



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 56 OF 2017

NJUGA CONSOLIDATED CO. LTD.....1ST APPELLANT

DAVID MACHARIA WANGU.....2ND APPELLANT

Versus

LINETH CHEMUTAI MORITIM a.k.a LINET CHEMUTAI MARITIM....RESPONDENT

(Being an appeal from the Judgment dated 5th April, 2017 delivered

by J. Kituku Principal Magistrate in Kiambu CMCC No. 171 of 2015)

J U D G M E N T

1. This appeal emanates from the judgment of Kituku, Principal Magistrate in Kiambu CMCC No. 171 of 2015. By the Plaint dated 25/6/2015, the Plaintiff in the lower court and now the Respondent herein sued the Defendants now the Appellants, claiming compensation for serious injuries she sustained on 14th September, 2012, while lawfully travelling as a passenger in motor vehicle registration number **KBP 575W**. She averred that the 2nd Defendant so negligently drove the said motor vehicle that he caused an accident and as a result, she sustained injuries..

2. The Appellants filed a Defence dated 9th September, 2015, denying any liability for the accident. In particular, the Appellants pleaded inevitable accident. The matter proceeded to a full hearing. Liability was entered against the Appellant at 100% in favor of the Respondent. On quantum, the trial Magistrate entered judgment as follows:

- | | | |
|--------------------------------|-------|-------------|
| a. General damages | Kshs. | 5,000,000/= |
| b. Diminished earning capacity | Kshs. | 3,456,000/= |
| c. Special damages | Kshs. | 226,230/= |

3. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present appeal based on the following grounds:-“

- a. The learned magistrate erred in law and fact in failing to appreciate the evidence of the 2nd Appellant with regard to the occurrence of the accident.
- b. The learned Magistrate erred in law and fact in finding the Appellants 100% liable for the accident.
- c. The Learned Magistrate erred in law and fact in failing to find that the occurrence of the accident was inevitable.
- d. The Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions and authorities attached thereto while assessing damages.
- e. The Learned Magistrate's award was an erroneous estimate of the damages due in the particular case.
- f. The Learned Magistrate erred in law and in fact in awarding Kshs. 5,000,000/= as damages for pain and suffering.

g. The Learned Magistrate erred in law and in fact in awarding Kshs. 3,456,000/= as damages for diminished earning capacity.

h. The Learned Magistrate erred in law and fact in awarding the costs of the suit with interest to the Respondent.”

4. The Court directed that the appeal be disposed of by way of written submissions followed by oral highlighting. In their written submissions, the Appellants asserted that the correct approach in awarding damages entails the application of recent awards in comparable cases as held in the case of *Tayab vs Kinanu (1983) eKLR*. Counsel submitted that the trial court failed to provide the basis for awarding Kshs. 5 Million in general damages for pain and suffering which was said to be inordinately high. Counsel cited several cases among them *Akamba Public Road Services v Abdikadir Adan Galgalo (2016) eKLR*, *Makau Kiswili v Athi-River Mining Ltd 2009) eKLR* and *Pyramid Packaging Limited v Humphrey W. Wanjala (2012) eKLR* and placing reliance on the cited authorities, invited the court to set aside the award of Kshs. 5 million and replace the same with an award of 2 million.

5. In regard to the award of damages for loss of earning capacity, counsel contended that this award once proved is available to a claimant but there is no formula as held in the case of *SJ VS Francesco Di Nello & Another (2015) eKLR* where the court awarded Kshs. 1,500,000 for loss of earning capacity for a 15 year old who had been rendered 100% paraplegic. In the instant case, counsel contended, an award of Kshs. 750,000/= would be sufficient. It was further contended that in any case, no evidence was placed before the court to prove the Respondent's income as pleaded.

6. The Appellant cited in support of the above propositions the case of *Henry Moriasi Osiemo v Quid J Mohamed & Merali Mfadhuli (2001) eKLR* where Waki J(as he then was) noted that loss of earning capacity damages has to be proved and that the Plaintiff cannot throw figures at the judge. Further, counsel stated that in assessing the Respondent's loss of earning capacity, the Magistrate ought to have accounted for the Respondent's degree of disability as decided in the case of *Charles Mwaniki Muchiri v Coastal Kenya Enterprises Ltd (2016) eKLR*. Lastly, counsel submitted that no interest should accrue on the award for loss of earning capacity.

