



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.24 OF 2015

SBI INTERNATIONAL

HOLDINGS (AG) Kenya.....APPELLANT

VERSUS

WILLIAM AMBUGA ONGERI.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. S. M. Soita, Chief Magistrate, Kericho in CMCC No. 227 of 2013)

JUDGMENT

1. This appeal arises out of the judgment of the court in **Kericho CMCC No. 277 of 2013**. A consent on liability at 80% to 20% in favour of the plaintiff/respondent had been entered by the parties on 24th March 2014. The trial court was therefore required to deal only with the question of quantum.

2. The respondent was the plaintiff in the suit. He had sued the appellant, the defendant in the matter, following a road traffic accident that occurred on 30th March 2012 in Kericho township involving the appellant's motor vehicle registration number KAX 791L and a motor cycle registration number KBD 753B which the respondent was riding.

3. The respondent had alleged in his suit that the appellant's driver, servant or agent so negligently drove motor vehicle registration number KAX 791L that he caused it to violently knock the motor cycle that the respondent was riding, causing the respondent grievous injuries.

4. In his judgment in the matter, the trial magistrate, who assessed damages after hearing only the plaintiff, the appellant/defendant having called no witnesses, made an award in general damages for pain and suffering of Kshs. 800,000/-. He also made an award for loss of future earnings of Kshs. 1,500,000/-. After taking into account the 80:20 apportionment on liability, judgment was entered for the respondent at Kshs. 640,000/- in general damages for pain, suffering and loss of future earnings. The court also made an award of Kshs. 58,000/- in special damages.

5. Dissatisfied with the judgment of the trial court, the appellant filed the present appeal in which it sets out the grounds of appeal in the Memorandum of Appeal dated 7th July 2015 as follows:

1. That the learned trial magistrate erred in awarding general damages for pain suffering and loss of amenities that is inordinately high and not commensurate to previous judicial awards for analogous injuries.

2. That the learned magistrate erroneously reached the conclusion that the partial permanent disability sustained by the respondent was directly caused by the accident in quo despite the respondent's evidence that his failure to seek medical treatment in good time occasioned the permanent disability.

3. That the learned trial magistrate erred in law in awarding the respondent 100% damages for loss of future earnings yet the respondent was only permanently disabled to an extent of 40% and conceded that he could still drive some vehicles.

4. That the learned magistrate erred in concluding that the plaintiff could no longer work as a driver despite the plaintiff's evidence that he could still be engaged to drive some kind of vehicles.

6. The appellant asked the court to review or set aside the judgment of the trial court dated 10th June 2014, and to order that the respondent bears the costs of the appeal and the suit before the lower court.

7. The parties agreed to canvass the appeal by way of written submissions. The appellant filed two sets of submissions. The first was dated

27th May 2016 and filed in court on 31st May 2016. Supplementary submissions dated 28th October 2016 were filed in court on 31st October 2016. The respondent filed submissions dated 10th June 2016 and filed in court on 15th June 2016.

The appellant's submissions

8. The appellant submits that it is dissatisfied with the quantum of damages awarded to the respondent. In its view, the award of damages of Kshs. 800,000/- is on the higher side and should be disturbed by this court. It proposes an award of Kshs 350,000/-, which it had proposed in its submissions to the trial court, for the injuries sustained by the respondent, being a dislocation of the hip joint.

9. It submits that the medical report by Dr. Zoga, filed on behalf of the respondent, indicated that the respondent suffered 45% permanent disability, while the report by Dr. Malik which it had filed assessed his disability at 40%. The appellant relied on the decision in **Naomi Wambua Njiraini vs Prof. Ezra Kiprono Maritim [2010] eKLR** in which an award of Kshs. 450,000 was made for a fracture and dislocation of the left hip joint, compound dislocation of the left knee joint, compound fracture of the left patella and left upper third of the tibia and metatarsal fracture of the left foot.

10. The appellant also relied on **Bildad Onditi & Another vs Rashid M. Rateng [2013] eKLR** where an award of Kshs 350,000 was made for posterior dislocation of the right hip joint and **Samuel Ndirangu Nganga vs Lucy Wambui Wachira (2013)eKLR** in which an award of Kshs 380,000 was reduced to Kshs 250,000 on appeal for a fracture of the radial-ulna and dislocation of the right hip joint. Its conclusion was that the trial magistrate had erred in awarding general damages for pain and suffering and loss of amenities that were inordinately high and not commensurate with previous judicial awards for similar injuries.

