REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 54 OF 2018

FINLAYS HORTICULTURE KENYA LIMITED.....APPELLANT

VERSUS

GRACE WACUGU CHIIRA.....RESPONDENT

(Being an appeal from the judgment of Hon E Nyambu CM delivered on 6th December, 2017 in Naivasha CMCC No 545 of 2014)

JUDGMENT

Background and issues

1. The plaintiff in the lower court was found to have suffered a *severe dislocation of the left ankle joint; and fracture of the left malleolus* after injuring herself whilst at work in the defendant's farm. The trial court found the defendant 100% liable and awarded damages as follows:

a. General damages- pain, suffering and loss of amenities Kshs 1,000,000.00

b. Future medical expenses Kshs 150,000.00

c. Loss of earning capacity Kshs 869,400.00

d. Special damages Kshs 7,000.00

Total Kshs 2,026,400.00

2. Dissatisfied with the judgment, the appellant has filed this appeal which challenges both liability and quantum. The grounds of appeal are summarized as follows:

a. On liability - That the trial court erred in finding 100% liability with no contributory negligence; and that appellant's submissions on liability were ignored;

b. On quantum – That the trial court took into account medical evidence extraneous to the suit; that the awards for general damages and loss of earning capacity were grossly excessive and not in accord to the evidence

c. That the award of costs of the suit to the respondent was not warranted

3. The duty of this court in its role as a first appellate court is to conduct a fresh and exhaustive scrutiny of the evidence in the case, and come to its own conclusions about it. In this exercise, it must bear in mind that it did not have the opportunity of seeing and hearing the witnesses first hand or to appreciate their demeanour, and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. This was stated **Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123**

Liability

4. The appellant's major argument regarding liability is premised on the appellant's position that the evidence leaned against a finding that the plaintiff that was at work on 30th June 2004 when she slipped and fell. Instead, they argue that she was in the defendant's premises but was walking to the workplace where she would then be assigned duties.

5. The appellants rely on the evidence of DW2 Martha Masai who testified that she was walking with the plaintiff to work when the plaintiff slipped at a place sloppy with grass and fell. In cross examination she said that they were yet to report and assemble for the register to be taken so as to start working; that there was no ditch or hole where the plaintiff fell; when pressed DW2 admitted that in her statement she had said the plaintiff fell in a hole.

6. PW1, the plaintiff had testified that she was at work when she slipped and fell in a ditch that was about 2 metres wide and 2-3 metres deep used as an open drain. She had no gumboots and was wearing rubber shoes; that the trench was open and had no stone covering or iron rods or timber to prevent falling.

7. In cross examination PW1 confirmed that she had worked at the location of the accident for five (5) years and had seen the ditch where she fell for those five years. In total, she worked for the defendant for sixteen years.

8. The documentary evidence availed also supports the plaintiff's evidence. PExb 20 – Workmen's Compensation Act Notice signed and stamped by the defendant on 12/7/2012 indicates the cause of the accident as ***"slippery trench on the farm"***. PExb 5, contained in a bundle admitted as PExb 1-16, is a form in which the report of the accident is detailed and is on the employer's letterhead. In it, the cause of the accident is indicated as a trench, and the accident is stated to have happened when plaintiff ***"slipped into a small trench".*** The plaintiff's doctor's comments are:

"Dislocation left ankle joint after slipping at her place of work"

9. I agree with the trial magistrate that the plaintiff was injured in a trench at her workplace whilst at work. The evidence of DW1 that they were headed to but had not reported to work when the plaintiff fell on a slippery slop of grass is not convincing since the defendant itself recorded the accident as a result of slipping in a trench at her place of work. For DW1 to suggest that they were headed to work when the employer filled in two forms, PExb 20 and PExb 5, that show the plaintiff was already in the farm and fell in a trench at her workplace is not believable.

10. The cross examination of DW1 also revealed her inconsistent evidence when she admitted she said the Plaintiff had fallen in a hole.

11. I also agree with the trial magistrate that the plaintiff did not have any protective footwear such as gumboots. DW1 said uniforms and protective wear are released from the store after duties are assigned. However, no muster roll, attendance book or storekeeper's record book was availed to show the events at the workplace on the material or any other day.

