



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 231 OF 2017**

**TILE & CARPET CENTER LTD.....APPELLANT**

**VERSUS**

**HUSSEIN OTIATO WESONGA.....RESPONDENT**

**JUDGMENT**

1. The appeal and cross appeal arise from the judgment of Honorable H. Nyakweba in Mombasa CMCC No.1003 of 2016 wherein the respondent herein had sued for damages arising out of an accident that occurred on 25<sup>th</sup> February 2015.

2. Parties entered into a consent on liability at the ratio of 70:30 in favour of the respondent. And after a hearing on assessment of damages, judgment was awarded by the trial court in the following terms:-

**i. General damages- Kshs.4,500,000/=**

**ii. Special damages - Kshs.2,000 /=-**

**iii. Less contributory negligence30%- Kshs.1,350,000/=**

3. The appellant, being dissatisfied with the trial Court's judgment on general damages filed this appeal and seeks to have it set aside .The appellant has listed six (6) grounds of appeal in its Memorandum of Appeal dated the 7<sup>th</sup> November,2017. The grounds of the appeal appear on page 1 and 2 of the Record of Appeal.

4. On the other hand, the Respondent cross appealed as evidenced on the face of the cross-appeal dated 13<sup>th</sup> November ,2017.

5. Both the appeal and cross-appeal were disposed of by way of written submissions which were highlighted on the 27<sup>th</sup> February,2019.

6. It is now settled that the duty of the first Appellate court is to analyse and re-evaluate the evidence that was adduced before the lower court to reach its own independent conclusion. However, in doing so, it ought to bear in mind that it had the benefit of seeing or hearing the witnesses testify.(See the case of SELLE AND ANOTHER VRS ASSOCIATE MOTOR BOAT CO. LTD,1968 E.A 130).

7. In considering this appeal, I have read the grounds of appeal vis-à-vis the evidence and judgment of the lower court, submissions together with the cited statute and case law by both parties.

8. From the submissions and highlighting of the same, there is consonance that all the grounds of appeal in the Memorandum of Appeal and Cross- Appeal can be grouped into a single ground which is against the award of quantum in general damages and the loss of future earnings capacity which was not awarded by the trial court .

9. In the case of **Peter M. Kariuki vs the Attorney General [2014] eKLR** where the Court of Appeal cited **Kemfro Africa Ltd vs Lubia & Another (No.2) 1987 KLR 30** ,where Kneller JA stated as follows:-

**“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages”.** See also Law JA (as he was then)

And in the case of **Butt versus Khan [1982-88] 1KAR**, 1 at page 4 where it was stated thus:-

**“An appellate court will not disturb an award of damages 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 must have apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”**

10. In the case of **Sophinaf Company Limited & Another Vs. Daniel Ng’ang’a Kanyi [2006] eKLR**, the Court of Appeal observed:

**“The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards for similar injuries and the principles developed by the Courts, ultimately, what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.”**

11. As for the role of this court, it is now settled that it can only interfere with the exercise of discretion by the trial court if that court: -

**“(a) Took into account an irrelevant factor or**

**(b) Left out of account a relevant factor or,**

**(c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” –**

**A. Whether the learned magistrate took into account an irrelevant factor or Left out of account a relevant factor.**

12. **M/s. Kwya** argued and submitted on the issue of damages more, specifically on inordinately high award on general damages. The bone of contention being the fact that in respect of general damages, there is no correlation with the injuries suffered. She contended that the learned magistrate fell in error in awarding of 4,500,000/= which was excessive, unreasonable and was exactly similar to the award in HCCC 888 of 2006 where Kshs. 4,536,800/= had been awarded. Learned counsel further pointed out that despite there being two medical reports, one by **Dr. Ndegwa** and the second by **Dr. Sheth**, in the decision by the trial magistrate, no consideration was given to the medical report by **Dr. Sheth** who was an orthopedic surgeon, his medical report having been produced by consent of both parties. **Dr. Sheth’s** Report found that the Respondent had only suffered 5% permanent incapacity.

13. From the judgment, it is noteworthy that the trial magistrate relied on the statement by PW2 (the respondent) and the medical report by **Dr. S.K NDEGWA** who testified and corroborated the Respondent’s testimony and his testimony was also subjected to cross-examination. The trial magistrate also noted that the two medical reports were conflicting in content and in opting to rely on the Medical Report by **Dr. Ndegwa**, he opined that **Dr. Ndegwa** was duly cross-examined on the contents of his medical report whilst **Dr. Sheth** was never called as a witness and his report was therefore not subjected to cross-examination.

14. The issue of sexual dysfunction was also contained in the medical report by **Dr. Ndegwa** and on cross-examination the Respondent stated that he had not sought for medical help since he had no money. It is my view that if at all the Appellant wanted to dispel the inference made by the Respondent, then the proper thing to do was to call a Defence expert to dispel that inference. Since the Appellant did not call any witness to dispel that inference then the testimony of the Respondent on the injuries he sustained remained uncontroverted.