11. The second issue raised by the appellant was whether the trial court erred in finding that the partial permanent disability suffered by the respondent was directly caused by the accident despite the respondent's evidence that his failure to seek medical treatment in good time occasioned the permanent disability.

12. The appellant observed that the respondent had sought treatment at Kericho District Hospital, where he was treated and discharged after 5 days. That the doctor at Kericho District Hospital had advised him that the injury would resolve by itself, and that he had gone to Tenwek Mission Hospital after 7 months as the injury did not resolve itself as he had been advised.

13. The submission of the appellant is that the only injury sustained by the respondent was dislocation of the hip joint. In its view, the misfortune of permanent disability was due to the respondent's own inaction in failing to seek medical intervention until after 7 months. The aggravation of the injury sustained by the respondent could not, in its view, be blamed on it. The submission was therefore that the appellant was not responsible for the partial permanent disability suffered by the respondent.

14. The third issue raised by the appellant was whether the trial court erred in awarding the respondent 100% damages for the loss of future earnings when he was only permanently disabled to an extent of 40% and had admitted that he could drive some vehicles. In the appellant's view, the trial court erred in awarding damages under this head as an award for loss of earning capacity is awarded as part of general damages. The submission was that the respondent was not entitled to an award for loss of future earnings as he has not been rendered totally unemployable and can still engage in gainful employment despite his injuries.

15. Its submission was therefore that an award of Kshs 350,000 which it proposed was sufficient to cover general damages, inclusive of loss of future earning capacity. The appellant relied on the decision in **Simon Ano Mua vs Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 Others [2013]** in which the principles to be considered in determining whether a person is entitled to damages under the head of loss of future earnings or loss of earning capacity were settled. The appellant also relied on the decision in **Butler vs Butler (1984) KLR 225** in this regard.

16. The appellant submitted that as the respondent was still able to obtain work as his right leg was still functional and he could drive an automatic transmission vehicle, the issue of loss of future earnings does not arise. However, even if it did, and in the applicant's view, it did not, the trial court erred by failing to reduce the loss of future earnings to 40% in computing the award to be made. The appellant relied on the decision in **James Thiongo Githiri vs Nduati Njuguna Ngugi (2012) eKLR** in which the award for loss of earning capacity was limited to the percentage of disability sustained by the plaintiff.

17. In its supplementary submissions, the appellant relies on the decision in **Robinson Ngova Masha vs Summit Cove Line Ltd and Another (2013) eKLR** to submit that the general damages of Kshs 1,500,000 based on 100% permanent disability should have been based on 40% as the respondent suffered permanent disability of 40%. In the said case, an award for loss of earning capacity was reduced by taking into account the extent of the permanent disability.

18. The appellant further submitted that there was no proof of the respondent's earnings before the court. It proposed that in the circumstances, the court should have taken the minimum wage of Kshs. 7,500 and a multiplier of 5 years given that the respondent was 54 years old and the retirement age was 60. The respondent was thus entitled to an award for loss of earnings capacity of Kshs 144,000/- after reducing the amount by 60.

19. The appellant also faulted the magistrate for finding that the plaintiff/respondent could no longer work as a driver despite his concession that automatic transmission vehicles could be driven with only a right leg.

The respondent's submissions

20. In his written submissions, the respondent states that the discharge summary that forms part of the record indicates that he suffered

chronic left hip dislocation, femoral head fracture and bone loss. This had been confirmed by both Dr. Zoga and Dr. Malik. In the respondent's view, the authorities relied on by the appellant were therefore distinguishable from the present case.

21. The respondent relied on the decision in **Paul Odhiambo Musandu vs Kirdam Conservation Kisii HCCC No. 31 of 1999**, where an award of Kshs 500,000 was made in 2002 in respect of a fracture of the upper femur (left side) shortening of left hip by 4 cm, and weakness of left leg. He also relied on **Rosemary Bulinda vs Peter Gakumu & Others Nakuru HCCC No 86 of 1998** in which an award of general damages of Kshs 650,000 was made in 2003 for a comminuted fracture of the right femur. The plaintiff in that case was also awarded damages for loss of earnings for 5 years. His submission is that the award of Kshs 800,000 in general damages is not excessive.

