



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 135 OF 2018

KANGAROO SHUTTLE.....APPELLANT

VERSUS

JOSHUA MAINA NG'ANG'A.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. Obulutsa, Chief Magistrate, delivered on 12 October 2018 in Eldoret CMCC No. 1231 of 2017)

JUDGMENT

1. The appellant herein, **Kangaroo Shuttle**, was sued before the lower court by the respondent, **Joshua Maina Nganga**, in respect of a road traffic accident that occurred on **11 June 2016** along the Eldoret-Kitale Road. The respondent had alleged that he was lawfully riding his **Motor Cycle Registration Number KMDG 1111V** along the said road when the appellant's employee or agent so negligently drove **Motor Vehicle Registration No. KBW 384K** that he caused it to knock the said motor cycle. The respondent alleged that he had suffered severe injuries as a result of the accident, for which he blamed the appellant.

2. Accordingly, the respondent prayed for general damages for pain, suffering and loss of amenities; loss of earning capacity at the rate of **Kshs. 1,000/=** per day, special damages as well as costs of the suit. The claim was resisted by the appellant and the respondent put to strict proof before the lower court. It was further the contention of the appellant that, if indeed an accident occurred as alleged by the respondent, then the said accident was wholly caused by and/or substantially contributed to by the respondent. However, on **2 August 2018**, the parties settled the issue of liability by consent at 75:25 in favour of the respondent. The matter was then placed before **Hon. Obulutsa, CM**, for the purpose of assessment of damages only.

3. In a Judgment delivered on **12 October 2018**, the lower court awarded damages to the respondent as hereunder:

[a] General damages	Kshs. 6,500,000/=
[b] Special damages	Kshs. 251,127/=
[c] Loss of earnings	Kshs. 3,840,000/=
Total	Kshs. 10,591,127/=
Less 25% contribution	<u>Kshs. 2,647,781.75</u>
Net	Kshs. 7,943,345.25

4. Being dissatisfied with the decision of the lower court on quantum, the Appellants filed this appeal on **2 November 2018** on the following grounds:

[a] That the Learned Trial Magistrate erred in law and in fact in failing to exercise his discretion judiciously thereby awarding damages to the respondent which were so inordinately high as to be an erroneous estimate of the damages payable in the circumstances;

[b] That learned trial magistrate erred in law and fact in awarding damages under the head of loss of earnings whereas there was no factual basis for the same;

[c] That the learned trial magistrate erred in law and fact in using a multiplicand that had not been proved in the calculation of loss of earnings.

5. Thus, the appellant prayed that its appeal be allowed and that the lower court's Judgment be set aside and replaced with the findings of this Court. The appellant also prayed that the costs of the appeal be awarded to it.

6. The appeal was canvassed by way of written submissions; to which end, the appellant's written submissions were filed herein by the firm of **J.M. Kimani & Co. Advocates** reiterating its contention that the general damages awarded by the lower court were inordinately high for the injuries sustained by the respondent. He urged the Court to re-evaluate the medical evidence presented before the lower court; particularly the evidence adduced by **Dr. Sokobe**. He relied on **Kemfro Africa Limited t/a Meru Express Services & Others** for an elucidation of the applicable principles. He urged the Court to note that the injuries suffered by the plaintiff in **Laban Buyole Mamboleo vs. Rift Valley Textiles** [1998] eKLR, which the lower court based its decision on, were far more serious than the injuries sustained by the plaintiff herein.

7. Thus, according to counsel for the appellant, an award of **Kshs. 1,000,000/=** would have met the ends of justice in this matter. He relied on **Ouru Super Stores Ltd vs. Jackson Keragori Obure** [2018] eKLR in which a similar amount was awarded for comparable injuries. He urged the Court to note that in **Machakos HCCC No. 312 of 2009: Isaac Waweru Mundia Kiilu Kakie Ndeti T/A Wikwatyo Services**, an authority cited by Counsel for the respondent, an award of **Kshs. 1,000,000/=** was made for general damages for like injuries.

