



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 42 OF 2015

HENRY KIMAMA KURIA.....APPELLANT

VERSUS

ESTHER WANGUI NDUNG'U.....RESPONDENT

[Appeal from the judgment by B. Ochieng, Chief Magistrate, in

Murang'a CMCC No. 324 of 2013 delivered on 24th April 2015]

JUDGMENT

1. This appeal challenges *quantum of damages* for injuries sustained by the respondent in a road traffic accident. Liability for *negligence* was settled by consent at the ratio of 90:10 in favour of the respondent.
2. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic*; and, pursuant to the *Practice Directions* published in the *Kenya Gazette* of 17th April 2020 as Gazette Notice No. 3137 of 2020, this appeal was heard electronically on 9th June 2020.
3. The Court had earlier granted directions on 25th February 2020 that the appeal be canvassed through written submissions. The parties filed a consent dated 28th May 2020 agreeing that the appeal be determined by way of the written submissions on record; and, that the judgment be transmitted electronically.
4. The appellant filed submissions on 8th June 2020 while those by the respondents were lodged on 29th May 2020.
5. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123.
6. In the plaint dated 17th October 2013, the respondent pleaded that she sustained a crush injury to her right leg. It was amputated below the knee. She also suffered some bruises on the scalp and chest. She claimed for general damages; loss of future earnings; special damages of Kshs 125,897; and, a further Kshs 220,000 for future medical expenses.
7. The appellant lodged a statement of defence denying “knowledge of the particulars of injuries and special damages”.
8. At the hearing, the respondent testified that the appellant’s motor vehicle ran over her leg and severed it below the knee. Attempts by the doctor at Kenol Hospital to re-attach the limb were futile. She was later hospitalized at Kijabe Hospital for over a week.
9. The respondent testified that she was a farmer earning Kshs 20,000 per month from sale of potatoes. She could no longer do so due to the loss of her leg. She said that the cost of a prosthesis would be Kshs 220,000 and would require replacement every five years. On cross examination, she conceded that she had no licence for the potato business but that she “paid rates to the council on a daily basis”.
10. The appellant did not call a witness. I readily find that the respondent’s evidence was uncontroverted and truthful.
11. I will now turn to assessment of damages. The learned trial magistrate awarded Kshs 1,200,000 as *general damages*; Kshs 1,080,000 for *loss of earning capacity*; Kshs 230,000 to fit the prosthesis and replacements; and, Kshs 125,897 as *special damages*. The lower court also granted the respondent costs and interest.

12. The appellants have challenged the heads of damages through the *memorandum of appeal* dated 20th May 2015. There are three grounds: Firstly, that there was a dearth of evidence to support the award for loss of future earnings; secondly, that the award of Kshs 1,200,000 for pain, suffering and loss of amenities was exorbitant; and, thirdly, that the learned trial magistrate applied wrong principles in assessing damages.

13. Learned counsel submitted that the award was not backed by clear evidence and was manifestly excessive. For instance, she was of the view that the entire claim of loss of future earnings was unmerited; and, that Kshs 800,000 would have been sufficient for pain and suffering.

14. Learned counsel for the respondents countered that the trial court applied the correct principles to assess damages. I was implored to dismiss the appeal.

15. As a general rule, an appellate court will not interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

16. The medical report by Dr. Kagoda Byakika dated 10th July 2013 (exhibit 5) concluded as follows-

“The loss of a limb has significant adverse physical sequelae. Esther has to live with a limitation of activities of daily live (ADL) despite fitting a prosthesis. There is also the phantom limb phenomenon which means feeling like the lost limb exists and even feeling pain in it. This can be life long and is very disturbing”

17. The respondent was aged 51 years at the time of the accident and will be impacted negatively for the rest of her life. It is true that the respondent had no documentary evidence to prove earnings of Kshs 20,000 per month. The learned trial magistrate was alive to the issue of burden of proof. He reasoned that *“documentary evidence was not the only way to prove loss of earnings”*. After taking into account the degree of disability, he found that Kshs 10,000 per month for the next 9 years would compensate for loss of earning capacity.

18. I agree with the appellant’s counsel that loss of future earning capacity required to be strictly proved. He who alleges must prove. Section 107 of the **Evidence Act**. See also **Esther Wanjiru Kiarie v Mary Wanjiru Githaka**, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR.

