



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 17 OF 2019

ERIC NDAMBUKI NDEMANGE.....APPELLANT

-VERSUS-

JACKLINE KAKUVI MUTUA.....RESPONDENT

(Appeal from the Judgment of Hon. J.N Mwaniki (SPM) in the Senior Principal Magistrate’s Court at Makueni, Civil Case No.110 of 2008, delivered on 20th February 2019)

JUDGMENT

1. The Respondent sued the Appellant in the lower court seeking general damages, damages for lost earnings and lost earning capacity, costs and interest for injuries sustained in a road accident which occurred on 29/12/2005 along the Emali-Wote road. She averred that she was a fare paying passenger in the Respondent’s motor vehicle which was negligently driven by the Respondent hence the accident.

2. The Respondent filed a statement of defence and denied the claim. The parties consented on liability in the ratio of 85:15 in favour of the Respondent and the learned trial Magistrate proceeded to assess damages as follows;

General damages for pain, suffering &	
loss of amenities.....	kshs 2,500,000/=
Loss of future earning/earning capacity.....	kshs 1,500,000/=
Cost of future medical treatment.....	kshs 150,000/=
Special damages.....	kshs 2,500/=
Total.....	kshs 4,152,500/=
Less 15% contribution	
Net Total.....	kshs 3,529,625/=

3. Dissatisfied with the award, the Appellant filed this appeal through C.W Githae advocates and listed 3 grounds as follows;

- a) ***That, the learned Magistrate erred in law and fact in awarding Kshs.2,500,000/= as general damages for pain and suffering.***
- b) ***That, the learned Magistrate erred in law and fact in awarding Kshs.1,500,000/= for loss of future earnings/earning capacity.***
- c) ***That, the learned Magistrate erred in law and fact in awarding Kshs.150,000/= for future medical expenses.***

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. On ground (a), Mrs. Githae for the Appellant submits that the trial court erred in failing to take into account that the Respondent had a pre-existing severe infection to the left femur prior to the accident and that there was no evidence showing that the prior intervention had been corrected after the accident. She submits that the only injuries attributable to the accident, the subject of this appeal, are the ones in the

discharge summary from Makueni district hospital *to wit*, injuries to the face, right knee, right wrist and fracture to the nose. She contends that the trial court's judgment did not even make reference to her submissions which brought out this fact and as a result, it awarded an excessive amount.

6. She further submits that the reports of Dr. Wambugu confirm that the Respondent was being treated for femur bone osteomyelitis since 2002 and had been on follow up at PCEA Kikuyu hospital in respect to the bone infection. She contends that Kshs.200,000/= would have been adequate compensation and relies on **Nyeri HCCA No. 80 of 2008; Joel Kimithu –vs- Shadrack Kuira (2010) eKLR** where the Appellant was awarded Kshs.200,000/= for; injury on the frontal aspect of the chest, multiple cut wounds on the left hand around the wrist area, deep cut wound behind the right gluteus and multiple cut wounds right heel and ankle region.

7. On ground (b), she submits that the trial court failed to consider the physical state of the Respondent, particularly; whether she would have been able to work in light of her bone infection which had required treatment prior to the accident. She argues that the trial court also failed to consider whether the Respondent was actually in gainful employment prior to the accident. On this she relies on the case of **Mumias Sugar Company Ltd –vs- Francis Wanalo (2007) eKLR** where the Court of Appeal stated that;

“From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles among others emerge. 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 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 labor 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 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.”

8. Counsel further submits that courts can only make a global award in regard to damages for loss of earning capacity and contends that the Respondent conceded about her lack of formal and informal education that could have aided in sustaining herself. She also contends that there was concession from the Respondent about being infected by a disabling disease which required her to undergo radical surgery to remove the infected tissue and bone.

9. It is also her submission that the trial court failed to acknowledge that any award for loss of future earnings or earning capacity must be based on the facts of the case and actual evidence before it. She submits that the trial court would have discovered the disabling disease if it had carefully examined the evidence before it and would have held that the Respondent's chances of obtaining gainful employment were greatly diminished.

10. On ground (c), she submits that the Respondent does not require any future medical treatment as the implants she has *in situ* arise from her pre-existing condition and it would be unjust to saddle him with those costs. He submits that the discharge summary from Makueni district hospital does not show that the Respondent was inserted with metal implants as a result of the accident.

