



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. 3 OF 2018**

**MAGDALINE NZILANI MUTENDE**

alias **MAGDALE KINGOO**.....**APPELLANT**

**-VERSUS-**

**KENNEDY MUTWIL**.....**RESPONDENT**

*(Being an Appeal from the Judgment of Hon. Ruguru .N. (SRM) in the Senior Principal Magistrate's Court at Makueni Civil Case No.165 of 2016, delivered on 19<sup>th</sup> December 2017)*

**JUDGMENT**

**INTRODUCTION**

1. The appellant filed a suit in the lower Court against the respondents seeking general damages, special damages, cost of the suit and interest for injuries sustained in a road accident on 19<sup>th</sup> February 2016(*herein after 'the material day'*) along the Wote-Makindu road.
2. The respondent filed his defense and after close of pleadings and conclusion of preliminaries, the matter was heard and judgment eventually delivered.
3. Aggrieved by the entire judgment, the appellant filed the instant appeal and listed 4 grounds as follows;
  - a) *The learned Magistrate misdirected herself in law and fact by failing to award general damages for diminished earning capacity or such an award on general damages for pain and suffering as is commensurate to the degree of incapacity.*
  - b) *The learned trial magistrate misdirected herself in law and fact by failing to appreciate the degree and/or standard of proof for claim on diminished earning capacity.*
  - c) *The learned trial magistrate erred in law and fact by failing to appreciate the evidence adduced by the appellant that gave rise to an inference that her capacity to earn had diminished.*
  - d) *The learned Magistrate's erred in law and fact by failing to consider the appellant's submissions and authorities on awards made in similar cases.*
4. The appeal was canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
5. 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
6. Having looked at the grounds of appeal and the rival submissions, the only issue for determination is whether the trial Court erred by failing to award general damages for diminished earning capacity.

**Whether the trial Court erred by failing to award general damages for diminished earning capacity.**

7. The principles which an appellate Court should have in mind when called upon to disturb the quantum of damages awarded by a trial Judge were laid down in **Kemfro Africa Ltd & Anor. –vs- Lubia & Anor (1982-88) KLR** where the Court of Appeal expressed itself as follows;

***“In deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, an appellate Court must be satisfied that the judge in assessing the damage took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***

8. The appellant was examined by Dr. Musyoki and Dr. Wainaina and they prepared medical reports which were produced as evidence. It is evident that the appellant’s left arm was amputated at the shoulder level. Both doctors agreed that the degree of permanent incapacity was 50% and that she would not be able to use her left arm without an implant.

9. In her evidence in Court, the appellant testified that the amputation had adversely affected her life as a farmer and that she could no longer use farm tools such as machinery, jembe and pipes. That it was difficult to continue with her life with one hand and she had to rely on casual laborers to assist her with domestic chores as well.

10. On cross-examination, she said that her right hand was still effective but it was hard to use one hand. That she was farming horticultural crops and earning Kshs.70, 000/= after every three months from selling farm produce. She said that she didn’t have receipts as their products are not receipted. At the time of testifying, she said that she was keeping poultry and bees and selling two crates of eggs every day but was earning less.

11. In re-examination, she said that horticulture was more lucrative compared to livestock and poultry.

12. In dismissing the claim for diminished earning capacity, the trial magistrate stated as follows;

***“The plaintiff though pleaded for diminished earning capacity, from her evidence, she was a farmer growing horticultural produce but is now a poultry farmer. It is therefore clear that though she is not able to use her both hands, her earning capacity has not been diminished. She is still in the farming business eking out a living. It is my view that, on a balance of probability, the plaintiff did not prove loss of earning capacity and the claim under this head must therefore fail.”***

13. The appellant submitted extensively on why the award should be disturbed and the respondent maintained that the trial magistrate was right in disallowing the claim.

