



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 26 OF 2019**

**IBRAHIM OMAR OSMAN.....1<sup>ST</sup> APPELLANT**

**DAVID KAREMA AMDAN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JONATHAN KENGA KITSAO.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Malindi*

*by Hon. Dr. Julie Oseko (Chief Magistrate) made on 28<sup>th</sup> September, 2018*

*in Malindi CMCC No. 216 of 2017)*

**CORAM: Justice Hon. R. Nyakundi**

**Ms. Mogaka, Omwenga and Mabeya for the Appellants**

**Ms. Wambua Kilonzo for the Respondent**

**JUDGEMENT**

This appeal relates to the determination on quantum by the learned trial magistrate.

**Ibrahim Omar Osman** and **David Karema Amdan**, the appellants herein, were sued by **Jonathan Kenga Kitsao** the Respondent vide a Complaint dated 16<sup>th</sup> October, 2017 in **Malindi CMCC No. 216 of 2017** where the Respondent sought judgment in his favour for general and special damages, future medical expenses, loss of earning capacity, cost of the suit and interest.

When the matter came up for hearing, the respective parties agreed to enter a consent on liability and liability was hence apportioned at 10% against the Respondent and 90% against the Appellants. Thereafter, parties submitted on quantum and on 28<sup>th</sup> September, 2018, the Lower Court entered judgement in favour of the Respondent inclusive of general damages, special damages and loss of future earnings in the following terms:

1. General damages	-	Kshs.1,200,000/-
2. Special damages	-	Kshs. 163,803/-
3. Loss of future earning	-	Kshs.2, 822,400/-
<b>Total</b>		<b><u>Kshs.4,186,203/-</u></b>
Less 10%		Ksh. 418,620.3/-
<b>Net Award</b>		<b>Ksh.3,767,582.7/=</b>

The Appellants being aggrieved by the said judgement lodged the instant appeal vide a Memorandum of Appeal dated 21<sup>st</sup> November, 2018 and filed in Court on 23<sup>rd</sup> May, 2019 on the following grounds:

- a) *The Learned Magistrate erred in Law and in fact by awarding Ksh. 1,200,000/- in General Damages.*
- b) *The Learned Magistrate erred in Law and in fact by awarding Ksh. 2,822,400 as loss of Future Earnings.*
- c) *The Learned Magistrate erred in Law and in fact by awarding Ksh. 163, 808 as Special Damages.*
- d) *The Learned Magistrate erred in Law and in fact in failing to consider all the evidence and submissions on record.*

The appeal was prosecuted by way of written submissions upon directions from the court. Crystallised, the appellants' prayers are that this court ought to invoke its discretion to revise downwards the learned trial magistrate's findings on general and special damages as well as on loss of future earnings.

The role of a first appellate court as appreciated in **Selle vs Associated Motor Boat & Another [1968] EA 123** is old hat. It is to re-evaluate, re-assess and re-analyze the evidence tendered before it and hence make a determination on whether the conclusions reached by the trial court were proper.

When the matter proceeded at the trial court, it was agreed by consent that all the medical documents pertaining to the Respondent be admitted without calling their makers. To this end, two medical reports were produced. One was by **Dr. Ajoni Adede** and dated 25<sup>th</sup> August, 2017 and the other by **Dr. Udayan R. Sheth** dated 14<sup>th</sup> May, 2018. Per these reports the Respondent's injuries were identified as:

- a) *Rapture of the urethral structure which further had urinary retention and urethral stricture blockage.*
- b) *Blunt injury to the abdomen*
- c) *Blunt injury to the genitals (penis)*
- d) *Abrasions on the chest.*

In the report by **Dr. Adede** dated 25<sup>th</sup> August 2017, the conclusion reached was that the Respondent has suffered 12% permanent partial disability on account of the urethral stricture, which resulted in difficulty in passing urine and further led to sub fertility due to difficult in passing semen. The Respondent also suffered impotence due to repeated abdomen operation, penile operation and manipulation of the penis while inserting urine tubes, ejaculation became painful and unpleasant hence causing psychogenic impotence.