7. The Respondent filed her written submissions in defence of the awards in the trial court. The case of *Kemfro Africa Limited vs A.M Libia & Olive Lubia 727(1985) eKLR* was relied upon concerning the principles upon which an appellate court can interfere with the trial court's award on general damages. Counsel submitted that there is no factor of facts which the trial court failed to consider in arriving at the awards. Counsel urged the appellate court to exercise its jurisdiction of review with caution as held in the case of *Kiruga vs Kiruga & Another (1988) KLR 348* because the court did not have the advantage of hearing witnesses and observing the severity of injuries. In the Respondent's view, the awards in this case cannot be said to constitute an erroneous estimate.

8. Counsel urged the court to uphold the lower court's award and relied on several decisions namely; *Geoffrey Mwaniki vs Ibero (K) & Ano. Nairobi HCCC No. 578/2010* ; *Agnes Ndegwa vs Kenya Power & Lighting Company Embu HCC NO. 119/2008*; *Rugendo James Joseph vs Kenya Power & Lighting Company(2011)e KLR* ; and *J.S suing as father and next friend of KSA vs Kenya Power & Lighting Company (2015) e KLR*. In regard to damages for loss of earning capacity, it was contended that both the global and multiplier approaches have been adopted by the courts in calculating the loss of earning capacity and that the trial court cannot be faulted for adopting one of the approaches. Reliance was also placed on the case of *Jacob Maruja & Another vs Simeone Obayo CA No. 167/2002 (2005) eKLR* where the court rejected the contention that only documentary evidence can prove income. In conclusion, counsel submitted that the Appellants had not shown any valid ground on which to fault the lower court judgment in regard to damages for loss of earning capacity and that the Respondent is entitled to interest.

9. Subsequently, the parties elected to orally highlight their respective written submissions. Counsel for the Appellants contended that the Appellants contributed Kshs.2 million towards the Respondent's medical treatment. He insisted that no reasons were given for the trial court's award of Kshs. 5 million in general damages and that the method of multiplier and multiplicand employed was erroneous. It was argued that awards in general damages have far reaching effect on the economy. In regard to interest, counsel contended that the same should not attract in respect of damages for lost earning capacity.

10. The Respondent for her part, contended that the Appellants were meeting their obligation in advance when they made payments towards the Respondent's treatment. Counsel stated that there was nothing to show that certain key evidential matters were not considered by the trial court. The award was defended, counsel asserting that both multiplier and global approach were said to be applicable and thus court cannot be faulted for using any of the said approach. Lastly, the sum of Kshs. 400/= as daily wage was said to be below minimum wage and the court was urged to apply the guidelines on minimum wage applicable in 2015.

11. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. That duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify see *Peters v Sunday Post Limited (1958) EA 424*; *Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123*, *Williams Diamonds Limited v Brown (1970) EAI I*.

12. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278* stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

13. The point of contention in these appeals is the quantum of damages awarded in the lower court, viewed as inordinately high by Appellants. I propose to deal separately with each head of damages in contention. While doing so, the court will be guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30*.

It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.**

14. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that *“an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance”*.

Damages for pain and suffering

15. The Plaintiff’s evidence in the lower court was that she sustained extensive burns on her head, torso and several skeletal injuries. She was admitted at Nairobi West Hospital High Dependency Unit for 15 days and later admitted at Kenyatta National Hospital (KNH) for 3 months. See **P Exh 3 and 4** being respective discharge summaries.

16. A year since the accident she was examined by **Dr. Wokabi**, a consultant surgeon. His report, produced as **PExh. 9(a)** at the trial confirms extensive deep burns on the head, chest, back, both upper and lower limbs, and compound fracture to right tibia and fibula bones. The report confirmed the Plaintiff’s evidence that despite extensive surgical toilet and grafting procedures the injuries healed after a year, leaving prominent scars on the forehead, left cheek and left pinna. There were also nodular scars on the right arms and forearm. The entire left upper limb had extensive scarring **“with no normal skin being visible”**.

17. Moreover, the Respondent had lost four fingers of the left hand at the metacarpal phalangeal joint while a part of the left thumb was missing. The left hand was rendered rigid and stiff as a result of which the Plaintiff could not grip or grasp with it. There was also extensive scarring of the trunk, front and back and left leg. The tibia/fibula fracture had healed.

18. In the surgeon’s opinion, the burns covered an excess of 60% body surface area and occasioned a lot of pain and loss of fluid. Further pain was experienced in subsequent surgical skin grafting and dressing over the long treatment and recuperation period. The resultant disfigurement occasioned by scarring over more than 80% of the body was a permanent feature, likely to adversely affect her psychologically. According to the doctor no amount of plastic surgery could ease the disfigurement. The Plaintiff had also lost most of the left-hand function due to the loss of fingers. Total permanent disability was assessed at 60%.