11. Counsel argues that the medical reports referred to implants which the Respondent had prior to the accident and the figure given for removing them at a public hospital was Kshs.40,000/=. She contends that the trial Magistrate did not give reasons as to why he awarded Kshs.150,000/= as opposed to the figure given by the doctor.

12. In response to the question of a pre-existing severe infection, Mr. Kivuva for the Respondent submits that the Appellant has merely put across his own arguments and understanding of the evidence and facts of this case. He submits that what the Appellant seems to be belaboring has properly been answered by her medical evidence on record which the Appellant did not challenge at all. He contends that if the Appellant had any questions regarding her injuries, he should have called the makers of the medical reports for cross examination.

13. He submits that during the Respondent's examination in 2008, Dr. Wambugu informed her that she had a pre-existing condition known as aesthrothitis but denies agreeing with the doctor's opinion in her evidence. He submits that her evidence is clear about her previous surgery to the left femur which healed well since she never went back to the hospital after surgery. He argues that the evidence does not show that the initial fracture was on the same area as the one sustained after the accident.

14. Counsel submits that the discharge summary from Makueni District Hospital shows that the Respondent sustained 'sub conyln fracture of the femur'. It is also his submission that the discharge summary from PCEA Kikuyu Centre shows that she was diagnosed with left femur fracture and treated for pin removal, suture removal and surgical toilet left distal femur. He submits that the various other documentary evidence on record shows that she sustained a fracture on the left femur, had metal implants which are still *in situ* and that her past medical history was non contributory.

15. Counsel further submits that Dr. Wambugu's medical report is at variance with the reports of Dr. Kiama and Dr. Wokabi with regard to her past medical history and its contributory effect to her injuries. He contends that the report was procured by the Appellant for the benefit of the insurance company. Further that Dr. Wambugu's report indicates that in early December 2005, she underwent removal of some metal implants left femur before the accident. The report does not show which documents were availed for the doctor to make that conclusion, and it does not show whether the stated bone osteomyelitis had any significant contribution to her injuries.

16. It is his submission that page 2 of the P3 form, which the Appellant chose not to attach to the record of appeal, shows that the Respondent sustained a fracture on supralondylor left femur and was done open reduction and internal fixation.

17. Counsel argues that the Appellant proposed an award of Kshs.600,000/= before the trial court and cannot now submit Kshs.200,000/= as

general damages.

18. On ground (b) he submits that the distinction between loss of earning capacity and loss of future earnings was brought out in the case of **SJ –vs- Francesco Di Nello & Anor (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 Llyod’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.”

19. Counsel submits that the facts of the Respondent’s employment or inability to work were not interrogated by the Appellant at all and contends that it was her evidence that she was being paid in cash and had a letter of employment save that she forgot to carry it to court. He submits that the multiplier method would have translated to Kshs.5,258,256/= $[10,954.70(\text{minimum wage}) \times 40 (\text{multiplier}) \times 12]$ but she is in agreement with the award given by the court.

20. It is also his submission that it is not necessary for one to avail documentary evidence to prove earnings and relies on the case of **Nelson Rintari –vs- CMC Group Ltd (2015) eKLR** where the Court held that;

“...I agree a wrong doer must accept the victim as he finds him. The Respondent cannot therefore urge the Court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent’s submissions are accepted, this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further, this would go against Article 159(2)(d) of the Constitution of Kenya 2010 which obliges Courts to do justice without procedural technicalities..”

21. Counsel submits that the trial court had the advantage of observing her demeanor and accessing her injuries as she gave her testimony. She contends that the Appellant had proposed a token award of Kshs.50,000/= in the trial court and cannot now propose to have the award set aside in its entirety.

22. On ground (c), he submits that Dr. Wokabi’s medical report estimated the cost of removing the implant at Kshs.150,000/= which is the amount that was awarded. She submits that Dr. Wambugu’s estimation of Kshs.40,000/= was done in 2008 while that of Dr. Wokabi was done in 2017. He therefore submits that the Appellant has not shown that the trial court acted on wrong principles or that the awards were extremely high or low so as to amount to erroneous estimates.

Analysis and determination

23. Section 78(2) of the Civil Procedure Act gives an appellate court the same powers to those of the lower court. It provides:

“(2) Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

24. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it’s own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. This was stated in the case of **Oluoch Eric Gogo –vs- Universal corporation Ltd (2015) eKLR** where the court stated:

“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER –VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER 91968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....”

.....From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court’s finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally”.

25. Having considered the grounds of appeal, the rival submissions and entire record it is my considered view that the following issues arise for determination;

a) Whether the Respondent had a pre-existing condition.

b) Whether the quantum of damages should be disturbed

Issue no. (a) Whether the Respondent had a pre-existing condition

26. According to the Appellant, the fracture to the left femur was a pre-existing condition. The only injuries which he considers to be directly attributable to the accident are; injuries to the face, right knee, right wrist and fracture to the nose.

27. The accident happened on 29/12/2005 (*material day*) and the discharge summary from Makueni District Hospital (P.Ex-6) shows that the Respondent was admitted at the facility on the material day and discharged on 04/01/2006. The document shows that an x-ray revealed a supracondylar fracture of the knee.

28. The P3 form (P.Ex-7) shows that she was sent to hospital on the material day and with regard to '*lower limbs*', the information indicated is '*fracture of supracondylar left femur-done open reduction and internal fixation*'. It is also noteworthy that Dr. Wambugu, the Appellant's doctor, agreed in his medical report dated 26/11/2008, that discharge summaries and X-rays taken on the material day were availed to him and they showed a supracondylar fracture of the left femur.

29. It is therefore evident that the Respondent was diagnosed with a fractured left femur after the accident. In any case, the long period of hospitalization cannot have been due to soft tissue injuries and a fractured nose! Further, the documents do not show that the Respondent had metal implants *in situ* during the initial examination. I do not think that an x-ray would have failed to reveal implants if at all they were there. Accordingly, I find no basis for the Appellant's submission that the medical reports referred to implants which the Respondent had prior to the accident.

30. In cross examination, the Respondent (Pw1) agreed that she had fractured her left femur prior to the accident and surgery was done. She however stated that she never went back to the hospital after the surgery. Dr.Kiama examined the Respondent on 25/09/2008 and his medical report indicates that the Respondent's past medical history was non-contributory. On the other hand, Dr. Wambugu opined as follows; "*From the availed past medical history, discharge summaries, x-rays and findings on physical examination, it is apparent that Jackline has had a long term ailment of the left leg which has necessitated multiple surgical intervention.Chronic osteomyelitis weakens the bone(s) affected.*"

31. Dr. Wambugu's report relied mainly on information which he was apparently given by the Respondent. According to him, the Respondent admitted that she had been on follow up at the PCEA Kikuyu Hospital regarding the bone infection and treatment for the same for a long time. It is noteworthy that Dr. Wambugu examined the Respondent approximately 3 years after the accident and the evidence shows that the Respondent had been admitted at the said hospital for a long time within the 3 years.

32. The probability is that the follow up which the Respondent admitted to have been going through was directly linked to the injuries she sustained in the accident. Further, there is no evidence that the Respondent had multiple surgical interventions prior to the accident. Her evidence was that she never went back to the hospital. From my re-evaluation of the evidence, I do not see any nexus between the Respondent's past medical history and the injuries sustained from the accident. Accordingly, there was no pre-existing condition to be factored in by the trial Magistrate.

Issue no. (b) Whether the quantum of damages should be disturbed.

33. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established and captured in **Butt –vs- Khan (1982-88) KAR** as follows;

"An appellate court will not disturb an award for general 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."

General damages for pain, suffering & loss of amenities

34. In **Halsbury's Laws of England 4th Ed, vol. 12(1) page 348**, the justification for the award of damages for pain and suffering is explained as follows;

"883. Pain and suffering. Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate."

35. From the discharge summaries of Makueni hospital, PCEA Kikuyu Hospital and Bishop Kioko hospital, the Respondent was hospitalized for 172 days. Dr. Kiama categorized the injuries as grievous harm and opined that the Respondent suffered blood loss, pains and soft tissue injuries. Dr. Wambugu agreed that the accident resulted in severe trauma. Dr. Wokabi examined the Respondent on 16/07/2018 and his opinion was that she suffered acute pain and blood loss. The wounds on the face healed but left multiple prominent scars which are cosmetically unsightly. According to him, it is unfortunate that the scars are not the type that will require plastic surgery.

