the same. The current estimated all-inclusive cost of above procedure is Kshs.220,000/= at KNH.”*

32. What I get from the reports by the two doctors is as follows:

- The Respondent's right leg has been shortened by three (3) centimeters or so.
- There is need for total hip joint replacement.
- The Respondent suffered a degree of permanent incapacitation between 30% - 45%. The 30% reflects the position as at 26/07/2018. The 45% reflects an earlier position as at 19/01/2017.

33. In his submissions before the trial court, the Respondent proposed an award of Kshs.2,000,000/= and relied on the following authorities;

a) **Murang'a HCCC No. 69 of 2014; Michael Njoroge Maina –vs- Peter Karanja Njoroge (2018) eKLR** where the plaintiff suffered intertrochanteric fracture right femur and displaced comminuted left posterior wall acetabulum and had to be operated on twice as he was not able to walk for close to six months. The degree of permanent disability was assessed at 20%. He was awarded general damages of Kshs.1,300,000/= and the award was upheld by the Court of Appeal.

b) **Eldoret HCCA No. 45 of 2014; Patrick Kinyanjui Njama –vs- Evans Juma Mukwenyi (2017) eKLR** where the Respondent sustained segmental fracture of the right femur mid shaft, segmental fracture of the right tibia shaft and other soft tissue injuries. A metal plate was fixed on the right leg and he was using crutches for mobility. Further surgery was required to remove the metal implant and the degree of disability was assessed at 30%. The trial court's award of Kshs.1,500,000/= was upheld.

c) **Nanyuki HCCA No. 5 of 2015; Lucy Waruguru Gatundu –vs- Francis Kinyanjui Njuku (2017) eKLR** where the Respondent sustained fracture of the right femur, right tibia and right fibula segmental fracture. The trial Court's award of Kshs.1,600,000/= was upheld.

34. The Appellants relied on the case of **Maselus Eric Atieno –vs- Unitel Services Ltd (2017) eKLR** where the plaintiff was awarded Kshs.250,000/= for fractures of the right leg tibia/fibula bones, bruises on the right elbow joint, tenderness and swelling on the right knee. They also cited the case of **Mbogholi –vs- Harrison Tunje Chilyalya (2017) eKLR** where the plaintiff was awarded Kshs.400,000/= for fracture of the left tibia leg bone (*medial malleolus*), blunt object injury to the chest & left lower limb and bruises on the left forearm, right foot and big toe.

35. I have considered the decisions cited by both parties. The learned trial Magistrate did appreciate the seriousness of the injuries and went an extra mile by conducting her own independent research.

36. I have noted that the claimants in the cases cited by the Appellants did not suffer any permanent incapacity as a result of the injuries. There is also need for total hip replacement to enable the shortened leg to function as normal. I therefore find that the assessment of damages under this head was supported by evidence based on the correct legal principles and was not inordinately high.

#### **Loss of future earning capacity**

37. As held by the Court of Appeal in the **Mumias Sugar Co. Ltd vs. Francis Wanalo case (supra)**, damages under this head can be awarded under general damages for pain and suffering or as a separate head. Further, the court held that there is no formula for assessing loss of earning capacity but 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.

38. This is what the Court of Appeal stated in the said case.

*“From the above analysis, of the English case law and the decision of this court in Butler –vs- 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.”*

39. The Respondent in his evidence on 06/12/2018 told the court that he had been inserted with metal plates which were to be removed at a cost of Kshs.300,000/=. It is not clear if that has been done. Secondly the recommendation for a total hip replacement is by both doctors and I believe it is to alleviate some of the challenges experienced by the Respondent. Both doctors quoted the charges as at the time of examination.

40. Kenyatta National Hospital appears to offer more reasonable charges. It is not clear whether this has been done or not. A total hip replacement would most likely place the Respondent in a much more tolerable position than what he is going through now. Dr. Wambugu found a reduced permanent incapacity for the reason that he examined the Respondent two (2) years, two (2) months after the accident while Dr. Wokabi examined him about eight (8) months after the accident.

41. In this case, it is true that there was no proof of earnings but the Respondent's occupation was not controverted and the learned trial magistrate observed as much. The Respondent testified that he was out of work and would not be able to resume due to the permanent

incapacity. The Appellants submission that the Respondent would resume work because the fracture had united was indeed an acknowledgement that he was working prior to the accident.

42. Be as it may in the absence of proof of his earnings, terms of employment (whether permanent or contractual and the retirement age if any and in line with the Court of Appeal decision in the **Francis Amolo case**, I find the option of an award under general damages to have been more appropriate in this case. The reason being that getting the retirement age and even his earning capacity would be a challenge. I am also considering the fact that with a total hip replacement the Respondent may be able to drive as he used to. It would then be difficult to assess with certainty his period of loss of earning capacity.

43. That being the case, I hereby set aside the judgment delivered on 14<sup>th</sup> of February 2019. I substitute it with a judgment in the sum of Kshs.5,166,300/= plus interest and costs made up as follows:

- i. General damages for pain and suffering Kshs.5,000,000/=.
- ii. Special damages Kshs.166,300/=
- iii. Interest at court rates.
- iv. Costs of the lower court to the Respondent and costs of the appeal to the Appellant.

Orders accordingly.

**Delivered, signed & dated this 7<sup>th</sup> day of May 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**