REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 33 OF 2016

JEREMIAH AND BROTHERS CONTRACTOR.....1ST APPELLANT

JULIUS NYONGESA.....2ND APPELLANT

VERSUS

FRANCIS EGUSANGU KAGULI.....RESPONDENT

(Being an appeal from the judgment of the Honorable P. Gesora (C.M) delivered on the 26th October 2015 in Naivasha CM…)

JUDGMENT

Background

1. This appeal is only against the quantum of damages awarded in the lower court. The appellant raises two issues:

    a) Whether the trial magistrate erred in law and fact by awarding manifestly excessive damages of Kshs. 2,000,000/=; and

    b) Whether the trial court erred in awarding damages for loss of future income in the amount of Kshs 360,000/=

2. In the lower court, the parties recorded a consent on liability in the ratio of 95:5 in favour of the plaintiff against the defendant. On that basis the trial court made an award as follows:

General damages	-	Kshs. 2,000,000/=
Loss of capacity to earn	-	Kshs. 360,000/=
Cost of hiring an aide	-	Kshs. 360,000/=
		Kshs, 2,720,000/=
Less 5%		Kshs. 136,000/=
Total		Kshs 2,584,000/=

3. The grounds of appeal are as follows:-

    1. That the learned trial Magistrate erred in law and fact by awarding general damages which were manifestly excessive and a wholly erroneous estimation of the damages suffered by the Respondent.

    2. That the learned trial Magistrate erred in law and fact by failing to adhere to the prescribed limits of compensation for motor vehicle accident victims outlined in the schedule to the insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya) which is a mandatory requirement under sec 10 of the said Act as read together with section 3 of the Insurance (Motor Vehicle Third party Risks) (Amendment) Act, 2013.

3. That the learned trial Magistrate erred in law and fact in not taking into account or did not properly consider past awards for comparable injuries to those suffered by the respondent.

4. The learned trial Magistrate erred in in law and in fact by awarding Kshs 360,000/= as damages for loss of future income which was not only manifestly excessive but also in total disregard of the fact that the Respondent was already past the retirement age and was not employed at the time of the accident.

5. That the learned trial magistrate erred in law and in fact by deciding the matter against the weight of the evidence adduced.

6. That the learned trial Magistrate erred in law and in fact by failing to appreciate the provisions of the insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya) and the appellants' submissions and totally diverting from the evidence on record.

4. The duty of the court in a first appeal was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally" (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).***

5. With the above principles in mind, I must take the caution, whilst subjecting the evidence herein to re-appraisal, that this court did not have the opportunity of seeing and hearing the witnesses first hand. Further, that it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

6. I now deal with each issue, the factual aspects of the case having been resolved as to liability and the same having been apportioned by consent.

Award of general damages

7. The plaintiff's injuries were described in the report of 24th July, 2015 by Dr. Ikonya. The injuries were: soft tissue injuries to the chest, right elbow, back bruises, bruises to the right knee, and rectal prolapse which necessitated surgery. According to the report, the rectal prolapse was as a result of the accident the plaintiff/respondent was involved in and was diagnosed at Kenyatta National Hospital by Dr. J. Patel. The Respondent underwent 2 surgeries.

8. According to the appellant, the injuries sustained by the respondent were no more than soft tissue injuries as Doctor Ikonya's medical report did not indicate any degree of disability.

9. This necessarily raises the question – not raised in the lower court – as to what is rectal prolapse? The word *"prolapse"* is an English word merely meaning to "slip forward or down". The web-based **Medical Encyclopedia** defines rectal prolapse as a condition that occurs when the rectum sags and comes through the anal opening. Rectal prolapse repair is effected through surgery.

10. From this information, it is clear that rectal prolapse is not a soft tissue injury and the fact that the Respondent underwent two surgeries to rectify the situation speaks for itself. The medical report indicates that the surgical operations diminished the patient's ability to make full use of his body functions hence affecting the respondent's general health and wellbeing.

11. There are no local authorities available, from the research done by the court's researcher, on similar injuries or injuries that involved rectal prolapse. Accordingly, I agree with the respondent that there is no authority that does justice to the issue at hand. However, under no stretch of imagination can the respondent's injuries be referred to simply as soft tissue injuries, as this would result in a misdirection on the court's part. The respondent clearly underwent two surgeries, resulting in diminished ability to make full use of his body functions. As such, there is no discord in seeking instead to analyse the respondent's situation on the basis of instances where a person has lost or has diminished ability to make full use of their body functions leading to diminished earning capacity.

12. The appropriate question that then arises is: what are the rules for making awards for loss or diminished capacity to earn?

13. First it is important to distinguish between loss of earning capacity and loss of future earnings. The distinction was clarified in the Court of Appeal case of **SJ v. Francesco Di Nello & Another [2015] eKLR** where the Court stated as follows:

> ***"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."

14. In awarding damages under the head of loss of earning capacity, the Court of Appeal in **Mumias Sugar Company Limited v Francis Wanalo (2007) eKLR** stated as follows:

> ***"…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 the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to 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."*** (Underlining added for emphasis).

15. Further, in the case of **Butler v Butler [1984] KLR 225,** the Court of Appeal pointed out factors to be considered when awarding loss of earning capacity in the terms below;

> ***"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."***

16. In addition, the Court of Appeal also held, in the **Mumias Sugar Company Ltd** case (supra) that using a multiplier/multiplicand formula for a claim for loss of earning capacity was erroneous on the part of the trial court, and the Court set aside the award so made. In that light, I have noted that when making the award on loss of earning capacity, the trial magistrate took into account the fact that the Respondent was 61 years at the time of the accident, and was past the statutory retirement age. Nevertheless, the trial court proceeded to use a multiplier and multiplicand method resulting in a figure of Kshs. 360,000/= for approximately 5 years. Clearly, I think, on the basis of **the Mumias Sugar** case, the magistrate erred when making the award for loss of earning capacity using that methodology. The figure shall be set aside, as the methodology used was inappropriate in the circumstances of this case.

17. In Kenya, the recognized retirement age is 60 years. The respondent was aged 61 at the time of the accident, and was outside the job and was already out of the employable job market.

18. The appellant relied on the principle that loss of earning capacity is based on the Respondent's earning power case as established in the case of **Ndoro Kaka Kakondo v Salt Manufacturers (K) Ltd (2016) eKLR.** Given that the respondent was already past retirement age, it was incumbent on him to show, on a balance of probability, that he was still earning from the informal sector, either through a business or some other means. However, he did not do so. Accordingly, I think that the award for loss of earning capacity was unmerited and unjustified, and any losses under this head should have been given under head of general damages.

Whether the amount awarded in general damages awarded was too high?

19. As a general rule, the court will not interfere with and award simply because it might itself have reached a different conclusion. The court interferes where the award is inordinately high or inordinately low. Thus the court must exercise its discretion judiciously on the basis of the law and evidence presented in a suit and not arbitrarily or capriciously. The authorities relied on by the appellant concern soft tissue injuries. However, as already stated, the fact that there were also two surgeries increases the gravity of the injuries.

20. The Court of Appeal in the case of **Bhogal v Burbidge and Another [1975] E.A. 285**, held as follows:

> ***"Some degree of uniformity must be sought in the award of general damages and recent awards in comparable cases in local courts may be looked at".***

As earlier stated, there is no case that approximates the present case in terms of facts or injuries. As such the comparison I made was with a case reflecting situation of greater or more grievous injury.

21. For comparison purposes, I cite the case of **A.A.M v Justus Gisairo Ndarera & Another [2010] eKLR.** There the Plaintiff had suffered very severe brain damage which completely affected his bodily functioning to an extent of a permanent disability of over 40% following the road accident on 16th May 2001. On appeal, the Court of Appeal awarded Kshs. 2,500,000/= as general damages. That injury was far more grievous than in the current case. Yet, in the present case the award made was for Kshs 2,000,000/=. In my view, this figure was rather high even factoring in inflation and the fact that the percentage of incapacity was not mentioned in the medical report.

22. All in all, I am persuaded that the award of Kshs 2,000,000/= was on the high side and I would review it downwards to Kshs 1,750,000/=, taking into account the loss of earning capacity for the rectal prolapse.

23. The lower court's judgment is therefore set aside and the plaintiff/appellant shall be entitled to an award of Kshs 17650,000/= for General damages as follows:

General damages	-	Kshs. 1,750,000/=
Cost of hiring an aide	-	Kshs. 360,000/=
		Kshs, 2,110,000/=
Less 5% Contribution		Kshs. 105,500/=
Total		**Kshs 2,004,500/=**

24. The appellant shall have the costs of the appeal.

25. Orders accordingly.

Dated and Delivered at Naiirobi this 5th Day of December, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. ……..……..……..…..……for the Plaintiff

2. ……..……..…..……For the defendant

3. Court Clerk - Quinter Ogutu