



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 9 OF 2019

MUYE CHIBANZA MUNGA.....APPELLANT

VERSUS

TAHMED COACH LTD..... RESPONDENT

ALI KOMBO..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Honorable R. K. Ondieki at Kilifi in SPMCC NO. 301 of 2016 in a Judgment delivered on the 25th January 2019)

CORAM: Hon. Justice R. Nyakundi

Ms. Lewa for the Appellant

Ms. Kairu & McCourt for the Respondents

JUDGMENT

This is an appeal by the plaintiff in the trial court hereinafter referred as appellant challenging an assessment of damages whereby he was awarded general and special damages for acts in negligence by the respondents which totaled to a quantum of Kshs.780,480/= plus costs and interest.

Background

The claim filed by the appellant against the respondents was based on the averment in paragraph 5 of the Plaint which read as follows: **That on or about 22.1.2016 the plaintiff/appellant was lawfully and carefully travelling in motor vehicle registration number KBC 085J along the Malindi-Kilifi Road at Mkoroshoni area, when the 2nd Defendant drove motor vehicle number KAH 950H Isuzu bus so carelessly and negligently that he same collided with motor vehicle KBC 085 J as a result of which the plaintiff/appellant suffered serious physical injuries, damages and loss for which he holds the 1st defendant vicariously liable for the acts of the 2nd defendant who is also liable.**

It is from this passage and averments that the appellant presented evidence before the trial court to discharge the burden of proof on a balance of probabilities against the respondents. At the root of the trial was the issue of liability in negligence that resulted in the road traffic accident whereby the appellant sustained severe physical injuries.

In this respect the appellant gave evidence on causation and blameworthy of the accident that led him to be admitted at Kilifi District Hospital for examination and treatment. Further the appellant relied on documentary evidence in the form of discharge summary, receipts on medical expenses incurred in the course of treatment, medical report by Dr. Ndegwa and police abstract to buttress his case on causation and loss of damage.

The respondents relied on their statement of defence and opted not to call any evidence in rebuttal to the appellant claim. Consequently, based on the material before court a consent Judgment on liability was recorded in favor of the appellant as against the defendants jointly and severally at a ratio of 10%:90%. The parties then agreed to file their respective submissions on the pending issues on assessment of general and special damages.

Pursuant to the holding on liability as set out in the Judgment, bearing in mind the nature of injuries sustained and equally placing reliance on Dr. Ndegwa medical report an award of Kshs.780,483/= was made by the Learned trial Magistrate.

Dissatisfied by this decision, the appellant lodged an appeal to this court and put forward four grounds of appeal.

1. *That the Learned trial Magistrate erred in law and in fact awarding the appellant Kshs.600,000.00 as general damages for pain and suffering which award is too low in the circumstances of the injuries the appellant sustained.*
2. *That the Learned trial Magistrate erred in law and in fact by awarding the appellant Kshs.43,480.00 as special damages.*
3. *That the Learned trial Magistrate erred in law and in fact by awarding the appellant Kshs.50,000.00 as loss of future earnings which award is inordinately too low.*
4. *That the Learned trial Magistrate erred in law and in fact by delivering a Judgment in total contravention of the law.*

At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

Learned counsel Mr. Lewa for the appellant submitted in reference to the grounds of appeal and impugned the Judgment for not dealing with the appellant's evidence on the matter. He further argued that the Learned trial Magistrate did not make a full appraisal of the evidence which occasioned him to arrive at an inordinately low quantum. Learned counsel relying on the testimony of the appellant and subsequent medical report contended that the nature of the serious injuries suffered was bound to attract a higher award than the one arrived at by the trial Magistrate.

On appeal Learned counsel placed reliance on the following authorities to persuade this court to exercise discretion and interfere with the decision on the award. **Ziro Chimba Ziro v Jarson Wario Elema & Ano. HCCA 42 OF 2013, SBI International Holdings (AG) Kenya v William Ambuga Ongeru [2018] eKLR, Juma Salim Mwamaneno v Joshua Ndirangu Kiboi [2017] eKLR**

On the basis of the submissions Learned counsel urged this court to vary the award, more specifically on loss of future earnings from Kshs.50,000/= to Kshs.3,024,000/=. Learned counsel together as a whole sought that the appellant's appeal be allowed with costs.

Counsel for the respondents though served did not seem to have filed submissions on this appeal. In this appeal besides the award on general damages for pain and suffering, at the heart of the submissions on appeal lies the issue of loss of future earnings that was occasioned by the accident subject matter of the primary suit.

Analysis

As a first appellate court the principles to guide the determination of this appeal are as well set out in the case of **Selle v Associated Motor Boat Company Ltd 1986 EA. 123**. The facts giving rise to this appeal have been captured above which formed the basis of the trial court Judgment.

I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will refer to the various heads of damages awarded in the impugned Judgment subject matter of this appeal.

a). Loss of earnings, loss of future earnings and loss of earning capacity

The test to be applied in an award of damages under this head is as clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store CAppeal No. 5 of 1990, Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. This principle was earlier enunciated by non-other than **Lord Goddard CJ in Bonham Carter v Hydie Park Home Ltd 1948 64 TLR 177** where he stated thus:

“Plaintiffs must understand that if they bring actions for damage, it is for them to prove damage, it is not enough to write down the particulars and, so to speak them then at the head of the court saying “This is what I have lost, I ask to give me these damages.” There have to prove it sometimes it is impossible, though the justice of the case requires some award to be made or as Holmeyd CJ said in Dantee v Jones 1961 IWL 1103, 1109 C “arithmetic has failed to provide the answer which common sense demands.” The England court in Ashcroft v Curtin 1971 IWL on the plaintiff's loss of earnings capacity as a result of the injury which reduced his chances of any work in the laborer market or work held that he was entitled to compensation for loss of earnings, capacity, which is awarded or real assessable loss proved by evidence, compensation for diminution of earning capacity is awarded as part of the general damages.”

Further guidance on the principles for assessing such damages was given by the Court of Appeal in **Moeliker v Rey Volelo & Co 1977 IWL 132** which stated that:

“the question is what is the present value of the risk that at a future date or time the plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own, where the plaintiff had not worked before the accident or in addition to another where the plaintiff was on employment when and as at the date of trial. The factors to be taken into account will vary with the circumstances of each case examples include age and qualifications of the plaintiff, his remaining length of working life, his disabilities, previous service if any and so on. Mathematical calculation may not be possible but a court can try to assess what earnings a plaintiff may lose after the trial and for how long. There is no formula and the Judge must do the best he can.”

In Kenya also a common law jurisdiction the principles to be observed on assessment of damages for loss of earning capacity has been laid

down none other than the Court of Appeal in the case of **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 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 the case he loses the job, his diminution of chances of getting an alternative job in the labor 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”

(See also **SBI International Holdings v William Ambuga Ongeru 2018 eKLR**.)

I have considered the evidence on loss of real and future earnings capacity as specified by the appellant in his witness statements at the time of the accident. The appellant worked as a matatu conductor earning an average daily income of Kshs.1,500/= is presumed that the appellant worked for six days per week from morning to evening. Prior to the accident he would undertake various activities as a public service vehicle conductor which at the moment from the prognosis of Dr. Ndegwa his ability to work as been impaired due to the serious injuries suffered at the time of the accident.

The Court of Appeal Judgment in case of Mumias sugar company as given different approaches of computing and assessing quantum on loss of earning capacity. The Learned trial Magistrate, factored the issue of loss or earnings in his capacity and he did award Kshs.50,000/= for the appellant. Further the Learned trial Magistrate proceeded to award an out of pocket expenses and medical expenses incurred to the date of trial. It is not disputed with respect to this kind of employment which involves a lot of back and forth movement of the lower limbs. As submitted by the appellant counsel, the appellant would have been entitled to compensation for his loss of earning capacity. For he was no longer working and is unlikely to go back to his former employment. I therefore find from the medical report of Dr. Ndegwa the injury and permanent disability is an aggravating factor that will make the appellant not to sustain long periods of standing or movement expected of a matatu conductor. Though the appellant submitted at the trial court the daily income earned was Kshs.1,500/=:, I am not persuaded to go by that figure since it is not clear whether he worked as a part time or permanent basis. In this case therefore, I will make an assessment using the minimum wage guidelines for unskilled laborers with an average income of Kshs10,000/- per month. There is no evidence upon which the award of Kshs.50,000/- for loss of earning capacity was made by the learned trial Magistrate. In assessing damages under this limb I am of the view that the amount is inordinately low on account of the trial Magistrate leaving out a relevant factor. Making it wholly erroneous to this extent under the principles in the case of **Shah v Mbogo and Butler vs Butler** I fault their award and do vary it to the extent of applying a multiplicand of a minimum wage of 10,000 and a multiplier of 7 years as a just and fair proportionate compensation under this head. The sum therefore payable is **Kshs.10,000 x 12 x 7 = Kshs.840,000/=**.

What of the general damages?

Having considered the unchallenged medical reports and the authorities contained in the submissions filed by respective counsels, on the view in the circumstances surrounding the award there is no error of fact or law or misapprehension of the applicable principles by the Learned trial Magistrate to interfere with the award.

The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of **Shah (supra), Paul v E. A. Cargo Handling Services Ltd 1974 EA 75**

When I scrutinize and evaluate the record, I am satisfied that the Learned trial Magistrate correctly exercised his judicial discretion and applied his mind to the principles on the award with regard to general damages for pain and suffering. I think as a whole that there are no grounds for this court to differ with the Judgment of the trial court.

Consequently, the appeal partially succeeds in terms of variation and enhancement of the claim and loss of real and future earning capacity as set out above to that limited extent only. As regards the claim on general damages the trial court Judgment remains intact and is hereby affirmed. The appellant will have the cost of the suit and of this appeal together with interest and the total sum awarded. The award payable is subject to the 10% consent liability.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Shujaa for Lewa for the appellant