



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 70 OF 2015**

**SILAS SHAKAVA TULI..... APPELLANT**

**VERSUS**

**EZEKIEL K. CHIRCHIR..... RESPONDENT**

*(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable S. Mokua in Eldoret Civil Case No. 414 of 2013, dated 16<sup>th</sup> June, 2015)*

**JUDGMENT**

1. Silas Shakava Tuli hereinafter referred to as the Appellant is aggrieved by the judgment of the Chief Magistrate in Eldoret in which the magistrate gave judgment in favor of the appellant for Kshs. 1,500,000/- as general damages for pain and suffering and Kshs. 9,800/- being special damages.

2. The Appellant having been dissatisfied with the judgment preferred an appeal before this court on grounds that:

- a) The learned trial magistrate erred in law and in fact in failing to award the appellant general damages for loss of future earning capacity, future care and nursing and loss of consortium.
- b) The learned trial magistrate erred in law and fact in failing to address the evidence and submissions tendered by the appellant and therefore failed to take into account relevant facts while awarding damages.
- c) The learned trial magistrate erred in law and in fact in holding that the appellant had not sufficiently proven his claim on loss of future earning capacity, future care and nursing and loss of consortium in spite of the sufficient evidence placed before the court and also the law respecting minimum wages reigning in Kenya at all material times to this claim.
- d) The learned trial magistrate erred in law and in fact by applying the wrong principles in assessing damages and thereby arrived at a low award under the claim for general damages for pain and suffering and also failed to award the appellant damages for future care and nursing and loss of consortium.

**APPELLANTS' CASE**

The Appellant submitted on the following grounds of appeal.

**General Damages for Pain and Suffering**

In his submissions, the Appellant stated that the evidence on record showed that the appellant sustained partial paralysis of the lower and upper limbs and suffered 70% disability.

In his testimony the appellant testified that he was a casual laborer and could not engage in his trade due to the injuries. The court awarded him Kshs. 1,500,000.00 in damages on this limb.

The Appellant submitted that he proposed an award of Kshs. 3,500,000 and relied on the past decisions on pages 109-111 of the record of appeal where he avers that the learned judge awarded the plaintiff Kshs. 2,500,000/-

**General Damages for loss of future earning capacity**

The appellant submitted that the learned magistrate, at page 86 of his judgment erred in asserting that there was no evidence on the plaintiff's

age adduced and that no medical evidence was led to demonstrate that he could not engage himself in future activity.

The Appellant submitted that the doctors concurred in their medical reports that the plaintiff was 19 years old at the time of the accident and that he sustained paralysis of the upper and lower limbs. They assessed permanent disability at 70% and 40% respectively. The appellant relied on the case of **NAIROBI HIGH COURT CIVIL CASE NO. 349 OF 1996; ISABEL NYAMBURA (minor suing her father and next friend REUBEN KANG'ETHE MARANDI V SANRIC SUPPLIERS LIMITED** and submitted that the court should award loss of future earning despite there being no proof of earnings tendered.

#### **Loss of Consortium**

The Appellant submitted that he testified that he was married and in view of the paralysis his partner could not enjoy consortium. He proposed an award of Kshs. 300,000.

#### **RESPONDENTS' CASE**

The respondent grouped his submissions into two headings.

#### **Whether the trial court properly dealt with the issue of loss of future earning capacity, loss of consortium, future care and nursing.**

##### **Loss of future earning capacity**

The Respondent submitted that loss of future earnings is a special damage and it is trite law that special damages should be specifically pleaded and strictly proved.

The Respondent relied on **Simon Ano Mua v Mukwano (t/a Kioga Mukwano Transporters & 2 others (2013) eKLR**.

##### **Loss of Consortium**

The Respondent submitted that loss of consortium can be awarded if the spouse is alive but incapacitated. Further, that there was no proof that the appellant was married and that in the event he was married as alleged the loss of consortium was not proved. He relied on **General Motors East Africa Limited v Eunice Alila Ndeswa & Another [2015] eKLR**.

##### **Future care and nursing**

The Respondent submitted that there was no recommendation for an aide and the court was not informed of the cost of the nursing care. Further, that future care is a special damage and needs to be strictly proven and the same was not done.

#### **Whether the trial court erred in the award it made in general damages under the head of pain and suffering.**

The Respondent submitted that the court took into account the nature and extent of the injuries the appellant suffered in arriving at the reasonable award of Kshs. 1,500,000/- and urged the court not to disturb the award.

The Respondent relied on the case of **Mohammed Adan & 2 others v Hadija Hassan Mohammed & 2 others [2016] eKLR** on the issue of an appellate court determining appeals on quantum of damages.

