



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CIVIL APPEAL NO. 2 OF 2019

JAMES MUSYOKA NZEKE.....APPELLANT

-VERSUS-

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J.N Mwaniki (SPM) in the

Senior Principal Magistrate’s Court at Makueni, Civil Case No.01 of 2017,

delivered on 19th December 2018)

JUDGMENT

1. The Appellant sued the Respondent in the lower court seeking general damages, costs of hiring a house help, special damages, costs and interest for injuries sustained in a road accident which occurred on 07/06/2016 at Emali township.

2. The Respondent filed a statement of defence denying the claim and called for its strict proof. The matter proceeded to full hearing and a judgment delivered. The learned trial magistrate found the Respondent 100% liable and assessed damages as follows;

- General damages.....Kshs.2,500,000/=
- Special damages.....Kshs.194,140/=
- Future medical expenses.....Kshs.400,000/=
- Diminished earning capacity.....Kshs.750,000/=
- Total.....Kshs.3,844,140/=**

3. Dissatisfied with the award, the Appellant filed this appeal and listed 2 grounds as follows;

- a) *That the learned magistrate erred in law and fact in assessing general damages for diminished earning capacity awardable to the Appellant which was manifestly low and unjustified in the circumstances.*
- b) *That the learned magistrate erred in law and fact by failing to assess and award the Appellant costs for hiring a domestic house help when the same was pleaded and proved.*

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

Appellant’s Submissions

5. The Appellant submits that the trial court made the following errors of fact;

- a) Finding permanent disability at 65% when the same was assessed at 90% as per the medical report on record.

- b) Presuming that the requirement for a house help was equivalent to a walking aid.
- c) Mistaking the requirement of a house help as a wheel chair.
- d) Indicating that the Appellant could do many things by himself without carrying out an experiment.
- e) Mistaking a car wash business as a big business enterprise capable of employing staff.
- f) Considering the fact that the Appellant was receiving help from family members as sufficient.

6. He further submits that the trial court made the following errors of law;

- a) Applying a global figure instead of applying a multiplier as the same could be ascertained.
- b) Failing to assess and award costs of hiring a house help.

7. On ground (a), he submits that he lost total function of his left arm and would not be able to continue with his business or perform ordinary chores like dressing, personal hygiene and cooking. That he is a father of one and his wife left him after the accident. That he therefore lost his business and capacity to earn.

8. He submits that he suffered 90% disability and is not likely to be in gainful employment. That he was only 29 years old and does not have any training to enable him work without using both hands. He relies *inter alia* on **Mumias Sugar Co. Ltd -vs- Francis Wanalo (2007) eKLR** where a 26-year-old with a disability of 10-15% was awarded Kshs.500,000/= for loss of earning capacity.

9. With regard to the multiplicand, he submits that he is an ungraded artisan and as such, a minimum wage of Kshs.13,309.80/= should be adopted as per legal notice No. 112 of 2017.

10. As for the multiplier, he submits that the retirement age for civil servants and employees in the private sector is 60 and 65 years respectively. He therefore recommends a multiplier of 31 years. Accordingly, he claims Kshs.4,950,948/= ($13,309 \times 12 \times 31$) for diminished earning capacity.

11. He justifies the use of the multiplier approach by submitting that section 3 of the Insurance (Motor Vehicle Third Party Risks) Act recognizes the use of this approach as opposed to a global sum. That the global approach is mostly used in cases involving minors and people of advanced age.

12. He relies *inter alia* on **Chhabhadiya Enterprise Ltd & Anor -vs- Gladys Mutenyo Bitali (2018) eKLR** where it was held that a global sum should be applied where earnings are speculative especially for minors or plaintiffs of a very advanced age. He also referred to the cases of **Grace Beldina Odhiambo -vs- Bowers Okelo & Anor 2017 eKLR**; **Peninah Mboje Mwabili -vs- Kenya Power & Lighting Company (2016) eKLR among Others**.

13. On ground (b), he submits that it was erroneous for the trial magistrate not to assess and award costs of hiring a domestic house help. That he is a burden to his family and although he recommends a multiplier of 31 years, he will require a house help for the rest of his life. He submits that legal notice No. 112 of 2017 prescribes Kshs.6,896/= as the minimum wage for a domestic worker-for all other areas. Accordingly, he claims Kshs.2,565,312/= ($6,896 \times 12 \times 31$) for hiring and maintaining a house help.

The Respondents' Submissions

14. Citing **Rook -vs- Rairrie (1941) ALL E.R. 297** and **Butt -vs- Khan (1981) KLR 349**, the Respondent submits that for an award of damages to be disturbed, the appellate court must be convinced that the trial court proceeded on some wrong principle of law or that the award was extremely high or low as to make it an entirely erroneous estimate.

15. The Respondent (KPLC) submits that the trial court had the opportunity to see and assess the claimant and that such assessment may not be found on record.

16. It asked the court to be guided by the following principles while assessing damages in personal injury cases;

- a) An award of damages is not meant to enrich the victim but to compensate.
- b) The award should be commensurate with the injuries sustained.
- c) Previous awards in similar injuries are a mere guide but each case should be treated on its own facts.
- d) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- e) The awards should not be inordinately low or high.

17. It argued that loss of earning capacity is awarded as part of general damages and is distinct from loss of earnings which is a special

damage to be specifically pleaded and strictly proved.

