



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 651 OF 2016**

**KETER KIMTAI .....1<sup>ST</sup> APPELLANT**

**NATION MEDIA GROUP.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHRISTOPHER KAMAU KIRUKU .....RESPONDENT**

**JUDGMENT**

1. In the amended plaint dated 18<sup>th</sup> April 2016, the respondent sued the appellants herein seeking general and special damages for injuries sustained in a road traffic accident on 2<sup>nd</sup> July 2013. The respondent (then the plaintiff) pleaded that the accident was solely caused by the negligence of the 1<sup>st</sup> appellant in driving motor vehicle registration number KBL 922W in the course of his employment by the 2<sup>nd</sup> appellant.

2. Besides the claim for general damages for pain and suffering, the respondent claimed special damages in the total sum of KShs.20,000 and damages for loss of earnings and loss of earning capacity at the rate of KShs.25,000 per month from the date of the accident to the date of filing suit and from 18<sup>th</sup> June 2014 to a date subject to the determination of the court; costs of future medical expenses in the sum of KShs.80,000 and future costs of physiotherapy in the sum of Kshs.90,000.

3. In their joint statement of defence dated 21<sup>st</sup> April 2015, the appellants denied any liability as alleged in the plaint and put the respondent to strict proof thereof.

4. In the course of the trial, parties recorded a consent on liability in the ratio of 60:40 in favour of the respondent against the appellants jointly and severally. Hearing proceeded for assessment of damages and on 26<sup>th</sup> September 2016, the learned trial magistrate *Hon. M. Obura* entered final judgment for the respondent against both appellants jointly and severally as follows:

- i. Liability as agreed - 40% plaintiff: 60% defendant*
- ii. General damages - KShs.3,000,000*
- iii. Future medical costs - KShs.150,000*
- iv. Loss of earnings - KShs.352,080*
- v. Special damages - KShs.20,000*

The respondent was also awarded costs of the suit and interest.

5. The appellants were aggrieved by the trial court's decision on quantum hence this appeal.

In the memorandum of appeal dated 25<sup>th</sup> October 2016, the appellants advanced five grounds of appeal in which they basically complained that the learned trial magistrate erred in law and fact in making an award of general damages in the sum of KShs.3,000,000 which was manifestly excessive considering the injuries suffered by the plaintiff and the trend of previous awards for similar injuries; that the learned trial magistrate also erred in making a speculative and excessive assessment of the deceased's earnings and in computing damages for loss of future earnings on the basis of irrelevant documentary evidence.

6. By consent of the parties, the appeal was canvassed by way of written submissions. Those of the respondent were filed on 18<sup>th</sup> December 2017 while those of the appellants were filed much later on 27<sup>th</sup> March 2018.

7. This being an appeal challenging the trial magistrate's decision on quantum only, it is pertinent to note that an award of damages rests on the discretion of the trial magistrate but that discretion must be exercised judiciously. For this reason, the mandate of an appellate court to interfere with an award of damages made by the lower court is limited to certain circumstances which have been exemplified by principles developed by case law over time to guide appellate courts in the exercise of their appellate jurisdiction.

8. There are many authorities expounding on the aforesaid principles including those cited by the respondent. It will suffice to cite just three of them. In ***Kemfro Africa Limited T/A "Meru Express Services (1976)" & Another v Lubia & Another (No. 2) [1985] eKLR***, the Court of Appeal expressed itself as follows:

***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

In ***Mariga V Musila (1984) KLR 251*** the same court held as follows:

***"... that assessment of damages is more like an exercise of discretion and the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages unless it is satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reason made a wholly erroneous estimate of the damage suffered. .... It is not what the appellate court would have awarded, but whether the judge has acted on wrong principles."***

Lastly, in ***Mbogo V Shah, (1968) EA 93***, the court held that:

***"... a Court of Appeal should not interfere with the exercise of discretion of a judge (read magistrate) unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. ..."***

9. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in his assessment of damages awarded to the respondent in view of the averments in the plaint regarding the injuries and loss sustained by the respondent as a result of the accident in question and the evidence on record.

10. In paragraph 6 of the amended plaint, the respondent particularized his injuries as follows:

1. Head injury (cerebral concussion).
2. Soft tissue injury to the right cheek bone (maxilla).
3. Injury to the left knee joint, causing fracture of the medial condyle of the femur.
4. Fracture of the right thigh bone (femur).
5. Fracture of the pelvis.
6. Fracture of the left mandible.

11. The above injuries were confirmed by the medical reports prepared by *Dr. Nassir Bhanji* (PW1) dated 20<sup>th</sup> April 2015 and 1<sup>st</sup> April 2016 respectively.

The medical reports were produced in evidence by PW1 as exhibits 1 and 2 respectively. The two reports were for undisclosed reasons not included in the record of appeal and I had to study them from the original record of the lower court. Other evidence supporting the injuries sustained by the respondent is found in the testimony of the respondent who testified as PW2.

12. The trial court's record shows that the defendants did not call any witness in support of their defence but by consent of the parties, a medical report by *Dr. Ashim Madhuwalla* dated 7<sup>th</sup> August 2015 was produced as D exhibit 1.

13. In awarding general damages for pain and suffering in the sum of KShs.3,000,000, the learned trial magistrate considered the injuries suffered by the plaintiff as confirmed in the medical reports availed to the court. He also considered the proposals on quantum made by both parties in their respective submissions and authorities relied upon.