19. Undoubtedly, the Respondent sustained severe injuries and suffered a lot of pain and suffering. The trial court correctly set out the Respondent’s injuries but unfortunately failed to relate them to the authorities cited in submissions before it. The Appellants are therefore justified to attack the award of KShs.5million for want of justification through analysis of the legal authorities cited vis-à-vis the instant case. While it is near impossible to find two cases where Plaintiffs suffer similar injuries, it is the duty of the trial court to consider the injuries of the Plaintiff before it and find the most comparable authority placed before it for purposes of awarding general damages.

20. That said, the decision in **Akamba Public Road Services v Abdikadir Adan Galgalo [2016]** relied on by the Appellants at the trial were only relevant to this case in so far as the Plaintiff therein had sustained, like the Respondent herein, a fracture to the tibia/fibular bone and soft tissue injuries leaving a 3% permanent disability. The award of KShs.800,000/= in general damages was set aside and substituted with an award of KShs.500,000/= on appeal. More relevant perhaps was the case of **Makau v Athi River Mining Ltd [2009] e KLR** where the Plaintiff suffered 60% burns on his body surface resulting in scarring to the neck and pinna and 20% disability. He was awarded KShs.1.5million in 2009 for pain and suffering.

21. Evidently, the Respondent herein suffered severe scarring over a large part of her torso, and the upper limbs and ended up with a higher permanent disability. The only relevance the case of **Pyramid Packaging Ltd v Humphrey W. Wangala [2012] e KLR** might have to this case was the fact that the plaintiff therein sustained traumatic amputation of 3(three) fingers on the left hand and 15% permanent disability. He was awarded KShs.650,000/= for pain and suffering.

22. Similarly, none of the injuries suffered by the plaintiffs in the authorities cited by the Respondent were on all fours with the present case. The plaintiff in **Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd and Another (2014) e KLR** sustained a compound fracture to the left tibia/fibula bone, associated soft tissue injuries and a collar-bone fracture. He sustained 60% total disability as the affected leg was amputated as a result of gangrene. He was awarded KShs.2,500,00/= as general damages in 2014. The plaintiff in **Agnes Wanjiku Ndegwa v Kenya Power and lighting Ltd [2014] e KLR** suffered extensive burns to the neck, upper trunk, thigh buttocks left and right lower limbs and feet. She lost the right fifth toe. Total permanent disability was assessed at between 30 and 35% by two doctors. She was awarded KShs.1,300,000/= in 2014 for pain and suffering.

23. The court awarded KShs.3000,000/= as general damages for pain and suffering to the plaintiff in **James Joseph Rughendo v Kenya Power and Lighting Co. [2011] e KLR, in 2011**. He had sustained 70% permanent disability following electrical shock which caused:

- bilateral damage of upper limbs –radial- ulna and median nerve
- third degree electrical burns to 40% of both palms and hands
- gangrene to right leg leading to amputation below the knee

- gangrene to the left dorsal aspect leading to amputation of the left big toe and part of the second toe.

24. His prognosis was adverse as there was no likelihood of recovering the use of both his hands. I thus agree somewhat with the Appellants that the plaintiff in **Rughendo's case** sustained more severe injuries than the Respondent herein. Nevertheless the authority is useful in guiding the court arrive at an appropriate assessment.

25. The case of **J.S (suing as father and next friend of K.S) V Kenya Power and Lightning Ltd [2015]e KLR** also involved burn injuries due to electric shock. The minor had suffered superficial burns to the right upper limb (11%), the right leg (6%),and superficial and deep burns on the right foot (4%). The injuries left ugly scars and displacement of the left elbow joint and loss of 20% of body skin. He was awarded KShs.1,900,000/= in general damages for pain and suffering. The injuries suffered by present Respondent are therefore more severe and accompanied by a poor prognosis.

26. The key injuries sustained by the Respondent herein were the 60% burns, extensive scarring over her body due to repeated surgical procedures, fracture of tibia and fibula and loss of the four fingers of the left arm. The medical report paints a poor prognosis with regard to the permanent scarring over a large portion of the body and loss of the use of the left hand. The resultant permanent disability was assessed at 60%. The Respondent had been hospitalized for almost four months and endured multiple surgical procedures over a period of one year since the occurrence of the accident.

27. Having considered all the foregoing, the court agrees with the Appellant's criticism of the lower court that the award of KShs.5million in general damages was not based on any analysis of relevant facts against precedent and ended up with an assessment that is so inordinately high as to be an erroneous assessment. Had the trial court analysed the facts of this case against the authorities placed before him, he would have awarded at most, a sum more proximate to the case of which represented more severe injuries. 28. In my own view, despite the severity of injuries in **Rughendo's case**, it is instructive for purposes of comparison. The court has also to consider inflation over time, the psychological trauma which the surgeon said was caused to the Respondent, a young lady on all accounts, due to the extensive and permanent scarring over her body.