12. Accordingly, I find the plaintiff's version believable and the defence version of the evidence of liability unpersuasive. I however do not think the trial magistrate took into account the fact that the plaintiff had been working where the trench or ditch was for five years, and thus do not agree that liability should have been at 100% against the defendant, in my view, having seen the ditch for that long a period, the plaintiff ought to have exercise some care or to mitigate the possibility of falling.

13. I would apportion 15% negligence on her as the incident occurred at daytime and the drain was not a hidden one or one upon which the plaintiff suddenly found herself. Her work was weeding and harvesting flowers at the time of the incident. As indicated, I hereby apportion liability on the plaintiff only to the extent of 15% liability.

Damages

14. The injuries sustained are not in dispute. The plaintiff's long journey of treatment is well set out in the evidence. The fact that her injuries affected the plaintiff so seriously that the defendant had to retire her on medical grounds is also well recorded – for example in PExb 17 &18. In PExb 18, the defendant's doctor's recommendation shows that her festering injuries caused her to develop chronic osteoarthritis of the right ankle and painful metartarsuls. After continuous medical follow up for three years, she was unable to perform her duties. The defendant's doctor assessed her incapacitation at 25% in PExb 18 dated 21/03/2013.

15. In PExb 17, the plaintiff was retired on medical grounds vide a letter dated 21st November, 2012. She was aged 41 years. Her salary had been reviewed to Kshs 8,949/- including house allowance by letter dated 22nd June, 2012 (PExb 19).

16. A medical report by Dr Wellington Kiamba dated 1/12/2015 well after the plaintiff's retirement, shows that the plaintiff's condition on examination and details her injuries: back- tender lumbo sacral region, she cannot fully bend due to severe back pain, MRI taken on23/11/2015 shows lateral left disc protrusion at L4/5 and L5/S1, Left leg: swollen, with oedema; ankle is tender. He concluded that she cannot walk without a crutch and, her back will deteriorate with time, and she has to be on analgesics throughout her life in addition to visiting for physiotherapy. Future treatment will cost Kshs 500,000/- and she would never engage in gainful employment. He assessed permanent incapacity at 60%.

17. In arriving at the 60% incapacity, Dr Kiamba seems to have taken into account the injuries of the plaintiff's back identified long after the accident, but connected to deterioration emanating from the accident. However, back injuries are neither pleaded in the plaint or in the amended plaint.

18. It is unfortunate that Dr Kiamba was not called to explain the difference in incapacity assessed by him at 60% and opposed to the 25% assessed by the company's doctor, and Dr Kiamba's report remained unchallenged.

19. I am aware that the test to be applied by an appellate court on an appeal against an award of damages is that:

> ***"…[the] Court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."*** See **Mbogo & Another v Shah (1968) E.A. 93**

General damages

20. In the trial court, the plaintiff claimed Kshs 3,000,000/-. The defendant proposed 250,000/-. The trial magistrate reviewed the authorities relied on by the parties, specifically referencing:

> - **Machakos HCCA No 72 of 2013 Maithya Musango v Kackson Mailu** where, according to the defendant was awarded Kshs 250,000/- for fracture of the left ankle joint. I have not been able to access this authority, but from the defendant's submissions they appear less serious and no incapacity was suffered by the plaintiff in that case.
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> - **Eldoret HCCA No 36 of 2007 Nandi Tea Estates Ltd v Musa Weisia Songa** kshs 144,000/- was awarded for fracture of the lateral malleolus of left tibia leg and dislocation of the left ankle joint. However, that authority does not discuss any complications arising from treatment such as arose in the present case leading to permanent incapacity.

21. Reference was also made to the case of **Mehari Tewolde t/a Mehari Transporters Ltd v Damus Muasya Maingi [2013]eKLR** which I have perused, and I note that the plaintiff there suffered far more severe injuries in addition to total permanent incapacity. An award was made of Kshs 1,500,000/-.

22. Taking these cases into account, there is no demonstration that the award under this head was inordinately excessive or based on wrong principles. There is thus no reason to disturb the award of general damages.

Loss of earning capacity

23. The trial magistrate calculated the loss of earning capacity in the usual way; by taking the defendant's age, applying a multiplier of 10 years, and multiplying salary thus:

7,245x12x10 = Kshs 869,400/00 which she awarded.