15. I am in consonance with the reasoning of the trial magistrate’s reliance on **Dr. Ndegwa’s** Medical Report rather than **Dr. Sheth’s** report and I opine that the only competent evidence before me is the evidence of PW1 which was tested in cross examination and corroborated by PW2. As was held by **Warsame, J** in the case of **Theodore Otieno Kambogo vs. Norwegian People’s Aid Nairobi (Milimani) HCCC NO. 774 of 2000:**

**“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.”**

15. Similarly, the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, held as follows...

**“that while medical evidence is entitled to the highest possible regard, the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence like other expert evidence must not be rejected except on firm grounds.”**

16. I therefore find that in relying on **Dr. Ndegwa’s** Medical report, the learned Magistrate did not take into account irrelevant factor or Left out of account a relevant factor in arriving at his decision.

**B/whether loss of earning capacity and loss of future earnings were awardable**

17. From the pleadings by the appellant, loss of future earnings and loss of future earning capacity was not pleaded, yet loss of future earning capacity was a factor which was of such significance that both doctors in their reports alluded to it with regard to permanent disability. This is because the injuries suffered by the Respondent had impacted on his daily activities and it would be pretentious to ignore

this. I think this is why in assessing the damages, the trial magistrate opted to give a global sum taking into account all the factors as presented to court, rather than deal with each sub-head.

18. In the case of **MWAURA MURIUKI VS SUERA FLOWERS LTD & ANOTHER [2014] eKLR** in regard to loss of earnings it was held that:-

The claim for loss of earning capacity is general damages claim and is deemed to flow directly from the claim and need not be pleaded.

19. I can ascertain, and I agree with the reasoning of the trial magistrate in declining to award loss of future earnings. Loss of future earnings is a special damage claim and the same was supposed to have been specifically pleaded and proved. As was stated in the case of **Henry Moriasi Osiero Vs Quid J. Mohammed & Merali Mfadhul (2001)eKLR**, it was held that loss of earnings is a special damage claim that must not only be pleaded but must be strictly proved

20. Similarly, In the case of **DANIEL KOSGEI NGELECHEI VS CATHOLIC TRUSTEE REGISTERED DIOCESE OF ELDORET & SMIMON MONYARI ORACHI Civil Case No. 111 of 2006** was relied on where in reference to damages for loss of earnings it was held:-

...what this means is that a party cannot prove them during the hearing through the production of documents/evidence. It also means that a party is bound by his/her pleadings and short of what is not specifically referred to in the plaint cannot be granted by the court. Moreso, special damages are determined by what is real and can be assessed based on determinable loss or expenditure.

The Respondent might have produced his pay slip, but failure to plead loss of future earnings meant that the claim for loss of future earning was dead on arrival.

**C/Whether the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

21..M/s. Kwaya submitted that the trial court ignored all its authorities and purely relied on the respondent's authority and the award made of Kshs. 4,500,000/= was not proportionate to the injuries suffered by the Respondent. M/s Sharif on her part submitted that the general damages awarded were inordinately low and not commensurate with the severity of the injuries sustained by the Respondent.

22. In the case of **Farmers World Limited v Stonic Nyamwaya Okemwa [2012] eKLR**, the respondent sustained Spinal injuries, Numbness of both lower limbs, Tenderness of the back, soft tissue injuries to the neck, loss of power of upper limbs, sexual dysfunction and Abdominal pains. **Hellen Omondi J**, reduced a global figure of 1.4 million as general damages awarded by the trial magistrate to Kshs. million.

23. Mutende J., made an award of Kshs. 3,200,000/= in the case of **Joyce Wayna Richard vs Mike Trojanuok and Another [2014] eKLR**, where the plaintiff sustained the following injuries:-

- (i) Concussion of the brain with loss of consciousness for a day;
- (ii) Blunt injury on the right side;
- (iii) Deep cut wound on the head measuring 8 cm;
- (iv) Blunt trauma on the back;
- (v) Fracture of the thoracic spine T5 and T6;
- (vi) Spinal injury causing total paralysis of the lower limbs;
- (vii) Multiple cut wounds on both wrists; and
- (viii) Blunt injury to the left knee.

24. In the case of **William Wagura Maigua vs Elbur Flora Limited [2012] eKLR**, where the plaintiff suffered paralysis from the waist downwards, he was awarded Kshs. 3,000,000/=.

25. In the case of **Charlene Njeri Kuria vs Gitu Geoffrey and Another [2016] eKLR**, Mbogholi J award Kshs. 5,000,000/= to the plaintiff who sustained 60% disability with partial paralysis of the lower limbs.

26. From the above cited cases wherein injuries suffered were more severe than what was suffered by the Respondent herein bearing in mind that he only suffered 15% permanent disability.

27. In the upshot, I find the sum of Kshs. 4.5 million as general damages was rather excessive and I find it prudent to interfere with that award by setting it aside and substituting it with a global sum of Kshs. 2,500,000/= which is then apportioned at the 30:70% agreed ratio to give a net figure of Kshs. 1,750,000/= as general damages.

28. I also find the cross-appeal by the Respondent to have no merit and the same is dismissed with costs.

29. The costs of this appeal and the cross-appeal are awarded to the appellant.

**DELIVERED, SIGNED & DATED at NAIROBI on this 13<sup>TH</sup> day of MAY,2020.**

**D.O CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes.