



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 5 OF 2017

NANCY NDEA MURIITHI & ACK DIOCESE OF EMBU.....APPELLANTS

VERSUS

MOSES KINYUA NDWIGA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Embu Chief Magistrate in CMCC No. 5 of 2017. The respondents in that suit sued the appellants for general damages, future medical expenses of Kshs. 180,000/= and special damages of Kshs. 933,431/= for injuries sustained as a result of motor vehicle accident. The parties entered consent on liability in the ratio 80:20 in favour of the respondent. The trial court in finding in favour of the respondent awarded him loss of earnings of Kshs. 3,600,000/=, future medical expenses of Kshs. 180,000/= and special damages as pleaded Kshs. 933,431/= adding up to a total of Kshs. 6,313,431/= factoring in the agreed ratio on liability leading to an award of Kshs. 5,067,448/=. The trial court proceeded to reduce the same to Kshs. 4,890,745/= as had been pleaded by the respondent's counsel.

2. Being dissatisfied with the trial court's judgement, the appellants' filed their memorandum of appeal dated 6th March 2017 which was based on 4 grounds as follows;

a) *That the trial magistrate erred in law and fact in awarding special damages which were not proven,*

b) *That the trial magistrate misapplied the dicta in the case of Mumias Company v Francis Wanalo (2007) eKLR and in so doing failed to distinguish between damages for lost earnings and awarding damages for loss of earning capacity and subsequently awarded damages for lost earnings when the same were not pleaded.*

3. The parties agreed to dispose of the matter by way of filing written submissions.

B. Appellants' Submissions

4. The appellants submitted that the respondent was only entitled to the award of special damages of Kshs. 453,666/= as it was the only amount supported by receipts and that the evidence of invoice as special damages was inadmissible. Reliance was placed on the case of Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR where the court held inter alia that "*given the requirement of strict proof, an invoice does not suffice as evidence but only a receipt will meet the test.*" Further reliance on this proposition was placed on the case of Abdi Werdi Abdulahi v James Royo Mungatia & Another [2019] eKLR where the court held that "*...our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a profoma invoice will not suffice.*"

5. It is submitted that the trial magistrate failed to distinguish between lost earnings and loss of earning capacity and thus erred when he awarded lost earnings of Kshs. 3,600,000. It was further submitted that loss of earning was a special damage that ought to have been specifically pleaded and proved as was held by the Court of Appeal in the cases of Cecilia W Mwangi & Another v Ruth W Mwangi [1997] eKLR and that of Mohammed Hassan Musa & Another v Peter M Mailanyi & Another C.A. No. 243 of 1998 at Nyeri.

6. The appellants further submitted that the trial court erroneously and against the weight of evidence adopted a multiplicand of Kshs. 20,000 and multiplier of 15 years in calculating lost earnings whereas it should have adopted the minimum wage as the multiplicand or adopt a global award.

7. The appellants relied on the case of Ibrahim Omar Osman & Another v Jonathan Kenga Kitsao [2019] eKLR where the court in

reviewing an award for lost earnings held inter alia that a multiplicand of 10 years for a 32 years old man was sufficient. The applicant also relied on the case of **Abdi Werdi Abdulahi v James Royo Mungatia & Another [2019] eKLR** where the court adopted a global award of Kshs. 500,000 for a claimant who had suffered amputation.

8. The appellants further submitted that the trial court erred in assessing the respondent's permanent incapacity at 100% whereas the respondent's doctor did not assess any degree of incapacity.

C. Respondent's Submissions

9. The respondent submitted that he produced receipts and invoice to prove his claim for special damages and as such the trial court did not err. It was further submitted that hospitals take title deeds to secure unpaid amounts and as such the claim for special damages of Kshs. 463,536/= as supported by invoices was merited and duly awarded.

10. It was also submitted that the claim for loss of earning capacity was a general damage flowing directly from the claim and need not be pleaded as was held in the case of **Mwaura Muiruri v Suera Flowers Ltd – Nakuru HCCC No. 189 of 2009.**

11. It was also submitted that the trial judge relied on the Court of Appeal case of **Mumias Sugar Co Ltd v Francis Wanalo [2007] eKLR** which laid down the principles for the award of loss of earning capacity which the respondent had clearly demonstrated.

12. It was submitted that an award of Kshs. 5,000,000/= would be adequate compensation for general damages considering the nature and extent of injuries sustained by the respondent. Reliance was placed on the case of **Catherine Njeri Njoroge v Bernard N. Njeru Nairobi HCCC No. 305 of 2011** and that of **Geoffrey Mwaniki Mwinzi v Ibero (K) Ltd & Another, Nairobi HCCC No. 578 of 2010.**

D. Analysis & Determination

13. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. This was aptly stated in the cases of **Selle v Associated Motor Boat Company Ltd [1968] EA 123** and **Peters v Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

14. I have considered the judgment, the record of appeal and having looked at the appellant's grounds of appeal and submissions of the parties. It is my considered view that the following are the issues for determination;

a) *Whether the trial magistrate erred in law and fact in awarding special damages which were not proven,*

b) *Whether the trial magistrate failed to distinguish between damages for lost earnings and awarding damages for loss of earning capacity when the same were not pleaded.*

c) *Whether the trial magistrate took into consideration all the relevant factors in the assessment of general damages.*

15. On special damages, it is trite law that special damages have to be specifically pleaded and strictly proved. This has been reinstated in **Francis Mchee Nthiga v Davis N. Waweru (2014) eKLR**, **William Kiplagat Maritim & Another v Benson Omwanga, Charles Sande v KCC Ltd CA154/92**, and **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR.**

16. In the case of **Zacharia Waweru Thumbi** (supra) the court stated;

“If I were to explain, or define, special damages to a layman, I would say “they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortious act (s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test.”

