



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.528 OF 2017

WYCLIFFE LUMULA M'MASI.....APPELLANT

-VERSUS-

ERNEST WAITHATKA.....1ST RESPONDENT

PETER SIGEI.....2ND RESPONDENT

(Being an appeal from the Judgment of Honourable Senior Resident Magistrate K. I. Orenge (Mr.))

delivered on 19th September, 2017 in Chief Magistrates Court at Nairobi Milimani

Civil Case No. 7608 of 2015)

JUDGEMENT

The Appellant herein was the plaintiff in CMCC number 7608 of 2015, at Milimani in which he sued the Respondents for General damages, special damages in the sum of Kshs. 600,832 plus costs and interest.

The cause of action arose from a Road Traffic Accident that occurred on or about the 18th day of November, 2004 at the junction of Joseph Kang'ethe and Ole Odume roads, involving the appellant and motor vehicle registration number KAQ 707G which was allegedly owned by the 2nd Respondent and was being driven by the 1st respondent as the authorized driver and/or agent. That as a consequence, the appellant sustained serious injuries, suffered loss and damage.

The appellant averred that the accident was caused by negligence on the part of the 1st respondent in the way he drove and/or managed the aforesaid motor vehicle. The particulars of negligence, injuries and special damages are set out in paragraph 4 of the plaint. He prayed for judgment as set out in the plaint.

The respondents did not enter appearance and/or defence, and on the 28th day of November, 2016, an Interlocutory Judgment was entered against them and hence the matter preceded ex parte by way of formal proof.

The appellant gave evidence as the only witness in support of his case. He adopted his witness statement dated the 23rd day of September, 2015 as his evidence in chief. In his evidence, he stated that he was a security guard with M/S A Team Security Limited earning Kshs. 12,000/= per month. That on 18th November, 2014, he was guarding residential premises off Ole Odume Road when two vehicles collided at the Ole Odume Road junction with Joseph Kang'ethe road. He joined other good Samaritans in the rescue efforts and in the process of carrying out the rescue, another motor vehicle KAQ 707G run over his leg as a result of which, he sustained injuries. He produced several documents in support of his claim.

Upon hearing the case and analyzing the evidence on record, the learned Magistrate found the respondents liable and awarded general damages of Kshs. 400,000/=, special damages in the sum of Kshs. 480,832/= and Kshs. 120,000/= as future medical expenses. The appellant being dissatisfied with the said judgment has appealed to this court and has cited two grounds of appeal as set out in the Memorandum of Appeal dated the 2nd day of October, 2017 and filed on 4th October, 2017.

The court has perused the Memorandum of Appeal and the same is essentially on quantum of damages, the contention being that the award of Kshs. 400,000/= as general damages was too low and failure by the learned Magistrate to make an award for past and future loss of earnings.

The appeal was disposed of by way of written submissions which the court has considered together with the evidence on record and the plaint.

This being the first appeal, the court is required to consider the evidence adduced before the trial court, evaluate it and draw its own conclusion bearing in mind and making allowance for the fact that it did not have the opportunity which the trial court had to see and hear the witnesses who testified. See the case of **Selle & Another vs. Associated Motor Boat Company Limited & Others (1968)EA.**

The court should also bear in mind that it will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the trial Magistrate is shown demonstrably to have acted on a wrong principle in reaching the finding that it did.

On general damages, this court is guided by the medical report dated the 6th August, 2015 by Mr. W. M. Wokabi wherein the injuries sustained by the plaintiff are set out as follows;

- a) Extensive degloving injury on the right foot
- b) Extensive skin loss on the right foot.

X-rays done revealed fracture of the right talus bone (major bone of the ankle joint and foot). Surgical toilet was carried out and later skin grafting of the wounds done. All the wounds did not heal and to date there are still wounds which have not yet healed.

In his opinion, the doctor opines that the plaintiff suffered a lot of pain and blood loss from the major injuries he sustained on the right foot. He also suffered a lot of pain after the many surgical toilet procedures and from the skin grafting operation. The wounds on the right foot are rather extensive and if left alone they will take very long time to heal.

The doctor has recommended surgery to apply another skin graft at the cost of kshs. 120,000/=. He assessed the degree of harm to the extent of 30%. He also opines that the plaintiff cannot be gainfully employed as a security guard any time soon or ever.

The learned Magistrate in awarding the sum of Kshs. 400,000/= stated that he took into account the severity of the injuries and the lapse of time and was guided by the case of **Peter Okello Omedi vs. Clement Ochieng (2000 eKLR)** and that of **Said Abdullahi & Another vs. Alice Wanjira (2010) eKLR.**

The appellant herein averred that the learned Magistrate's award was too low and relied on the case of **Easy Coach vs. Emily Nyangasi (2017) eKLR** where the High court awarded Kshs. 700,000/= for soft tissue injuries with the most serious injuries on the right hand which healed with a 10cm scar with keloid formation on the elbow on the right leg which was treated through grafting and healed with 18cm scar on right thigh, 26cm scar on the right leg, 28cm scar below knee and 12cm scar right foot".

He also referred the court to the case of **Kiru Tea Factory (2008) eKLR** where an award of Kshs. 800,000/= was made for fractures of radius, ulna and pelvis plus degloving injuries. The case of **Tononoka Rolling Mills vs. James Boso Were (2015)** was also cited in which an award of Kshs. 850,000/= was made. The appellant urged the court to enhance the award to Kshs. 2,500,000/=

The court has considered the authorities cited and in particular that of **Kiru Tea Factory** and the one for **Tononoka Rolling Mills** (supra) and I find that they reflect injuries which though not the same as those sustained by the appellant, are not far off. Taking into account the inflation and the age of those authorities, I am of the considered view that a sum of kshs. 700,000/= would be reasonable as general damages.

On loss of earnings, I have perused the plaint filed herein and I note that this category of loss was not pleaded.

It is trite that this is a special damage claim and it should be pleaded specifically and enough particulars should be given to the court for it to make an award under this head. I therefore find that the learned Magistrate was right in failing to make any award under this head.

On future loss of earnings, the evidence on record is that, the plaintiff had not recovered by the time he testified in court sometime in September, 2015. The claim for loss of earnings materialized from the date of the filing of the suit, in December, 2015, this translates to a total of 19 months from the date of filing the plaint and 6 months in 2017. On the monthly salary of kshs. 12,000/=:, the court notes that no evidence was adduced to prove the same. It was just the appellant's word which was not supported in any way even by way of a letter from the employer. For that reason, I concur with the learned Magistrate's finding that there was no proof of employment but with the evidence of the appellant to the effect that he was a security guard and which evidence was not controverted, I find that the learned Magistrate ought to have applied the minimum wages of a security guard/watchman as the salary that he was earning.

In that regard, the court has looked at the Regulation of Wages (General) (Amendment) Order, 2013 wherein the minimum wage of a watchman is set at kshs. 9,780.95 for a day watchman. Applying that salary to the 19 months, I award a total of Kshs. 185,820/=:.

In the end, the appeal has succeeded to the extent shown hereinabove. General damages to earn interest from the date of this judgment whereas the special damages will attract interest from the date of filing of the plaint.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 7TH day of MAY 2020.

L. NJUGUNA

JUDGE

In the presence of:-

..... **for the Appellant**

..... **for the Respondents**