The Respondent relied on Robert **Gichuchi Maina v John Kamau [2004] eKLR**, **Julian Anyango Kuni v United Millers Ltd (Kisumu High Court Civil case no. 35 of 2004)** and **Patrick Mwangi Irungu v Charles Macharia Mwangi and Another NKU HCCC No. 188 of 2005 [2008] eKLR** on the determination of damages awarded in similar cases to the one before the court.

#### **ANALYSIS**

##### **General Damages for Pain and Suffering**

The Appellant relied on pages 109-111 of his record of appeal to support this ground. Notably there are no such pages on the record.

In **PATRICK MWANGI IRUNGU v CHARLES MACHARIA MWANGI & ANOTHER [2008] eKLR** the plaintiff, who was 20 years old suffered 100% disability and the court held;

*On the loss of the plaintiff's earning capacity, I have taken note of the decision in the case of Butler vs. Butler [1984] where it was held as follows:*

*"A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labor market or work, as well paid as before the accident are lessened by his injury..."*

*The factors to be taken into account in considering damages under the head of loss earning capacity will vary with the circumstances of the case, and they include such factors as age. The qualifications of the claimant, his remaining length of*

*working life, his disabilities and previous service.”*

*The plaintiff was aged 20 years. Assuming he was not able to pursue a vocational training and he was to assume self-employment or any other informal employment earning a basic salary of Kshs 5,000/- I award him a multiplier of 25 years taking into account the uncertainties in life and for loss of future earning I would award him Kshs 5,000 x 25 x 12 = 1,500,000.*

In **JULIAN ANYANGO KUNI v UNITED MILLERS LTD & 3 others [2009] eKLR** the court awarded the plaintiff 1,500,000/- as damages for pain and suffering where she had sustained 80% permanent disability.

#### **General Damages for loss of future earning capacity**

The principles for distinguishing between loss of earning capacity and loss of future earnings was brought out in **SBI International Holdings (AG) Kenya v William Ambuga Ongeru [2018] eKLR** where the court referred to **SJ vs Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

*14. 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.*

The court further held;

In **Butler Vs Butler (supra)**, the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

*i. A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labor market or work, as well paid as before the accident are lessened by his injury;*

*ii. Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;*

*iii. Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;*

*iv. Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;*

*v. Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading;*

*vi. The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.”*

If the Appellant was seeking damages for loss of future earnings, then he would have to adduce evidence to prove the same as they are damages awarded for a real assessable loss proven by evidence.

If the Appellant was seeking damages for loss of earning capacity the same would be awarded as general damages.

From a perusal of the proceedings the medical reports were merely produced and no evidence was led as to the age of the appellant. There was no proof of his current earnings and therefore I find that the court rightfully arrived at its decision with regards to the award for general damages.

#### **Loss of future care and nursing**

The Appellant abandoned this ground. However, the same was not proven hence the ground would have failed nonetheless. In **Alex Otieno Amolo & another v Hayer Bishan Singh & Sons Limited [2016] eKLR** the court held;

This sum was not pleaded and no evidence was led to show the nature and extent of future medical expenses sought. In this respect, I would do no better than quote the case *Kenya Bus Services Ltd v Gituma* [2004] EA 91 where the Court of Appeal stated as follows;

*And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.*

#### **Loss of consortium**

The appellant is required to prove that he is married and that there was damage. In general Motors the court held that;

**In my view; the respondent did not lay any evidence to prove loss of consortium other than simply mentioning it in her plaint in paragraph 8 thereof. In the case of (DAVID BAGINE V MARTIN BUNDI CA No. (Nrb) 283/1996, the Court of Appeal referring to Lord Goddard CJ in *Bonhan Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177) held that-**

*“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”*

The appellant is not entitled to damages for loss of consortium as the same is a relief only available to his spouse. In *Edwin Otieno Japaso v Easy Coach Bus Company Limited* [2016] eKLR it was held;

**Following the case of *Best v Samuel Fox & Co. Ltd* [1951] 2 KB 639, the Court of Appeal in *Chege Kimotho & Others v Maria Vesters & Another* [1988] KLR 48, defined consortium as, “*companionship, love affection, comfort, mutual services, sexual-intercourse- all belong to the married state.*” The court held that this claim can only be made to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. There a plaintiff, like the appellant, who has himself suffered any injuries and as a result is unable to perform his conjugal duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium. In other words, the award of general damages subsumed any claim for loss of consortium.**

The Appeal is therefore unmerited and is dismissed with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 8<sup>th</sup> day of May 2019**

In the presence of:

Mr. Ombati for the appellant

Ms. Sarah – Court assistant