22. The respondent notes that the appellant did not tender any evidence at the trial, and that it conceded to the production of the respondent's discharge summary and medical report. The submission on behalf of the respondent is that the respondent would not be in the current state save for the accident, and his condition is therefore a direct result of the accident.

23. The respondent further submitted that he had pleaded both loss of future earnings and loss of future earning capacity. While he had established that his earnings were Kshs. 44,000, he was satisfied with the trial court pegging his earnings at Kshs 25,000. The respondent further submitted that he was addressing himself, before the trial court, to loss of future earning capacity, that the trial court was addressing itself to the same thing, and that the use of the words '*loss of future earnings is a slip*'. The respondent also relied on **Butler vs Butler (supra)** to argue that there are different ways of awarding damages and if the amount awarded by the trial court differs from another's assessment, it is not necessarily wrong.

24. The respondent further submitted that loss of future earning capacity is not subject to deductions of percentages of incapacity, that the respondent has been retrenched and has never worked and his loss is therefore 100%. He relied on **Mumias Sugar Company Ltd vs Francis Wanalo Civil Appeal No.91 of 2003** to submit that the trial court's judgment should not be disturbed.

Analysis and Determination

25. This being a first appeal, the appellate court is under a duty to re-evaluate the evidence and reach its own conclusion. See **Selle vs Associated Motor Boat Co. Ltd 1968 E.A 123**.

26. The record indicates that the appellant did not call any witnesses, and it was only the respondent/plaintiff who testified before the trial court. His evidence was that he was involved in an accident on 30th March 2012. He was injured in the hip and the right knee and was treated at Kericho District Hospital. He was admitted at the hospital for 5 days, was told that the hip would normalize, and was discharged. The hip worsened and he was taken to Tenwek Mission Hospital where he was x-rayed and it was found that the bone was dislocated, and he was operated on. He was also told that the bone had fractured.

27. In cross-examination, he conceded that he went to Tenwek Hospital after 7 months, and that his injury was aggravated by the (mis)diagnosis of the doctor at Kericho District Hospital. Had he received proper treatment, the complication would not have arisen. He indicated his salary then as Kshs 30,000. He conceded further that he was aware that there are automatic cars, and that his right leg is functional. In re-examination, he stated that he was not a doctor and had followed the doctor's advice to take bed rest. He had been discharged as a driver.

28. I note from the respondent's statement filed on 2nd August 2013 that he suffered a chronic dislocation of the left hip, fracture of the femoral head, and bruises on the right thigh. The medical report by Dr. Ezekiel Ogando Zoga indicates that the respondent suffered the injuries set out in his statement, and that he was treated at Tenwek Mission Hospital. An open reduction of the left hip was done, but that it failed, and he was treated with analgesics, antibiotics and tetanus toxoid. The report indicates that the "*right leg was significantly shorter than the right (sic) due to bone loss.*" Dr. Zoga assessed permanent disability at 45%.

29. The medical report by Dr. M. S. Malik indicates that the respondent suffered a dislocation of the left hip, the dislocation was neglected and an unsuccessful attempt was made to reduce it by operation. Dr. Malik further notes that the respondent was informed that nothing further can be done and he has to live with the dislocation. He has pain in the hip, walks with a limp, and his left leg is shortened by 5 cm. Dr. Malik assessed permanent physical disability of 40 %.

30. From the submissions of the parties, I believe that three issues arise for determination.

i. Whether the award of damages of Kshs 800,000 was inordinately high and should be disturbed;

ii. Whether the trial court erred in finding that the partial permanent disability suffered by the respondent was directly caused by the accident;

iii. Whether the trial court erred in awarding the respondent 100% damages for loss of earning capacity.

Whether the award of damages of Kshs 800,000 was inordinately high and should be disturbed

31. The principles on which an appellate court will disturb an award in damages are fairly well settled. The principle is that an appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages. In **Butt -vs- Khan Civil Appeal No. 40 of 1997**, the court stated that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety

*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 arrive at a figure which was either inordinately high or low.” See also **Kemfro Africa Ltd and Another vs A.M. Lubia & Another (1982-1988)***

32. In the present case, the respondent suffered chronic dislocation of the left hip and a fracture of the femoral head, as well as bruises on the right thigh. The medical reports by Dr. Zoga and Malik are in agreement that the respondent suffered the injuries set out in his statement. He was treated at Tenwek Mission Hospital where an open reduction of the left hip was done.