18. Its contention is that that the trial court correctly observed that the business alluded to by the Appellant did not require him to do it personally and that with the help of hired workers and sufficient provision, it would continue to run profitably. It relies on **Paul Njoroge –vs- Abdul Saburi Sabonyo (2015) eKLR** where the Court of Appeal declined to consider a claim for loss of earning capacity where the claimant, a police officer, was still in office and had not shown that his employment was affected. That although the working ability of the Appellant was affected, he was not 100% incapacitated.

19. On the issue of the house help, the Respondent reiterates the trial magistrate's observation that the Appellant was able to move around without much assistance. It submits that such provision would be made if the Appellant was completely incapacitated by the accident.

20. This is a first appeal and this court has a duty to analyze and re-evaluate the evidence on record in order to reach it's own conclusions. It must be borne in mind that it did not have the benefit of seeing or hearing the witnesses, and should give an allowance for that. **See Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123.**

21. Having considered the grounds of appeal, the rival submissions and entire record it is clear that this appeal is purely on quantum. Accordingly, the only issue for determination is whether the quantum of damages should be disturbed.

22. 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 (supra).**

23. As for the complaint that the multiplier approach should have been used instead of the global approach, I find relevance in **Court of Appeal Mumias Sugar Company Limited –vs- Francis Wanalo Kisumu Civil Appeal No. 91 of 2003 (2007) eKLR:** where the court expressed itself as follows

*“From the above analysis of the English case law and the decision of this Court in **Butler v Butler [1984] KLR 225**, 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 mine)*

24. It was therefore not an error of law for the learned trial magistrate to use the global approach instead of the multiplier approach.

25. As to whether the damages awarded were inordinately low, the medical report by Dr. Wokabi (*exhibit 9*) states that the Appellant sustained major injuries on the left arm and both legs. The left arm was amputated above the elbow. The doctor's prognosis was that loss of the left upper limb conferred permanent disability of 65%. Disability of the right leg was assessed at 25% hence total permanent disability was assessed at 90%. It was therefore erroneous for the trial magistrate to conclude that the permanent disability assessed was 65%.

26. It is an accepted principle in assessment of damages that comparable injuries should attract comparable awards. The learned trial magistrate cited the case of **George Ragoka –vs-AG (2008) eKLR** where the plaintiff whose right arm was amputated was awarded Ksh.2,000,000/= as general damages and Kshs.1,800,000/= for diminished earning capacity. He also cited **Rosemary Wanjiru –vs- Elijah Macharia & Anor (2014) eKLR** where a plaintiff with 100% incapacity was awarded Kshs.3,000,000/=.

27. I took the liberty of looking at further authorities and in **Cosmas Mutiso Muema –vs- Kenya Road Transporters Limited & Another [2014] eKLR** the plaintiff suffered a crushed left leg leading to amputation below the knee, fractures to the cervical spine, fractures to the skull, fractures to the ribs, dislocation to the right knee and vertebrae amongst other injuries and was awarded kshs 2,000,000/= for pain and suffering and loss of amenities.

28. In the case of **Catherine Njeri Njoroge –vs- Benard N Njeru (2016) eKLR**, the Plaintiff sustained an injury leading to total amputation of the right lower limb at the hip, fracture of the femur and compound fracture of the superior and anterior pubic ramus of the right bone and was awarded Kshs.3,000,000/= general damages for pain and suffering and loss of amenities.

29. Achieving a reasonable award is always a delicate balancing act and my view is that the award of Kshs.2,500,000/= as general damages is sufficient compensation despite the erroneous conclusion with regard to the percentage of permanent disability. It is not lost to my mind that unlike the trial court I did not have the advantage of seeing the Appellant.

30. In respect to diminished earning capacity, the Appellant testified that he was earning Kshs.2,500/= from his carwash business. That he would charge Kshs.200/= for a small motor vehicle Kshs.800 for big vehicles and would pay Kshs.400/= for water, Ksh.150/= for fuel and Kshs.100/= for soap daily. The learned trial magistrate opined that such business may not require him to do the actual washing and that hiring a supervised worker would ensure that the business does not collapse. I am inclined to agree with the learned trial magistrate on this.

31. The business is already in existence and all what is required is to ensure its continuity. Suggesting a solution of how that continuity can be achieved does not, in my view, amount to being mistaken as to the magnitude of the business. The business does not have to end just because the Appellant can no longer personally attend to clients.

32. The award in this case was meant to cushion the Appellant during the transition from personalized services to outsourced services. It is therefore my view that the award of Kshs.750,000/= was not inordinately low as to amount to an erroneous estimate.

33. On the domestic help issue, the learned trial magistrate declined to make an award and stated that the Appellant was getting assistance from family members. He observed that the Appellant could do things without much assistance contrary to what he said. According to the Appellant, that was an error of fact as the trial magistrate did not conduct any experiment. First, it is important to point that this court cannot fault the trial court's observation as it did not have a similar opportunity of seeing the Appellant.

34. The trend in decided cases is that costs for hiring a house help are awarded where the plaintiff is totally disabled and in a vegetative state. This is hardly the situation in this case and I find that an award under this head was rightly declined. The award for general damages took care of the whole situation after the trial court observed the Appellant.

35. The upshot is that the appeal lacks merit and is dismissed with costs. The judgment of the learned trial magistrate is upheld.

DELIVERED, SIGNED & DATED THIS 1ST DAY OF OCTOBER 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE