



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 10 OF 2018

EDWINA ADHIAMBO OGOL.....APPELLANT

VERSUS

JAMES KARIUKI.....RESPONDENT

(Consolidated with HCCA No 11 of 2018)

JAMES KARIUKI.....APPELLANT

VERSUS

EDWINA ADHIAMBO OGOL.....RESPONDENT

(Being appeals from the Judgment of the Honourable Z Abdul (RM)

delivered on the 23rd January, 2018 in Naivasha CMCC No 829 of 2015)

JUDGMENT

Background

1. Following an accident on 19th June, 2015, the plaintiff Edwina Ogol, suffered the following injuries according to the medical evidence availed in court: Fracture of left humerus; Compound(open) fractures of the left tibia and fibular; Amputation of the left leg above the knee; and Intra uterine fetal death at 32 weeks (as per ultra sound).

2. She filed a suit for recovery of damages in the lower court, which proceeded to hearing. A consent was entered on liability at 80:20 in her favour, and damages were awarded by the court as follows:

- General damages	Kshs 1,500,000.00
- Cost of future medical expenses (Implant; Prosthetic)	Kshs 760,000.00
- Special damages	Kshs <u>27,331.00</u>
Less 20% Contribution	Kshs 467,466.80
Total	Kshs 1,819,864.80

3. Dissatisfied, both the plaintiff and the defendant filed appeals challenging the quantum of damages awarded by the lower court. Edwina Ogol, the appellant in this appeal, urges that the award was too low on the grounds that:

- The trial court failed to award loss of income despite proof thereof;

- The general damages awarded were on the lower side; and
- The trial magistrate recorded evidence that was not adduced.

4. On his part, James Kariuki the respondent, appealed on the following grounds:

- That the award was inordinately high, in particular the general damages and cost of future medical expenses.
- That the trial magistrate applied the wrong principles and disregarded the respondent's submissions.

5. The two appeals are consolidated herein and the present file (No 10) is the lead file. The grounds of appeal are encapsulated as follows:

- a. The failure to make an award for loss of income
- b. Whether the amounts awarded were excessive or inordinately low in the circumstances

6. This Court's responsibility as a first appellate court is to consider the evidence tendered in the lower court and to subject it to a fresh and exhaustive evaluation. This court should then make its own conclusions after such evaluation, noting that I did not have the opportunity to see and hear the witnesses (*Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123*). In general, 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 misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (See Law J.A., in *Butt v Khan (1977) KAR 1*).

7. It is noteworthy that in the lower court, the only testimony tendered in this case was that of the plaintiff. Briefly, the evidence was that on 19/6/2015 the plaintiff was travelling in a bus No KBY 527F from Kisii to Nairobi. At Maai Mahiu, an oncoming lorry No KCB 513S collided into the bus, which rolled. The plaintiff testified that the lorry had lost control and hit the bus.

8. I now deal with each ground of the appeals herein as follows.

Failure to make an award for Loss of Income

9. The plaintiff claimed Kshs 4,200,000/- for loss of income, stating that she was 25 years old at the time of the accident and would have worked for 35 more years at a salary of Kshs 10,000/- per month. Her evidence was simply that she was a tailor, trained at Mathare North College of Tailoring; she attached the certificate of her training. She said she used to earn 10,000/- per month without showing where or for whom or how she worked, or demonstrating her income generation; that since her hand was paralyzed and her left leg amputated as a result of the accident, she now cannot work. The trial magistrate found that there had been no proof of the existence of the tailoring business, and that every amount claimed for must be proved. She declined to make an award under this head.

10. In the appeal the plaintiff referred to the Nakuru case of **Patrick Mwangi Irungu v Charles Macharia Mwangi & Another [2008] eKLR**. There, the plaintiff was a young man who had completed his secondary school. Further, he suffered permanent incapacity (100%) following the accident. He was awarded Kshs 1,500,000/-.

11. In the present case, the medical report from Kinoo Medical Clinic (Dr GK Mwaura) confirms that the plaintiff had her leg amputated and the degree of incapacity thereof was assessed at 50%. The degree of incapacity in relation to the left hand was assessed at 5%. The doctor also opined that the plaintiff would be "totally incapacitated for 10 months". This evidence was not rebutted.

12. The principles concerning claims for loss of income were explained in the case of **SJ v Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

"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 earning capacity may be defined as diminution in earning capacity. 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. This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages." (Emphasis added).