The respondent had made a proposal for KShs.4,000,000 while the appellants proposed a sum of KShs.1,000,000.

14. I wholly agree with the appellants' submission that as a general rule, damages awarded should represent fair compensation for the injuries suffered and should not be excessive.

I have noted the authorities cited by the appellants in their bid to persuade the court to find that the general damages awarded to the

respondent were in fact excessive. Out of the said four authorities cited namely, *Florence Njoki Mwangi V Chege Mbitiru [2014] eKLR*; *Dennis Nyamweno Openda V Anwarali & Brothers Ltd & Another [2015] eKLR*; *Thomas Muendo Kimilu & 2 Others [2009] eKLR* and *Gibson Kanithi Kairu & Another V Joseph Mutio Peter, [2009] eKLR*, only one of them, namely *Florence Njoki Mwangi V Chege Mbitiru, (supra)*, was relied upon by the appellants in the trial court.

15. I have considered the nature of the injuries sustained by the respondent. I note that he sustained severe multiple injuries including fractures most of which had not completely healed by the time he was examined by *Dr. Bhanji* and *Dr. Madhiwala* on 7<sup>th</sup> August 2015 about two years after the accident. The area around the fracture to the right femur was still painful and there was deformity in the left knee. The respondent could not walk without the support of one crutch. The fracture of the pelvis and left mandible had however healed completely. *Dr. Madhiwala* assessed the degree of the respondent's permanent disability as 30%. I have also noted that the respondent was admitted for treatment at Kenyatta National Hospital where he underwent surgery to fix the fracture to the right femur using a metal plate and screws.

16. Given the nature and extent of the injuries suffered by the respondent, I agree with the respondent's counsel's submission that he must have suffered immense pain and suffering. It must however be understood that no amount of money can fully compensate a person who has suffered injury and pain. This is because no amount of money can remove or replace the pain and suffering a person may undergo as a result of injuries inflicted on any part of the body however serious or minor they may appear to be. An award of general damages only represents an assessment of what a court considers to be reasonable compensation given the circumstances of each case.

17. The learned trial magistrate did not give any reason for awarding the respondent KShs.3,000,000 in general damages given the different proposals on quantum that had been made by the parties.

In my view, given the injuries sustained by the respondent, the award of KShs.3,000,000 general damages in the year 2016 was inordinately high and excessive considering that the fracture to the right femur had apparently united leaving only residual pain. The respondent only suffered deformity on the left knee. Apart from the head injury, the other injuries were soft tissue injuries which had completely healed. In my opinion, an award of KShs.2,000,000 would have been reasonable compensation for the pain and suffering the respondent must have endured as a result of the injuries sustained in the accident.

For the foregoing reasons, I set aside the award of KShs.3,000,000 as general damages and substitute it with an award of KShs.2,000,000.

18. The award of KShs.150,000 for future medical costs and special damages in the sum of KShs.20,000 were not contested on appeal and will therefore remain undisturbed.

19. Regarding the award of loss of earnings, the respondent pleaded and testified that as a result of the injuries sustained in the accident, he was unable to engage in any gainful occupation; that prior to the accident he was a businessman trading in grape fruits which business earned him KShs.25,000 per month; that he used to source the grapefruits from Tanzania where he owned a farm. The respondent did not however adduce any iota of evidence to prove these claims.

20. The learned trial magistrate in his judgment after noting that the respondent had failed to produce any evidence to prove that he was a businessman prior to the date of the accident proceeded to apply the minimum wage for a general labourer as stipulated in the *Regulations of Wages (General) Amendment Order of 2013 (Legal Notice No. 197)* which was KShs. 9,780 per month as a basis for computing damages for loss of earnings.

21. This was a serious misdirection by the learned trial magistrate. I say so because to start with, the respondent's claim for loss of earnings was based on the averment that he used to be a businessman trading in grapefruits sourced from Tanzania. It was never part of his claim that he used to be a general labourer. There was therefore no basis for the trial magistrate to apply the minimum wage as set out in the regulations stated above.

Secondly, the claim for loss of future earnings is a special damage claim which must not only be specifically pleaded but must also be strictly proved. In the absence of credible evidence to prove the facts upon which such a claim is anchored, the claim must automatically fail.

22. Since in this case there was no evidence adduced before the trial court to prove alleged loss of income on the basis of which the claim for loss of future earnings could be computed, the learned trial magistrate fell into error when he awarded the respondent a sum of KShs.353,080 on the basis of minimum wage guidelines which were not applicable in this case.

23. Given my foregoing findings, it is clear that the trial magistrate's award for loss of earnings did not have any legal basis and it is consequently set aside. It is substituted with this court's order dismissing the respondent's claim for loss of earnings and earning capacity.

24. The upshot of this judgment is that this appeal is allowed to the extent that the award for general damages for pain and suffering is reduced from KShs.3,000,000 to KShs.2,000,000 and the award of damages for loss of earnings in the sum of KShs.352,080 is set aside. The amount shall attract interest at court rates from today until full payment.

25. As the appeal has partially succeeded, each party shall bear its own costs of the appeal.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** this 11<sup>th</sup> day of October, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Mwangi holding brief for Mr. Okeyo for the appellants

No appearance for the respondent

Mr Fidel: Court Clerk