17. Considering the precedence cited above, it is my considered view that special damages are only proved through the provision of receipts and not through invoices was the case herein. As such, I find that the trial court ought not to have awarded special damages relying on invoices.

18. On the loss of earning capacity, it is the appellant's case that the trial magistrate failed to differentiate between lost earnings and loss of earning capacity and as such arrived at a erroneous decision. It is the appellants' case that loss of earning capacity is a special damage and cogent evidence ought to be adduced to support the claim. Further, the appellants' state that lost earnings being special damages has to be strictly proved.

19. The appellants' advocate submits that neither the medical report nor the discharge summary state shows that the respondent would not be able to earn a living in future.

20. It was argued that the use of multiplier of 15 years by the trial magistrate was not appropriate since it is a suggestive representation that the respondent suffered 100% incapacity which was not justified.

21. Regarding the loss of earning capacity, the respondent submits that the claim was pleaded and prayed for. He submits that the trial court was right. The issue for determination herein therefore is whether loss of earnings is a special damage. This issue was addressed by the Court of Appeal in Cecilia W. Mwangi & another v Ruth W. Mwangi [1997] eKLR where it was held that, *“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.* “

22. Similarly in the case of Douglas Kalafa Ombeva v David Ngama [2013] eKLR, the Court of Appeal held that, *“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically’.*

23. It is now clear that a claim for loss of earning is special damage claim which must be specifically pleaded and proved. Conversely, 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 (supra) 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]

24. Associating itself with the words of Lord Denning in Fairley v John Thompson Ltd [1973] 2 Lloyd’s Report at page 40, the Court of Appeal in Mumias Sugar Company Limited [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]

25. The court stated in James Mukatui Mavia v 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, 18th edition paragraph 35 – 065.)”

26. I am bound by the authority in the Mumias case (supra) being a Court of Appeal decision. Loss of earning capacity is a general damage and need not be pleaded. To this point, the trial court was right in considering loss of earning capacity as general damages.

27. However, it is noteworthy that there was no evidence of the respondent’s monthly earnings before the trial magistrate. The respondent’s testimony in examination in chief and cross examination differed as to his earnings with him stating that it was Kshs. 4,000/= and Kshs. 400/= respectively. Further, the trial magistrate proceeded to use a multiplier of 15 years on the unproven wage of Kshs. 20,000/= to award Kshs. 3,600,000/= as damages for loss of earning capacity.

28. I am convinced from the foregoing authorities that the magistrate ought to have used minimum wage as the multiplicand since there was no prove of income. I regard the minimum wage of Kshs. 10,071/= as the appropriate multiplicand in this case.

29. According to the report of Dr. Maina dated 6/07/2015, the respondent sustained very grave injuries including a crash one on the right leg that resulted in the amputation of the right leg and a deformed left leg that was causing pain on the left ankle and limping. These injuries were more severe than those in the case of Ibrahim Omar Osman (supra). The respondent could not walk without crutches even at the time of examination on 6/07/2013 which was two years after the accident.

30. The doctor recommended that the plaintiff had to be fitted with a better quality of an artificial limb. This recommendation was not disputed by evidence from another expert. It was assessed at Kshs. 180,000/= which item of damages was pleaded in the plaint. I am convinced this was the reason for awarding future medical expenses by the trial court. I find no fault in the trial court giving this award of Kshs. 180,000/=. In my considered view, this award ought not be disturbed.

31. The loss of earning capacity cannot be assessed at 100% although the respondent was a driver and having lost the right leg, his trade was in jeopardy. However, it is important to consider that the respondent would not get a job as a driver in the future and requires to be compensated for this loss.

32. I am of the considered opinion that the multiplier of 15 years was not on the higher side bearing in mind that the respondent was aged 31 years and that he would have earned his living as a driver for about 20 or more years before retiring considering that retirement age in the public service is 60 years. However, since there was no proof of earnings, the minimum wage of Kshs. 10,071/= ought to have been used instead of Kshs. 20,000/= regarded as monthly salary which was unproven.

33. I therefore find the appeal partly successful and set aside the award for loss of earnings. It is hereby substituted with the following award based on the aforementioned considerations: -

$\emptyset 10,071 \times 12 \times 15 = 1,812,780/=$

34. The summary of the award is as follows: -

a) Loss of earning capacity	-	1,812,780/=
b) Future medical expenses	-	180,000/=
c) Special damages	-	<u>433,666/=</u>

2,426,446/=

35. Being a lump sum, the court will reduce it with Kshs. 150,000/= leaving a balance of Kshs. 2,276,446/= subject to agreed contribution ratio of 20%.

36. The amount payable to the respondent is **Kshs. 1,821,156.80**.

37. Each party will meet their own costs of this appeal.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3RD DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mutegi for Ithiga for Respondent