The Respondent/Plaintiff's advocate submitting on quantum at the lower court had for general damages proposed a figure of Ksh. 1,200,000/- basing this sum on **Rosemary Tamba (suing thro' next of friend Kevin Walimbwa Mike) vs Francis Sikanga Sikolia & Nzoia Sugar CO. Ltd Kakamega HCCA No. 185 of 2011 (2013) eKLR** where the Plaintiff then had been adjudged to have suffered cuts on the head, trauma to the urethra leading to urethral stricture, fractured ribs and facial abrasions and was awarded Ksh. 900,000/-. As regards the cost of future medication, the Respondent's advocate had proposed a figure of Ksh. 80,000/- based on the fact that the Plaintiff then would have had to undergo surgery for urinary retention at least 8 times during the pendency of his lifetime at a cost of Ksh. 10,000/-. As for loss of earning capacity, the Plaintiff had proposed a figure of Ksh. 5,040,000/- basing it on a welder's monthly salary of Ksh.15,000/- and a multiplier of 28 years. Finally, it was proposed that Ksh. 163,803/- be adopted as the proven figures for special damages.

The Defendant's Advocate on the other hand had cited 750,000/- as being sufficient for general damages, placing reliance on **Joseph Musinde Amlabu vs J.K Kamunge & Another Nairobi HCCC No. 2723 of 1988**. In the Defendants' retort against the prayer for future medical costs, the Appellants' advocate had in that instance submitted that the prayer for medical costs had not been specifically pleaded in the Plaint and further that such claims could only be made once said monies had been spent. Reliance had been placed on **Zacharia Waweru Thumbi vs Samuel Njoroge Thuku (2006) eKLR**. For loss of earning capacity, the Appellants had submitted that no evidence was led towards proving the Plaintiff's occupation. As such, they took the view that a figure of Ksh. 9,800/-, being the minimum wage of an unskilled labourer be adopted and taken with a multiplier of 15 years suggested Ksh. 1,764,000/- as appropriate in the circumstances. Placing reliance on **Central Bank of Kenya vs Martin King'ori [2009] eKLR**, it was submitted that special damages ought to be strictly pleaded and proven and that the documents filed in court by the Plaintiff proved only Ksh. 61,558/- in terms of special damages.

Considering the evidence on the record, giving due regard to the authorities referred to the court by the respective advocates and taking into account the injuries suffered by the deceased, the learned trial magistrate awarded for General damages Ksh. 1,200,000/-, Special damages at Ksh. 163,803/- and using a multiplier of 24 years calculated loss of future earning at Ksh. 2,822,400/- hence totalling Ksh.3,767,582.7/=- once 10% liability had been taken into account. These sums form the gravamen of the instant appeal.

#### **Submissions on Appeal, the Law, Analysis and Determinations**

I have fully considered the case on appeal as presented through the memorandum of appeal, the evidence on the record as well as the written submissions of the respective advocates which I will make reference to as necessary in the ensuing deliberations. In this appeal, the court is tasked with answering whether the trial magistrate erred in law and fact by failing to consider the evidence on the record hence reaching erroneous conclusions on the quantum of general damages, special damages and loss of earnings.

Having outlined the case at trial as I am beholden to do, my point of departure is a restatement of the legal principle on exercise of discretion

by a superior court over jurisdiction of a subordinate court or inferior tribunal. **Sir Clement De Lestang, VP** was succinct in his summation in **Mbogo v Shah 1968 EA 93**, where he held as follows;

*“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”*

On the question of damages, the court in the case of **Butt v Khan 1982 -1988 1 KAR** pronounced itself as follows:

*“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded 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.”*

This court in **P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR** held as below:

*“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”*

Counsel for the appellants’ directed the court to the Court of Appeal decision in **Johnson Evan Gicheru vs Andrew Morton & Another [2005] eKLR** which alludes to the principle espoused hereinabove.