8. As for loss of earnings, it was the submission of **Mr. Kimani** that it is a special damage item that needed to be specifically pleaded and proved. He relied on **Cecilia W. Mwangi & Another vs. Ruth W. Mwangi** [1997] eKLR in support of this proposition and in urging the Court to find that not a shred of evidence was adduced by the respondent to support the allegation that he used to earn **Kshs. 1,000/=** per day from his business; and therefore that the lower court erred in making an award of **Kshs. 3,840,000/=** under the head of loss of earnings.

9. On behalf of the respondent, written submissions were filed herein dated **3 September 2019** by **M/s Alwang'a & Company Advocates** highlighting the evidence adduced before the lower court by the respondent and two doctors. Counsel pointed out that the severity of the respondent's injuries was never disputed or controverted by the appellant; and that the injuries included loss of consciousness and paralysis of the right side; which, in **Dr. Sokobe's view**, resulted in 60% disability and a drastic change of life for the respondent. Thus, counsel defended the trial magistrate's award in all its aspects. He relied on the following authorities:

[a] **Nairobi HCCC No. 118 of 2006: Jacqueline Syombua vs. B.O.B. Ekalakala Secondary School** in which the court made an award of **Kshs. 6,500,000/=** as general damages for pain, suffering and loss of amenities. The plaintiff in had sustained 70% disability from the injuries he sustained.

[b] **Nairobi HCCC No. 531 of 2004: Jackson Wahome Ngatia vs. Agridutt (K) Ltd & 2 Others**. The plaintiff in this suit had suffered paralysis of both the upper and lower limbs and was bound to a wheel chair for the rest of his life. The doctor's assessment was that the plaintiff had suffered 100% permanent disability. The court awarded general damages in the sum of **Kshs. 4,500,000/=**.

[c] In **Nakuru HCCC No. 64 of 2001: Susan Wanjiru Njuguna vs. Keringet Flowers Ltd & 2 Others**, an award of **Kshs. 3,000,000/=** was made as general damages for pain, suffering and loss of amenities for a plaintiff who had suffered head injuries resulting in permanent brain damage along with dislocation of the left elbow and multiple lacerations. As a result of the head injury, the plaintiff suffered loss of speech and hemiplegia or weakness of the right upper and lower limbs. The conclusion reached by the doctor was that the plaintiff had suffered 100% disability and would require nursing aid for the rest of her life.

10. In response to the appellant's contention that no justification was made for the award of **Kshs. 3,840,000/=** for loss of future earnings, **Mr. Oduor** for the respondent made reference to the prayers in the Plaint and clarified that what was sought was not loss of future earnings but loss of earning capacity which is awardable as part of general damages; and therefore need not be pleaded specifically. He relied on **Ntulele Estate Transporters TD & John Ashika Mutsayi vs. Patrick Omutanyi Mukolwe** [2014] eKLR to buttress his argument. He also pointed out that the evidence led before the lower court clearly supported a claim for loss of earning capacity and not otherwise. He therefore supported the multiplier of 16 years, submitting that it was reasonable in the circumstances.

11. While acknowledging that the respondent did not adduce evidence to prove that he was earning **Kshs. 1,000/=** per day, **Mr. Oduor** submitted that authorities abound for the proposition that documentary evidence is not the only way by which proof of income can be made. He relied on **Jacob Ayiga Maruja & Another vs. Simeon Obayo** [2005] eKLR and **Mumias Sugar Company Ltd vs. Francis Wanalo** [2007] eKLR and urged the Court to dismiss the appeal.

12. This being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon; and in doing so, I must bear in mind that I did not have the advantage of seeing or hearing the witnesses. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968] EA 123 it was held that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. With the foregoing in mind, I have given careful consideration to the evidence placed before the lower court in the light of the pleaded injuries. The Respondent gave uncontroverted evidence before the lower court to the effect that he was riding his **Motor Cycle Registration No. KMDG 111V** on **11 January 2016** along Eldoret-Kitale Road towards Eldoret Town direction when he was hit head on by **Motor Vehicle Registration No. KBM 384K**, matatu. He explained that the offending motor vehicle was in the process of overtaking another motor vehicle at high speed and without any proper look-out and thereby swerved onto his lane.