33. Due to the mis-diagnosis at the Kericho District Hospital which led to his seeking proper treatment too late, the open reduction at the Tenwek Hospital failed. His leg was as a result significantly shortened due to bone loss, and he has permanent disability assessed at 40% - 45%. Are the damages awarded in this respect inordinately high in the circumstances?

34. I have noted the decisions relied on by the parties. The respondent relies on the case of **Paul Odhiambo Musandu vs Kirdam Conservation Kisii HCCC No. 31 of 1999** in which the court made an award of Kshs 500,000 in 2002 in respect of a fracture of the upper left femur, shortening of the left hip by 4 cm, and weakness of the left leg. He has also cited the case of **Rosemary Bulinda vs Peter Gakumu & Others Nakuru HCCC No 86 of 1998** where an award of general damages of Kshs 650,000 was made in 2003 for a comminuted fracture of the right femur.

35. The appellant relies on the decision in **Naomi Wambua Njiraini vs Prof. Ezra Kiprono Maritim [2010] eKLR** in which an award of Kshs. 450,000 was made for a fracture and dislocation of the left hip joint, compound dislocation of the left knee joint, compound fracture of the left patella and left upper third of the tibia and metatarsal fracture of the left foot. He has also cited the case of **Bildad Onditi & Another vs Rashid M. Rateng [2013] eKLR** where an award of Kshs 350,000 was made for posterior dislocation of the right hip joint and **Samuel Ndirangu Nganga vs Lucy Wambui Wachira (2013) eKLR** in which an award of Kshs 380,000 was reduced to Kshs 250,000 on appeal for a fracture of the radial-ulna and dislocation of the right hip joint.

36. In the present case, and noting the extent of the disability suffered by the respondent, which the parties are more or less agreed on, I am not satisfied that the award of the trial court was so inordinately high as to amount to an entirely erroneous estimate or a demonstration that the trial court proceeded on wrong principles or misapprehended the evidence. I accordingly resolve this issue in favour of the respondent.

Whether the trial court erred in finding that the partial permanent disability suffered by the respondent was directly caused by the accident.

37. The appellant has argued that the court erred in finding that the partial permanent disability suffered by the respondent was caused directly by the accident. It contends that the respondent sought treatment of his dislocated hip after 7 months, and that the delay caused the partial permanent disability.

38. The facts indicate that the respondent sought medical help immediately after the accident. He was admitted at the Kericho District Hospital for a period of five days. He was informed by the doctor, upon his discharge that his injury would resolve itself, and he should stay on bed rest. He followed the doctor's advice, but the injury did not resolve itself, so he sought treatment at the Tenwek Mission Hospital, but it was too late and his hip could not be treated. Was he to blame for the situation he found himself in?

39. In **Abdalla Hussein Kilo vs Kombo Kassim Omar & another [1986] eKLR**, the court stated that the test in situations such as is presently before me is whether the injured person acted reasonably based on the circumstances of the case:

*“It will be recalled that the burden of proof of damages is upon the plaintiff, as the person alleging loss. But if a defendant seeks to show that the plaintiff ought to have mitigated his loss, the burden may pass to the defendant, and the normal measure of damages will not be cut down unless the defendant succeeds in showing that the plaintiff ought reasonably to have taken mitigating steps. (see **Mayne & MacGregor on Damages 17th Ed p 825.**)*

40. The respondent in this case is a layman. He was informed by a doctor at a public hospital that his injury would resolve itself. He had no reason to disbelieve the advice of a medical doctor, and his evidence was that he acted in accordance with that advice. In my view, in the circumstances, and in the absence of any evidence from the appellant that the respondent should have taken steps to mitigate his loss, I am satisfied that the trial court was correct in reaching the finding that the partial permanent disability suffered by the respondent was directly attributable to the accident that was primarily caused by the appellant.

Whether the trial court erred in awarding the respondent 100% damages for loss of earning capacity

41. The appellant is dissatisfied that the court made an award of 100% damages for loss of future earnings when he was only permanently disabled to an extent of 40% and had admitted that he could drive some vehicles. His argument is that an award for loss of earning capacity is awarded as part of general damages.

42. Further, that the respondent was not entitled to an award for loss of future earnings as he has not been rendered totally unemployable and can still engage in gainful employment despite his injuries. The appellant relied on the decision in **Simon Ano Mua vs Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others [2013]** and **Butler vs Butler (1984) KLR 225** in this regard.