13. In **Mumias Sugar Ltd v Francis Wanalo [2007] eKLR** the court elaborated on loss of future earning capacity as follows:

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 the 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.”

14. The principle in the **Francesco Di Nello case** is that a loss of income claim is properly defined as real actual loss is loss of future earnings. Unlike a loss of earning capacity claim, a loss of income claim is “compensated for real assessable loss which is proved by evidence”.

15. Looking at the evidence in the present case, there is nothing that shows that the plaintiff had a business from which she was earning the income alleged. Further, there is nothing to suggest that she could not work after the accident. The exception indicated in the medical report was when she was totally incapacitated for ten months after the accident. Thereafter, the incapacitation was in relation to her hand at only 5%, and incapacity of her left leg was assessed at 50%. As such, I do not think there is sufficient evidence to demonstrate that the plaintiff was unable to work again for the rest of her lifetime.

16. To the extent that I see no evidence to show that the plaintiff was unable to work and earn income after the accident, I am sympathetic with the trial court’s position in not making an award for loss of income.

17. In my view, the plaintiff’s most optimistic option was to claim loss of income for the ten months when she could not work due to being totally incapacitated, as confirmed by the medical report. That would amount to Kshs 100,000/-. To that extent, I would have been prepared to award Kshs 100,000/- loss of income. However, the plaintiff did not press for or argue for such a claim.

18. On this head, therefore, the plaintiff’s appeal fails and I agree with and uphold the position taken by the trial magistrate for the reasons herein.

Whether the amounts awarded were excessive or inordinately low

19. In his appeal, the defendant/appellant argues that the general damages of Kshs 1,500,000/- and cost of future medical expenses of 760,000/- were too high. On her part, the plaintiff in her appeal asserts that both of the awards were inordinately low. I deal with each of them hereunder

General damages

20. In the lower court the plaintiff proposed Kshs 3,000,000/- for general damages relying on **Catherine Njeri Njoroge v Bernard Njeru [2016] eKLR** where the plaintiff suffered the following injuries: 1. Avulsion injury to the right femoral artery with resultant a vascular necrosis of the right femur and total amputation of the right lower limb at the hip; 2. Fracture of the right femur; and 3. Compound fracture of the superior and inferior pubic ramus of the right bone. The plaintiff underwent a special operation for the total amputation of the right leg at the hip joint. The plaintiff was initially treated at Thika Level 4 hospital and later transferred to Kenyatta National Hospital where she was admitted for 3 months. She was awarded Kshs 3,000,000/-.

21. The injuries suffered by the plaintiff in this case are not disputed. For those injuries, pain, loss and suffering, the trial magistrate awarded 1,500,000/- based on the more recent precedent in **Frodak Cleaning Services & Another v Daniel Meshack Shikanga [2017] eKLR**, where a similar amount was awarded for amputation above the knee. I have not been able to obtain the **Frodak** authority and am unable to evaluate the extent of all injuries suffered there other than amputation of the leg.

22. On appeal, the defendant argued against both the general damages and cost of future medical costs together. The defendant asserts that the total award made by the trial court was made without giving a basis for the amount. He cited **Joseph Mavulu Mutua v Samuel Njoroge Mwangi [2003] eKLR** where Kshs 320,000/- was awarded for fractures of 9th-12th ribs; fracture of left tibia and fibula; loss of spleen; and loss of pregnancy. The defendant alleges that their submission of 400,000/- for general damages was not considered.

23. The plaintiff on her part seeks an enhancement of the damages on the additional strength of the case of **Nickson Muthoka Mutavi v KARI [2016] eKLR**. There the

High Court reversed the award of Kshs 1,500,000/- general damages, and awarded the plaintiff Kshs 3,000,000/- for the following injuries from electrocution namely: 3rd degree burns on the abdomen right side of 7%, 3rd degree burns on the both palms of 1%, 4th degree burns on the right leg of 4%, and 3rd degree burns on the left foot both sole and dorsum. The Appellant was hospitalized for four months and his right leg was amputated below the knee.

24. The injuries of the plaintiff here were fracture of left humerus; compound (open) fractures of the left tibia and fibular; amputation of the left leg above the knee; and intra uterine fetal death at 32 weeks (as per ultra sound). Plaintiff was hospitalized for two months and suffered the additional trauma of losing her fetus. She had total incapacity for ten months and will live with 50% incapacity of left leg.