The instant appeal is founded on a personal injury claim founded on the following injuries sustained by the Plaintiff/Respondent:

- a) *Rapture of the urethral structure which further had urinary retention and urethral stricture blockage.*
- b) *Blunt injury to the abdomen*
- c) *Blunt injury to the genitals (penis)*
- d) *Abrasions on the chest.*

The injuries described above amounted to a partial permanent incapacity of 12% in the opinion of the Dr. Adede in the medical report dated 25<sup>th</sup> August 2017. The injuries described therein are not in question as the medical reports were consensually produced and the finding by the trial magistrate on the injuries sustained remain uncontroverted. In the English Court in the case of **West (H) & Son Ltd v Stephard [1964] AC 345** it stated as follows:

*“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional.”*

Similarly, the Court in **Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR** opined thus:

*“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”*

Counsel for the Appellants’ in this instant appeal remind the Court of its role as an appellate court making reference not only to **Section 78 of the Civil Procedure Act** but also to **Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma- Deceased) [2019] eKLR** and **Abok James Odera T/A Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**. Going further, Counsel submits that the assessment of general damages is a question of fact; however, the principle upon which the assessment is made is a principle of law. The legal principle is comparable injury should as far as possible get comparable compensatory award. For this, Counsel places reliance on **Kenya Power & Lighting Company Ltd v E K O & another**.

As far as the appellants’ are concerned, the injuries in the case relied upon by the Respondent at the trial court were not comparable to the ones in question except for that of urethral stricture.

Thus, it is their view that the Honourable trial magistrate by placing reliance on the authority submitted by the Respondent to award general

damages amounted to erring in law and fact since the amount was misleading. Advocate for the appellants maintains that an award of Ksh. 750,000 as general damages is reasonable as regards the injuries sustained by the Respondent. He buttresses this position by making reference to **Cirio Del Monte (Kenya) Limited vs Litia Mamu [2018] eKLR** where the appellate court affirmed the decision of the trial magistrate who awarded Kshs. 70,000 as general damages for the injuries of blunt trauma to the chest and to the abdomen among others. Further reference is made to **Joseph Musinde Amlabu vs J.K Kamunge & Another Nairobi HCCC No. 2723 of 1988** where the court awarded a sum of Ksh. 300,000 as general damages for rupture of the urethra and other injuries.

As far as Mr. Wambua for the Respondent is concerned, there are no compelling grounds placed before this court by the appellants to warrant its exercise of discretion to impeach the findings of the learned trial magistrate on quantum. The respondent's counsel indicates that all the medical documents had been admitted by the consent of the parties and the award of Ksh. 1,200,000/- for general damages is a far estimate.

The learned trial magistrate in arriving at the figure of Ksh. 1,200,000/- based her reasoning on **Macharia Miriam & Another vs Muema Ndila [2017] eKLR** where for similar injuries, the court awarded Ksh. 400,000/- in 2017. Taking into account the vagaries of inflation, it is my finding that the learned trial magistrate made a correct finding on general damages and I am therefore disinclined to disturb it. The appeal on this limb therefore fails.

Turning to the loss of earning capacity, the appellants' advocate submits that neither Dr. Adede's medical report nor the discharge summary state that the Respondent would not be able to earn a living in future even though his earning capacity has been diminished. However, counsel concedes that the Respondent's earning capacity has been diminished. Nevertheless, as the appellants see it, the use of multiplier of 24 years as opted for by the trial magistrate was not appropriate since it is a suggestive representation that the Respondent suffered 100% incapacity which was not justified. Reliance is placed on **Gerald Oyugi v Evans Okeyo Mochere [2019] eKLR** for the submission that the award of Ksh. 2,822,400 as damages for loss of earning is excessive thus ought to be reduced.