19. However documentary evidence was not the exclusive method of proof. The respondent certainly earned a living. The appellant did not lead any evidence to controvert her claim. I am well guided by the court of appeal in **Jacob Ayiga Maruja & ano v Simeon Obayo**, Kisumu, Civil Appeal 167 of 2002 [2005] eKLR where the learned judges held:

In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs.4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.

20. In the end, it was open to the trial court, granted the evidence and the unique circumstances of the respondent, to settle on the sum of Kshs 20,000 per month for the next 9 years. However, the respondent did not lose her *full* earning capacity. Her disability was assessed by Dr. Kagonda at 50% and by Dr. Wambugu at 40%. The average by the two professionals would thus be 45%. The correct arithmetic should thus work out as $9,000 \times 9 \times 12 = 972,000$.

21. I will now turn to general damages for pain suffering and loss of amenities. Both doctors agreed that the amputation was below the knee. The wound has healed with no palpable neuroma. The knee joint movements are normal. However, the patient walked with support of two elbow crutches. She requires a prosthesis. Like I stated, the doctors assessed the degree of disability at between 40% to 50%.

22. The appellant submitted in this court that Kshs 800,000 would be sufficient damages for pain and suffering. She stated that the lower court erred by relying on the decision in **Bayusuf Freighters Ltd v Patrick Kyengo**, Nyeri, Court of Appeal, Civil Appeal 19 of 2014 [2014] eKLR. In that case, general damages of Kshs 1,600,000 were awarded. I agree that in that case, the plaintiff had other serious injuries besides the crush injury and amputation of his left leg. He had fractures of the radius and right ulna as well as severe degloving injuries to the right forearm and hand.

23. I have looked at a few other precedents. In **Douglas Erick Nyakundi Masira v Rongai workshop Ltd & another**, Nairobi, High Court Civil Case 28 of 2007 [2009] eKLR, the plaintiff suffered compound fractures of the right leg which was later amputated. Damages for pain, suffering and loss of amenities were assessed at Kshs 800,000.

24. In **Salome Wachira v Signon Freight Ltd & others**, Nairobi, High Court Civil Case 658 of 2004 [2007] eKLR the claimant’s leg was amputated at mid-thigh. He also had injuries to the chest, ribs, left leg, hip and abrasions to the arms. Damages were assessed at Kshs 1,200,000.

25. In **Jane Otieno v Mombasa Liners Ltd & another**, Mombasa, High Court Civil Case 47 of 2003 [2005] eKLR, the plaintiff’s right leg was amputated; there were fractures to the left ulna and radius among other injuries. She was awarded Kshs 800,000 for pain and suffering.

26. Taking into account the degree of injuries, inflation and the age of the authorities, I find that a sum of Kshs 1,000,000 would be adequate

compensation to the respondent.

27. The memorandum of appeal does not challenge the price of the prosthesis or the cost future replacements. I find that there there was clear evidence on the matter from both Dr. Kagonda and Dr. Wambugu. I will thus not disturb the award of Kshs 230,000 under that head.

28. Lastly, the special damages were specifically pleaded at paragraphs 5 and 9 of the plaint. From the bundle of receipts (exhibit 7), I find that the respondent proved that she incurred the sum of Kshs 125,897.

29. The upshot is that this appeal *partially* succeeds. The judgment and decree of the lower court are *set aside*. There shall now be judgment in favour of the *respondent* in the following terms:

a) General damages for pain, suffering and loss of amenities: Kshs 1,000,000.

b) Loss of future earnings: Kshs 972,000.

c) Special damages: Kshs 125,897.

d) Future medical expenses for prosthesis and replacements: Kshs 230,000.

Subtotal.....Kshs 2,327,897.00

Less 10% contributory negligence.....Kshs 232,789.70

Net Award.....Kshs 2,095,107.30

30. That is to say that the appellant shall now pay to the respondent the sum of Kshs 2,095,107.30 plus interest at court rates from the date of the original decree till full payment.

31. Costs follow the event and are at the *discretion* of the court. I grant the respondent costs in the *lower court*. However, each party shall bear its own costs in the *appeal*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 2nd day of July 2020.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this judgment was transmitted to the parties' email addresses. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the Practice Directions issued by his Lordship, the Chief Justice dated 17th March 2020 and published in the *Kenya Gazette* of 17th April 2020 as Gazette Notice No. 3137, this judgment has been delivered to the parties by electronic mail. The parties filed a consent dated 28th May 2020 waiving compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.