14. The Court of Appeal has expressed itself on when the award under consideration should be made. The appellant referred this Court to *inter alia* the case of **Mumias Sugar Company Ltd –vs- Francis Wanalo (2007) eKLR** where the Court of Appeal held that;

***“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of future 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. 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- Rey Rolle & Company Ltd (1977)1 WLR 132. In that case, Browne LJ said at page 140, paragraph B:***

***“This head of damages generally only arises where the plaintiff is at the time of trial in employment, but there is a risk that he may lose his 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 earnings which can already be proved at the time of trial.”***

15. The respondent relied on **Ndoro Kaka Kakondo –vs- Salt Manufacturers (K) Limited (2016) eKLR** in the trial Court and before this Court. The learned Judge of the Industrial Court (*as it then was*) stated that;

***“Damages for loss of future earning capacity and/or diminished earning capacity, unlike damages for loss of earnings, is a type of remedy based on the claimant’s potential earning power. It focuses on the claimant’s ability to earn income. The remedy is granted based on the difference in potential earning power, not on what the claimant actually earned in the past. Even if a person is unemployed at the time the injury occurs, he would be entitled to pursue damages for loss of future earning capacity or diminished earning capacity. This item is therefore treated as general damages, which though not required to be specifically proved, must be proved on the balance of probability.”***

16. What is clear from the above authorities is that for a party to succeed in this claim, all they need to show is that the capacity to earn has been lessened compared to how it was before the offending act. It does not mean that the capacity to earn must be totally lost. In my understanding, ‘diminished’ means ‘to make small or less’. The trial magistrate’s statement that ‘...the plaintiff did not prove loss of earning capacity...’ is a clear indication that she misapprehended the applicable principles.

17. So, did the appellant demonstrate that her capacity to earn was lower than it was prior to the accident? From the evidence, the appellant was self-employed in the horticultural business which she had to abandon and venture into poultry farming and bee keeping. The reason for this being that she could no longer use her two hands to use farm implements and operate machinery. According to her, horticulture was more lucrative than the current venture. This evidence was not rebutted.

18. Our jurisdiction is awash with authorities to the effect that failure to substantiate pleadings by calling witnesses or adducing other evidence means that they remain mere averments or denials. As rightly submitted by the appellant, the trial magistrate should have believed the testimony and it was therefore erroneous to find that the burden of proof was not discharged.

19. Further, it is a fact that the appellant was incapacitated and even the trial magistrate acknowledged that she could not use her two hands.

20. The confirmation by the doctors that the appellant suffered a 50% incapacity is a relevant factor which was overlooked by the trial magistrate because it buttressed the impact of the amputation on her earning capacity in the sense that the inability to use both hands forced her out of a more lucrative business.

21. I respectfully do not agree with the respondent's submissions that the change from one business to another was voluntary. I do not think it's natural for people to abandon lucrative businesses for less lucrative ones without a compelling reason. In a nutshell, it is not a question of whether the appellant is still getting an income but whether her income is now less because of an incapacity caused by the accident.

22. I now turn to consider the amount that will reasonably compensate the appellant for the diminished earning capacity. In the trial Court, the appellant had proposed an award of Kshs.1,500,000/= and relied on the Mumias Sugar Company case (*supra*) where the incapacity suffered was loss of the fifth finger of the right hand and inability to fully extend the right fourth finger.

23. The degree of incapacity was assessed at 15% by one Doctor and 10 % by another. The Court made an award of kshs.500,000/=.

24. In **John Kibicho Thirima –vs-Emmanuel Parsimei Mkoitiko (2017) eKLR** the injuries involved fractures of the pelvis, right hand, leg, ribs and mandibles resulting to 35% incapacity. The plaintiff was awarded Kshs.600,000/= for diminished earning capacity.

25. In **Cosmas Kipkoech Sigei –vs- Madrugada Ltd & Another, Nakuru Hccc No.176 of 2005**, the plaintiff suffered a traumatic amputation of the left hand at the wrist joint. Permanent incapacity was assessed at 65% by Dr. Ng'etich while Dr. Malik assessed it at 60%. Justice D. K. Maraga awarded ksh.2 million for pain and suffering, ksh.750,000/- for lost years and ksh.700,000/- as costs of prosthesis in June, 2010.

26. I find the case of Cosmas Kipkoech Sigei (*supra*) relevant to the instant case and I have considered the fact that it was decided eight years ago as well as the inflationary trends. It is my considered view that an award of Kshs.1,000,000/= is reasonable compensation for diminished earning capacity. The amount will be subjected to 10% contribution (100,000/=) giving a net figure of Kshs.900,000/=.

27. For avoidance of doubt, this award is in addition to the one which had been made by the trial magistrate.

#### **CONCLUSION**

The court finds that the appeal has merit, and thus makes the following orders;

- **The court thus makes an award of Kshs.1, 000,000/= for diminished earning capacity. The amount will be subjected to 10% contribution (100,000/=) giving a net figure of Kshs.900, 000/=.**
- **Parties bear their own costs.**

**DATED, DELIVERED, SIGNED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2019 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**