Regarding the loss of earning capacity, Mr. Wambua submits that the claim was pleaded and prayed for. He submits that the trial court was right in its calculation of the award in that it took the retirement age of 60 years but also considered the vagaries of life and reduced it to a multiplier of 24 years. He urges the court to make a distinction because the respondent did not die in the accident. According to him the award ought not to be disturbed.

The issue of making an award under the heading of 'loss of earning capacity' has been considerably cogitated upon by courts. In **Mumias Sugar Company Limited vs. Francis Wanalo Kisumu HCCA No. 91 of 2003 [2007] eKLR** the Court of Appeal after discussing English authorities on the subject opined:

*“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 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 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 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 factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.” [emphasis added]*

Associating itself with the words of Lord Denning in **Fairley vs. John Thompson Ltd [1973] 2 Lloyd's Report at page 40**, the Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo [supra]** quoted where it was stated:

*“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.” [emphasis added]*

The court stated in **James Mukatui Mavia vs. M. A. Bayusuf & Sons Limited [2013] eKLR**

*“The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see **McGregor on damages, 18<sup>th</sup> edition paragraph 35 – 065**).”*

The trial magistrate upon finding that the Respondent had not adduced evidence to show his monthly earnings of Ksh. 15,000/-, went on to use a multiplier of 24 years and the minimum wage of an unskilled labourer of Ksh. 9,800/- to award Ksh. 2,822,400/- as damages for loss of earning. While I am in agreement with the use of the minimum wage in the absence of evidence of earnings, I find that the multiplier of 24 years used by the learned trial magistrate is on the higher side. The Respondent was 32 years at the time of the accident, having regard to the contingencies of life and accelerated payment, I shall award damages under this head equivalent to 10 years of salary. Analogously, I find that the appellants' appeal on the damages for loss of earning capacity is meritorious. I therefore interfere with the learned trial magistrate's award of Ksh. 2,822,400/- by setting it aside and awarding Ksh. 1,176,000/- made up of Ksh. 9,800/- multiplied by 12 multiplied by 10.

Finally, on the special damages pegged at Ksh. 163,803/- by the Respondent, the appellants submit that these ought to be specifically pleaded and proven and that this burden rests entirely on the Respondent. Counsel cites the **Evidence Act 2010 Cap 80, Section 107 (1), Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** as well as **Hahn v Singh (1985) KLR 716** and submits that on analysis of the evidence in the form of receipts produced by the Respondent, the amounts contained therein do not total to the amount prayed for. On special damages, the Respondent's position is that he had pleaded for Kshs.163,803/- and produced receipts by consent to this effect hence this award should not be disturbed.

That special damages ought to be specifically pleaded and proven is hackneyed. In the instant case, having summed up the receipts produced in evidence, this court came to a figure of Ksh. 61,558/-. Try as I might, I could not find any evidence that would support the figure of 163,803/- reached by the learned trial magistrate. Of consequence, the award of special damages contemplated by the trial court is erroneous and is therefore set aside and substituted with an award of Ksh. 61, 558/- as special damages that were proven by the Respondent.

In the end, the appeal succeeds in part and as a result the court makes the following orders:

a. The award of quantum of general damages, special damages and damages for loss of earning of Ksh. 4,186,203/-by the Chief Magistrate's Court at Malindi by Hon. Dr. Julie Oseko CM, made on 28<sup>th</sup> September, 2018 in Malindi CMCC No. 216 of 2017 is hereby set aside.

b. General, loss of earning capacity and special damages are awarded as follows:

1. General damages	-	Kshs.1,200,000/-
2. Loss of Earning Capacity	-	Kshs.1,176,000/-
3. Special damages	-	Kshs. 61,558/-
<b>Total</b>		<b><u>Ksh. 2,437,558/-</u></b>
	Less 10%	Ksh. 243,755.8/-
	<b>Net Award</b>	<b>Ksh. 2,193,802.2/-</b>

Orders accordingly.

The costs of the appeal be shared with the respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF OCTOBER 2019**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Ms. Wambua for Wambua Kilonzo Advocates for the respondent: present