43. In addition, he submits that the damages should have been reduced to 40% in computing the award to be made, on the authority of **James Thiongo Githiri vs Nduati Njuguna Ngugi (2012) eKLR** in which the award for loss of earning capacity was limited to the percentage of disability sustained by the plaintiff. He has also relied on the decision in **Robinson Ngova Masha vs Summit Cove Line Ltd and Another (2013) eKLR** in which an award for loss of earning capacity was reduced by taking into account the extent of the permanent disability.

44. The respondent argues that he had pleaded both loss of future earnings and loss of future earning capacity. While he had established that his earnings were Kshs. 44,000, he was satisfied with the trial court pegging his earnings at Kshs. 25,000. In his view, the reference to 'loss of future earnings' instead of loss of future earning capacity by the trial court was a slip.

45. To the argument that the award for loss of earning capacity should be deducted on the basis of the extent of disability his argument was that he has been retrenched and has never worked and his loss is therefore 100%. He relied on **Mumias Sugar Company Ltd vs Francis Wanalo Civil Appeal No.91 of 2003** to argue that the decision of the trial court should not be disturbed.

46. The parties to this appeal have both relied on the decision in **Butler vs Butler** on the applicable principles in making an award for loss of earning capacity. In that case, the Court of Appeal stated as follows:

“Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ---. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable.”

47. The distinction between loss of earning capacity and loss of future earnings was brought out in the case of **SJ vs Francesco Di Nello & Another [2015] eKLR** where the Court of Appeal stated as follows:

14. 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.”

48. In **Butler vs Butler (supra)**, the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows:

i. 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;

ii. 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;

iii. 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;

iv. 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;

v. 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;

vi. 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.”

49. In the present case, the respondent was 54 years old at the time of the accident, employed as a driver. He submits that he had lost his employment as a driver, where he was earning Kshs 44,000 per month, as a result of the accident. He was not able to use his left leg, though he conceded that he could drive a vehicle with automatic transmission as his right leg was still functional.

50. The trial court made an award of Kshs. 1,500,000 in respect of loss of future earnings. Two questions arise in this regard. Was the respondent entitled to damages for loss of future earnings (or loss of future earning capacity)? If he was, should the trial court have reduced it to 60% of the award as he had suffered 40% disability?

51. The respondent had pleaded at paragraph 5 of his plaint under the heading “**Particulars of Loss Damage and Loss of Future Earning Capacity**” as follows:

“The plaintiff was treated conservatively at Kericho District Hospital and Tenwek Hospital. The plaintiff sustained injuries that not only led to loss of blood and pain. He was aged 54 years and a driver earning Kshs 30,000 per month including overtime. Due to the injuries (he) will lose his marketability in the labour field and as such will seek loss of future earning capacity.” (sic)

(Emphasis added)

52. The plaintiff's evidence before the trial court was that he was a driver with Otange earning Kshs 30,000. The trial court used a multiplicand of Kshs 25,000 and a multiplier of 5 years to arrive at the amount of Kshs 1,500,000, less 20% being Kshs 1,200,000. I am satisfied that in this case, though the court referred to the award it made as loss of future earnings, the respondent was entitled to an award in respect of future earning capacity.

53. In **SJ vs Francisco Di Nello** (supra) the court stated:

'The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to suggest any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market – see Brown L.J's judgment in the case of MOELIKER V REUROLL & CO. LTD [1977] IWL 132.'

54. Should the court have reduced the award in light of the fact that the respondent suffered 45% permanent disability? The appellant has asked this court to be guided by the decision of the High Court in **James Thiongo Githiri vs Nduati Njuguna Ngugi** (supra) in which the court reduced the amount awarded to the plaintiff by 40-50% on the basis that he had suffered 50% permanent disability.

55. This decision is of persuasive authority, and I am not persuaded that I should follow the reasoning behind it. The respondent in this case was a driver who lost the capacity to use his left leg, the extent of permanent disability that he suffered assessed at 45%. At 54 years of age, even were vehicles with automatic transmission the norm in the market where he used to work, would he be likely to get employment as a driver at all? In my view, there is no basis for reducing the damages for loss of earning capacity by 40% or 45%, and I therefore find no reason to interfere with the decision of the lower court.

56. The upshot of my findings above is that I am not satisfied that there is any merit in this appeal. It is hereby dismissed with costs to the respondent.

Dated Delivered and Signed at Kericho this 7th day of March 2018.

MUMBI NGUGI

JUDGE