14. The respondent further told the lower court that he lost consciousness and later found himself at **Moi Teaching and Referral Hospital** where he was confined for 6 months, two of which he was in a coma. He testified that he suffered skull fracture, loss of 6 teeth, as well as paralysis on the right side of his body. After his discharge from hospital, he presented himself to **Dr. Sokobe (PW2)** for examination and for purposes of a medical report. He added that he was a businessman before the accident and used to transport bales of second-hand clothes (otherwise known as *mitumba*) from market to market on his motor cycle, from which he earned not less than **Kshs. 20,000/=** per month.

15. The plaintiff called **Dr. Sokobe** before the lower court as **PW2**; and he confirmed that, on **17 November 2017**, he examined the respondent, who presented a history of having been involved in a road traffic accident. From the treatment documents, he ascertained that the respondent had sustained the following injuries:

[a] Head injury with loss of consciousness for 2 months

[b] Skull fracture with large epidural haematoma

[c] Loss of six teeth (5 lower and one upper left molars)

[d] Paralysis of the right limbs

16. **PW2** further stated that, as of **17 November 2017** when the medical examination was done, the respondent was still experiencing weakness of the left upper limb, along with persistent headache. He accordingly formed the opinion that other than the loss of 6 teeth, the respondent also sustained severe head injury from which he had healed with paralysis of the right limbs. He assessed the respondent's permanent disability at 60%.

17. The respondent also called **Dr. Paul Rono (PW1)** of **Moi Teaching and Referral Hospital** as his witness before the lower court. He confirmed that the respondent was admitted at their facility from **11 January 2016** to **12 February 2016**. He produced the treatment documents and receipts issued to the respondent as **Exhibits 1 to 9** and mentioned that the respondent was attended to by several doctors for severe head injuries, fracture of the skull and haematoma. He confirmed too that the patient had suffered paralysis of the limb and loss of six teeth.

18. As no evidence was adduced before the lower court by the defence to controvert the respondent's, there is no dispute that the respondent was aged 42 years at the time of the accident. There is similarly no dispute as to the nature and severity of the respondent's injuries; namely:

[a] Head injury with loss of consciousness for 2 months

[b] Skull fracture with large epidural haematoma

[c] Loss of six teeth (5 lower and one upper left molars)

[d] Paralysis of the right limbs

19. The special damages component appears to be undisputed. In any event, the respondent produced a bundle of receipts before the lower court in proof thereof. Consequently, the only issue for determination is whether the general damages award of **Kshs. 6,500,000/=**, is a fair estimate in the circumstances for the loss, pain and suffering the respondent suffered, bearing in mind the nature of the injuries he sustained. Ancillary to that is the question whether the respondent was entitled to an award of **Kshs. 3,840,000/=** under the head of loss of earnings. In cases of this nature, it is often useful to bear in mind the words of caution expressed in **H. West & Son Ltd vs. Shephard [1964] AC 326**, are apt, namely, that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

20. I have similarly taken into consideration the enduring principle that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. Hence, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal held that:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages." (Also see **Butt vs. Khan [1981] KLR 349**)

21. The approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, and which I find useful, was thus:

"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

22. And, in Stanley Moore vs. Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

"...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

23. In the light of the foregoing, I have looked at recent awards and note as follows:

[a] In Jacqueline Syombua vs. B.O.G. Ekalakala Secondary School (supra) in which the plaintiff suffered 100% disability, she was awarded **Kshs. 6,500,000/=** general damages for pain, suffering and loss of amenities. In addition, she was awarded **Kshs. 3,000,000/=** for future medical expenses in a Judgment rendered on **4 March 2010**.

[b] In Jackson Wahome Ngatia vs. Agridutt (K) Ltd & Others (supra), the plaintiff suffered injuries that included fractures of the bones in the neck along with paralysis of both the upper and lower limbs. Permanent disability was assessed at 100%. An award of **Kshs. 4,500,000/=** for pain, suffering and loss of amenities was made on **4 March 2011**.