29. General damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff – see **HALSBURY'S Laws of England 4th Ed. Reissue Vol 12(1)** at page 348, paragraph 883.

30. The sentiments of the English court in **Lim Poh Choo v Health Authority (1978)1 ALLER 332** cited by the Respondent were echoed by Potter J in **Tayab v Kinany (1983) KLR14**, quoting dicta by Lord Morris Borth-y-Gest in **West (H) v Sheperd (1964) AC 326**, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (emphasis added)

31. The Respondent defends the award of KShs.5million as general damages, which in my considered view is on the higher side. The Appellants on their part urge an award of KShs.2million. This sum does not in my considered view take into account the multiplicity of injuries suffered by the plaintiff herein and attendant sequela. In my considered opinion the award of 5 million was too high, but an award of KShs.3000,000/= (three million) in general damages for pain and suffering would be appropriate in this case. The award in the court below is therefore set aside and accordingly substituted with the latter award.

Damages for loss of Earning Capacity

32. In the **Mumias Sugar Company v Francis Wanalo(2007)eKLR**, the Court of Appeal distinguished an award for damages in respect of lost earnings and that for diminished earning capacity by restating its findings in **Butler v Butler (1984) KLR 225**, where, a plaintiff who was not in employment before suffering injuries that rendered her incapable of ever finding a suitable job, was awarded damages for loss of earning capacity.

33. The Court of Appeal stated:

“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 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 the future.....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 factor into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

34. In its **decision in SJ V Francesco Di Nello & Another (2015)eKLR**, the Court of Appeal reiterated the distinction between claims made in respect of loss of future earnings and loss of earning capacity by stating:

“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 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 THUMPSON LTD [1973 2 LLOYD'S LAW REPORTS 40 at pg. 14 wherein Lord Denning MR. said as follows:

“It is important to realise 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.”

35. It is clear from the averments in paragraph 4 of the plaint that the Respondent herein sought damages for loss of earning capacity, in other words, general damages. There is nothing to suggest that the trial magistrate confused the two heads in his judgment. He stated *inter alia* that:

“Plaintiff stated she was a casual laborer earning KShs.400/= per day for six days. She was employed by the 1st Defendant. She did not produce any document to support that, and all parties agree that court could use the minimum wage guideline. She was 35 years and could have worked up to 60 years.”

36. Although the Respondent's evidence on this score was scanty, the trial court was obligated, notwithstanding, to do its best in the circumstances and to assess damages. see **Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR** where the Court of Appeal stated *inter alia*:

“But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ... we do not subscribe to the view that the only way to prove the profession of a person must be by way of 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.”

37. Damages for loss of earning capacity may be calculated by way of multiplier or the award of a global figure. Although the Appellants now complain on this appeal regarding the use of a multiplier approach, they had themselves proposed such an approach in their submissions at the trial. However their criticism of the trial court's use of the minimum wage applicable in 2015 rather than 2012 is valid. The applicable minimum wage in 2012 was KShs.7,916/= per month. The proposal on this appeal that the total award ought to have been subjected to the proven degree of incapacity is evidently an afterthought. It was not argued at the trial by the Appellants. In their submissions before the lower court, the Appellants had urged the use of the minimum wage applicable in 2012, that is, KShs.7,916/= per month. They also proposed a multiplier of 30 years. This is reasonable to my mind. Thus, $KShs.7,916 \times 12 \times 30 = KShs.2,849,760/=$ is awarded for loss of earning capacity.

I find no merit in the challenge to the application of interest on the award for loss of earning capacity.

38. In view of the foregoing, the court sets aside the award in respect of general damages for pain and suffering and for loss of earning capacity and substitutes therefore the following awards:-

- a) Damages for pain and suffering KShs.3,000,000/= [Three Million]
- b) Damages for loss of earning capacity KShs.2,849,760/=.

The grand total, including specials awarded by the lower court at KShs.226,230.50, is KShs.6,075,990.50 [Six Million Seventy Five Thousand, Nine Hundred Ninety and Fifty cents). As the appeal has partially succeeded, the Appellants are awarded half the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 15th DAY OF MAY 2019.

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C. MEOLI

JUDGE

In the presence of:-

Mr. Mwangi holding brief for Mrs Chirchir for the Respondent

Appellants absent

Court Assistant - Nancy/Kevin