25. One of the general principles for award of damages is that similar injuries are, as far as possible, awarded similar damages. In this case, I think the trial court’s award ought to have reflected injury, pain and suffering closer to that suffered in the **Nickson Muthoka** case. I would set aside the award of 1,500,000/- and substitute with award of Kshs 2,200,000/-.

Future medical costs

26. On the award for the cost of future medical costs, the defendant argues that it was made despite not being specifically proved as special damages. He relied on the case of **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR** where the High Court in Nairobi

(O. Mutungi J) stated:

“It is on the foregoing basis that in my humble view, awarding of damages for future medical costs is irregular and outside the known and established heads of damages under the law of Torts. Such an award is an affront to the general principles governing the award of special damages. For even if such claim is pleaded it cannot be proved. Even where a medical report gives a prognosis that the claimant will certainly require further medical treatment, estimated at whatever figure, until the treatment is carried out and actually paid for, there is no telling what the exact cost is or will be. It remains futuristic and in the same category of future loss of earnings which can only be claimed and awarded under the head of general damages. [See WINFIELD & JOLOWICZ on Torts, 17th Edition 2002, at Page 760]”

27. He also relied on **Douglas Odhiambo Apel & Another v Telkom Kenya Limited [2014]** where the Court of Appeal held that it is for the party claiming to present evidence to prove the claim and that:

“[even] at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

***The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved. See RATCLIFFE Vs. EVANS [1892] 2QB S24; KAMPALA CITY COUNCIL Vs. NAKAYE [1972] E.A 446 and HAHN Vs. SINGH [1985] KLR 716.*”**

28. In particular, the defendant argues that the plaintiff had not proved that she had a prosthetic shoe. The trial court dismissed this argument on the basis that the plaintiff had not acquired one stating that ***“[the] possible reason why she had not acquired one is clearly due to lack of funds”*** when that reason was not supported by the evidence.

29. The real issue is whether the plaintiff incurred or is bound to incur future medical expenses as was alleged. If so, how much. The trial magistrate relied on the evidence by the plaintiff which was that she had borrowed an artificial leg that had to be changed every four years and would have to remove a metal plate implanted in her left hand. This was supported by the medical report of Dr Mwaura which indicated the future costs as being:

“a) Prosthetic shoe at a cost of 20,000/-. This has to be changed every 4 years. Total cost is 640,000/-.

b) Removal of implants at a cost of sh 120,000/-.”

30. I am unable to understand the prosthetic shoe figure of 640,000/- proposed by the doctor. If a prosthetic shoe costs 20,000/- then 640,000/- would buy $640,000 \div 20,000 = 32$ shoes. These 32 shoes if changed/purchased every 4 years would cover reflect a lifespan of 128 years. This is an absurdity that cannot stand, and leads to an unreasonable and inordinately high award.

31. In the Court of Appeal case of **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988**, it was 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.”

I therefore find that the 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.

32. Based on Juliet Karisa’s case, I am entitled to use the information in the doctor’s report to form my own opinion. The plaintiff was aged 35 years at the time of the medical report in 2015, and would now be aged 40 years. Assuming she would live to 80 years, she has another 40 years and would be entitled to ten sets or changes of prosthetics. That would be $20,000 \times 10 = \text{Kshs } 200,000/-$.

33. Accordingly, the trial magistrate’s award for cost of prosthetics under the cost of future medical costs of Kshs 640,000/- is excessive. I would reduce it to Kshs 200,000/-. This would reduce the award under the head of cost of future medical expenses to a total of Kshs 320,000/-.

Disposition

34. All in all, each appeal has succeeded and failed to the extent shown herein. The trial court’s award is hereby set aside and substituted with the award herein:

- General damages Kshs 2,200,000.00
- Cost of future medical expenses (Implant; Prosthetic) Kshs 320,000.00
- Special damages Kshs 27,331.00

Sub Total Kshs 2,547,466.80

Less 20% Contribution Kshs 509,493.35

Total Kshs 2,037,973.45

35. I adjudge that the proper order for costs is that each party do bear its own costs of the appeal. Lower Court costs and interest will remain as in the Lower Court judgment

Administrative directions

36. 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 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 Executive Officer, Naivasha.

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

38. Orders accordingly.

Dated and Delivered in Naivasha by video conference this 13th Day of October, 2020

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RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Obura holding brief for Juma for Appellant in HCCA 11 of 2015 and Respondent in HCCA 10 of 2015.
2. Orege for Respondent in HCCA 11 of 2015 and in Appellant HCCA 10 of 2015.
3. Court Clerk - Quinter Ogutu