[c] In Bernard Mutisya Wambua vs. Swaleh Hashil [2017] eKLR, the plaintiff sustained severe skeletal and soft tissue injuries for which he was hospitalized over several months for treatment. He ended up with paralysis of his right hand and the use of his lower limbs. His degree of incapacity was assessed at 80%. An award of **Kshs. 6,500,000/=** was made on **3 November 2017** for pain suffering and loss of amenities.

[d] In Charlene Njeri Kuria vs. Githu Geoffrey & Another [2016] eKLR, in which the victim suffered partial paralysis of the lower limbs with 60% disability, an award of **Kshs. 5,000,000/=** was made on **30 November 2016** for pain, suffering and loss of amenities.

24. It is manifest then that the authorities relied on by counsel for the appellant are far from comparable; and that the proposal for an award of **Kshs. 1,000,000/=** for pain, suffering and loss of amenities is on the lower side; and is therefore for rejection. Guided by the authorities cited, it is my considered view that an award of **Kshs. 5,000,000/=** would suffice to meet the ends of justice in the matter in which disability was assessed at 60%.

25. The respondent also prayed for and was awarded **Kshs. 3,840,000/=** for lost earnings. Counsel for the appellant faulted the lower court for this award, contending that it is a special damage item that needed to be specifically pleaded and proved; and that not a shred of evidence was adduced by the respondent to support the allegation that he used to earn **Kshs. 1,000/=** per day from his business to justify that award. However, having looked at the Complaint dated **28 November 2017**, it is manifest, from paragraphs 7 and 8 as well as prayer (b) thereof that what was claimed was not loss of earnings, which is a special damage claim, but loss of earning capacity.

26. In Cecilia W. Mwangi & Another vs. Ruth W. Mwangi (supra), the Court of Appeal held that:

"Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of 'loss of earning capacity' can be classified as general damages but these have also to be proved on a balance of probability..."

Authorities abound to support the legal position that loss of earning capacity is a general damage claim to be proved on a balance of probabilities alongside the other components of general damages. Hence, in SJ vs. Francesco Di Nello & Another [2015] eKLR, the Court of Appeal acknowledged that:

"The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market."

27. It is therefore immaterial that the respondent pleaded a daily income of **Kshs. 1,000/=**; and while it is indeed the case that no proof of income by way of documentary evidence was given before the lower court, it is by no means implies that no evidence at all was adduced in this regard. In Hellen Waruguru Waweru Case (supra) the Court of Appeal proffered the following approach for the purpose of advancing the course of justice in such circumstances:

"This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR the Court observed:-

'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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."

28. In his evidence before the lower court, the respondent testified that he used to sell second-hand clothes from which he would earn an income of **Kshs. 20,000/=** per month. It cannot be gainsaid that, given the nature of his injuries, he is incapable of resuming his *mitumba* business, let alone ride a motor cycle. That evidence was uncontroverted as no evidence was called for the defence before the lower court. The respondent's age was, likewise, not disputed. Accordingly, a multiplier of 16 cannot be said to be unreasonable in the circumstances.

29. In the result, other than the adjustment on the award for pain, suffering and loss of amenities, I find no reason to interfere with the decision of the lower court. The appeal therefore fails and is accordingly dismissed with costs. The sums due to the respondent are confirmed as hereunder:

[a] General damages	Kshs. 5,000,000/=
[b] Special damages	Kshs. 251,127/=
[c] Loss of earnings	Kshs. 3,840,000/=
Total	Kshs. 9,091,127/=
Less 25% contribution	<u>Kshs. 2,272,781.75</u>
Net	Kshs. 6,818,345.25

30. The Judgment and Decree of the lower court is accordingly adjusted and substituted with Judgment in the respondents favour in the aforementioned sum of **Kshs. 6,818,345.25** together with interest and costs. Interest to accrue from the date of the lower court's decision.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF OCTOBER, 2020

OLGA SEWE

JUDGE