24. The error made by the trial court in this regard was failure to take into account the principle that in awarding loss of earning capacity the injured person should be compensated as closely to the extent of his disability. Although this was not argued by the appellant, it is a clear principle common in our jurisprudence that cannot be swept under the rug.

25. In **David Kigotho Iribe v John Wambugu Ndungu & Another [2008] eKLR** Koome J (as she then was) reduced the assessment of loss of earning capacity by 50% to match the assessed disability on the basis that:

> ***"The characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more comprehensively in Moeliker -vs- Reynolle & Co. Ltd [1977] 1 WLR 132. In that case Browne L.J said at page 140, paragraph B:***
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> > ***"This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earning which can already be proved at the time of the trial".***
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> ***The claim for loss of future earning as Brown L. J. said later at page 140 paragraph G is assessed on the ordinary "multiplier/multiplicand basis."***
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> ***Accordingly he is not able to be engaged in gainful employment, more so, as a driver because of the injuries. The plaintiff was aged 27 years when this accident occurred. He was earning Kshs.12, 000/- This was also supported by his then employer. Considering that the plaintiff can still use his hands to do some work, I will award the plaintiff a permanent disability of 50%. Considering that the plaintiff was aged 27 years and other vicissitudes of life and the general life expectancy in Kenya today, l will assess the loss of his future earning using the multiplier of 20 years i.e. Kshs 12, 000 x 20 x 12 less 50% = Kshs.1, 440,000"***

26. Further, in **Alpharama Limited v Joseph Kariuki Cebron [2017] eKLR** Nyamweya, J reduced earning capacity by 40% to Kshs 1,305,180/- and explained:

> ***"Given that both experts were agreed that the Respondent would suffer 60% disability, and it was not disputed that the Respondent was 41 years at the time of the accident and would have retired at about the age of 60 years, a multiplier of 15 years***

is reasonable in the circumstances taking into account that the Respondent will receive an early capital sum to compensate his loss which can be invested to produce an income, and his career might have been interrupted as a result of the normal risks of life . I therefore find that the loss of future earnings was Kshs 12,085 x12x15 = 2,175,200/=. Any rehabilitation of the Respondent would only result in 40% functionality and therefore reducing the future earnings by 40% would result in Kshs 1,305,180/=.

27. Finally, reference was made to **James Thiongo Githiri v Nduati Njuguna Ngugi [2012] eKLR** where it was held:

"The principle under this head of claim is that the court should take into account not only the present loss but also the capacity of the plaintiff to earn a future or improved income.

…….

PW2 also testified that the plaintiff would suffer 50% disability for the rest of his working life. Taking that the plaintiff was 27 years of age at the time of the accident, and would continue working upto the age of 60, the average retirement age, the plaintiff would have 33 years of active working life. Allowing therefore that multiplier, per month at the rate of Ksh 7,500/=, the figure would be comprised of the number of working years, multiplied by the months in the year, and the average monthly nett earnings i.e. 33 x 12 x 7,500 making a total of Ksh 2,970,000/=. <u>However as the plaintiff would only be incapacitated to the extent of 50%, the said sum would be reduced by that 50%</u> as follows - (i) 33 x 12 x 7,500/= 2,970,000/= Less 50% = 1,485,000/= Add 15 months incapacity 127,500 = Total Shs 1,612,500/="

28. Applying this principle to the present case, the award will be **7,245x12x10 = Kshs 869,400/- less 40%) = 347,760/- = 521,640/=.** I award this amount.

Disposition

29. In light of all the foregoing, I allow the appeal on apportionment of liability and loss of earning capacity, and set aside the award of the trial court. I hereby substitute the trial court's award with the following award:

The final award shall therefore be as follows:

a. General damages	Kshs	1,000,000.00
b. Future medical expenses	Kshs	150,000.00
c. Special damages	Kshs	7,000.00
d. Loss of future earning capacity		
Kshs 869,400/- less 40%)	Kshs	<u>521,640.00</u>
Sub-total	*Kshs*	*1,678,640.00*
Less Liability contribution 15%	Kshs	<u>251,796.00</u>
Total	**Kshs**	**1,426,844.00**

30. The parties shall bear their own costs of the appeal.

Administrative directions

31. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

32. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

33. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 2nd Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Musembi for the Appellant

2. Ms Kiberenge for the Respondent

3. Court Clerk - Quinter Ogutu