36. There is no doubt that the Respondent suffered a lot of pain and has endured anguish as a result of the injuries. Being a lady, it is obvious that the unsightly scars on her face have compounded her anguish.

37. As for loss of amenities, the **Halsbury's Laws of England (supra)** states as follows;

"884. Loss of amenities -

In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it."

38. Dr. Wambugu's prognosis is that the fracture has united but with residual stiffness of the knee joint. She also has multiple remnant scars on the face and right arm. He awarded 8% as the degree of partial permanent incapacitation. Dr. Wokabi assessed her permanent disability at 55%. He examined the Respondent recently and her complaints at the time of examination were;

- a) Difficulties of getting around. Travelling in any type of vehicle is very difficult because of her inability to bend the left knee.
- b) Difficulties walking up and down steep inclines. She cannot jump across anything.
- c) She cannot kneel or squat. She is not able to use pit latrines.
- d) She cannot wear normal shoes because of the deformity on the left foot.
- e) She cannot participate in any games or sports. She cannot dance either.
- f) Because of the condition of her leg, she was not able to finish college and she has never been well enough to resume.

39. It is evident that the Respondent's ability to enjoy certain aspects of her life were diminished. She testified that she cannot have a life, cannot be married and cannot have children. Her quality of life has certainly changed from what it was before the accident.

40. **Edward Mzamili Katana vs. CMC Motor Group Ltd & Another [2006] eKLR**- the 52 year old Plaintiff suffered injuries which resulted in the shortening of his leg and was Kshs. 2,000,000/= damages for pain and suffering and loss of amenities.

41. In **Mehari Tewoldge T/A Mehari Transporters Ltd vs. Muasya Maingi [2013] eKLR**- the plaintiff suffered 8% incapacity as a result of the injuries was awarded Kshs.1,500,000/- general damages.

42. Taking all the above into consideration, it is my view that the award of Kshs.2,500,000/= is reasonable and should not be disturbed.

Loss of Earning capacity

43. The Appellant faulted the trial Magistrate for failing to consider whether the Respondent was actually in gainful employment prior to the accident. From the **Francis Wanalo case (supra)**, damages for loss of earning capacity are awardable whether or not the plaintiff was employed prior to the accident. The Respondent testified that prior to the accident, she was a hair dresser at Makindu earning between Kshs8,000/= to Kshs.10,000/= per month.

44. In **SBI International Holdings (AG) Kenya -vs- William Ambuga Ongeru [2018] eKLR**, the Respondent was 54 years and his permanent disability was assessed at 45%. He was a driver prior to the accident. An award of Kshs.1,500,000/= for loss of earning capacity was upheld on appeal.

45. The work of a hairdresser involves a lot of standing up and from the consequences of her injuries and resultant disability, there is a risk that she will not get suitable employment in future. Accordingly, I am in agreement with the trial Magistrate that the award of Kshs1,500,000/= is a reasonable and conservative figure.

Future Medical Treatment

46. Dr.Kiama estimated the costs of removing the implants at Kshs.95,000/=, Dr. Wambugu estimated the cost to be Kshs.40,000/= at PCEA Kikuyu hospital or KNH and Dr. Wokabi estimated the cost to be Kshs.150,000/=. The reports by doctor Wokabi and Wambugu were specifically admitted into evidence by consent of the parties hence they waived their rights to cross examine the makers.

47. There is no reason given for the varied estimated costs. PCEA Kikuyu hospital and Kenyatta national hospital are very good hospitals with excellent services. To minimize expenditure I would go for either of them and so make an award of Kshs.50,000/= on that end.

48. I therefore set aside the award of Kshs.150,000/= for costs of future medical treatment and substitute it with Kshs.50,000/=. The other awards remain undisturbed.

49. The judgment of Kshs.3, 529,625/= is set aside and substituted with one of Kshs.3,444,625/= plus costs and interest. The Respondent is awarded costs of the appeal.

Delivered, signed & dated this 11th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge