



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILMANI LAW COURTS**  
**CIVIL APPEAL NO. 348 OF 2013**  
**(CORAM: F. GIKONYO J.)**  
**DANIEL MUNGAI GITAU..... APPELLANT**  
**VERSUS**  
**CATHERINE GATHONI KAMAU.....RESPONDENT**  
**JUDGMENT**

1. Vide plaint dated 23/1/2007 the respondent herein prayed for;

- a. General damages**
- b. Special damages of Kshs. 67,320/=**
- c. Cost of the suit**
- d. Interest in (a) (b) and (c) above**
- e. Any other relief that this honourable court may find it just and fit to grant**

2. The facts of the case were that on 24/7/2006 the respondent herein was a lawful passenger in Motor Vehicle Registration number KSK 951 travelling along Langata- Nairobi road, when, near Bomas of Kenya, the said vehicle collided with motor vehicle registration number KTS 530 which belonged to the appellant herein as the beneficial owner and the plaintiff sustained injuries as a result.

3. On the date of the hearing the appellant did not attend court. Therefore in the absence of evidence to the contrary the trial court found the appellant and two others 100% liable for the accident. The court consequently entered judgment in favor of the respondent against the defendants jointly and severally and awarded Kshs. 600,000 as general damages, Kshs. 91,000 as special damages, Kshs. 250,000 for future medical costs and costs and interest.

**Appeal on quantum**

4. The appellant was aggrieved by the trial magistrate's decision specifically on the quantum of damages in the sum of Kshs. 600,000 in general damages and he filed this appeal.

5. Catherine Gathoni Kamau in her replying affidavit dated 8/10/2013 deposed that this appeal is only meant to frustrate her from enjoying the fruits of her judgment and in addition the award was not excessive as was being claimed.

**Cross Appeal**

6. On 11/5/2019 the respondents filed a cross appeal on the grounds that the trial magistrate erred in making an award of Kshs. 600,000/= in respect of the injuries suffered which was inordinately low and by failing to award loss of earning capacity.

**Submissions**

7. The appellant submitted that the respondent in her testimony never laid blame upon the appellant as she said that the driver of the vehicle she was travelling in, KSK 951 was solely to blame for the accident. Furthermore, it was never proved that the appellant herein was the registered owner of the motor vehicle registration number KTS 530. One could not be the insured of a motor vehicle that he was neither legally nor beneficially entitled to. In support they quoted **Section 76A** of the **Insurance Act**.

8. It was therefore the contention of the appellant that since he was neither the registered nor the beneficial owner of the motor vehicle he could not be held vicariously liable for the actions of the 2<sup>nd</sup> defendant who was the beneficial owner of the said vehicle.

9. It was also argued that, from the evidence on record there was not a single witness who testified that he saw the appellant drive the accident motor vehicle or that it was driven by his employee, agent or servant and it was an anomaly on the part of the trial court to assume master/servant between the alleged driver and the appellant.

10. The respondents on the other hand submitted that the appellants failed to rebut the plaintiff's testimony as the motor vehicle records indicated that the vehicle KSK 951 driven by the 1<sup>st</sup> defendant was owned by Moses Njoroge and the appellant herein. Therefore the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were found to be vicariously liable for the acts and omissions of the driver who was the 1<sup>st</sup> defendant. Additionally, the appellant had raised issues for determination that are not in tandem with the memorandum of appeal. Therefore the said submissions are vexatious and misleading at best.

11. On the cross appeal the respondent submitted that she suffered extensive injuries that required extensive specialized tendon transfer surgery among other injuries as indicated in the medical report at page 105 and 106 of the record of appeal. Consequently the respondent lost 70% capacity to use her right arm rendering her incapacitated to do her normal duties and conduct her business. This was confirmed by Dr. Theophilus Wangata at page 105 of the record of appeal. The respondents herein proposed a sum of Kshs. 1,500,000 taking into consideration the nature of injuries suffered by the respondent. They relied on the case of **Johnson Evan Gicheru v. Andrew Morton & Another C.A No. 314 of 2000** in support.

## **Analysis and Determination**

### **Duty of court**

12. I know my duty as first appellate court; to evaluate the evidence afresh and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they testified. **See: SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123.** I am also aware that, in this exercise, the court is not beholden or compelled to adopt any particular style. Except, it must avoid merely rehashing of evidence as was recorded or trying to look for a point or two which support or does not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed

### **Quantum**

13. This appeal is on quantum on damages. In the case of **Butt vs. Khan (1977) 1 KAR**, the court set the test as follows:-

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

14. The main issue in the appeal and cross-appeal is on quantum of damages; the sum of Kshs. 600,000/= awarded as general damages for pain and suffering. However the appellants in their submissions have raised new issues such as the respondent in the trial court did not prove that the Motor Vehicle KTS 350 was owned by the appellant. This raises an issue of ownership which was not included by the appellant in his memorandum of appeal. In **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** the court of appeal quoted a decision of the Malawi Supreme Court of appeal where in **MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3**, the learned judges quoted with approval from an article by Sir Jack Jacob entitled *The Present Importance of Pleadings*, published in [1960] Current Legal problems, at P174 whereof the author had stated;

**“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....**

**In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”**

15. Similarly, the appellant cannot bring forth issues and argument on ownership of KTS 350 when no such issues were fastened in the memorandum of appeal. Of importance to note is that the memorandum of appeal was not amended. As such, I do not think a party may raise such substantial and new issues or cause of action through submissions. Nonetheless, they stated that the trial court failed to apportion liability. There is nothing that could be further from the truth; the trial magistrate considered all the evidence and came to the conclusion that the driver of motor vehicle KSK 951 was solely to blame for the accident for he entered the road from a junction without care and attention, thus, colliding with the other vehicle. The said driver was even charged and convicted for careless driving. The totality of the evidence before the trial court supported the finding that the said driver was solely to blame. There was no case made out for any apportionment of liability. The ground of appeal to the contrary fails.

#### Cross Appeal

16. In her cross appeal the respondent claimed that the trial court erred when it failed to award loss of earning capacity. She also attacked the award of Kshs. 600,000/= in general damages as inordinately low.

17. In awarding loss of earning capacity, the Court of Appeal in **Mumias Sugar Company Limited vs. Francis Wanalo (2007) eKLR** stated that

**“...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.”**

18. The said principles for a claim for loss of earning capacity were stated in **Butler vs. Butler (1984) KLR 225**, by the Court of Appeal as follows: -

- a) A person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;**
- b) 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;**
- c) 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;**
- d) 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;**
- e) 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; and**
- f) 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.**

19. On perusal of the trial court file the respondent in the Amended Plaint dated 19<sup>th</sup> November 2010 pleaded damages for loss of earning capacity. The doctor assessed her permanent disability at 70%. She cannot use her right hand yet she is a farmer. Evidence show that her ability to work for gain had been diminished. In light of the evidence adduced, she is entitled to an award for loss of earning capacity. As there was no evidence of the exact earning, it is prudent to include this item within the general damages. Therefore, I find that the trial court erred by not considering loss of earning capacity in spite of evidence to that effect. The trial court appreciated the serious nature of the injuries as well as the incapacitation but did not give effect to the diminished earning power of the Respondent. This important consideration was left out of account. I also find that the award of general in the sum of Kshs. 600,000 was inordinately low and is erroneous estimate of damages. I set aside the award by the trial court on general damages and in lieu thereof I award general damages of Kshs. 1,000,000 which includes loss of earning capacity. Accordingly, the cross-appeal succeeds. All the other items remain as were awarded by the trial court, to wit; Kshs. 91,000/= as special damages, Kshs. 250,000/= for future medical expenses, costs and interest.

20. In the upshot, I find the appeal herein not have merit and is dismissed. However, given the result of the appeal and cross-appeal, I order each party bearing its own cost thereto.

21. It is so ordered

**Dated and signed at Meru this 29<sup>th</sup> day of October 2019**

**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 5<sup>th</sup> day of November, 2019**

**L. NJUGUNA**

**JUDGE**