



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 31 OF 2017

BETWEEN

OURU SUPER STORES LIMITED APPELLANT

AND

JACKSON KERAGORI OBURE RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, CM dated 11th April 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 155 of 2014)

JUDGMENT

1. The respondent was cycling along the Kisii-Migori road on 26th July 2014 when at Daraja Mbili area he was hit by the respondent's motor vehicle registration number KBR 743K and injured as a result. The issue of liability was resolved by a consent apportioning liability at 80:20 in favour of the respondent. The trial court made the following award; general damages at Kshs. 1,200,000/-, Kshs. 600,000/- for loss of earning capacity and Kshs. 28,070/- as special damages.

2. The only issue for consideration in this appeal is the quantum of damages. The appellant argued that the award of general damages was excessive in view of the injuries sustained. Counsel for the appellant submitted that the respondent did not suffer any permanent disability to justify the high award taking into account the authorities cited. The appellant also complained that the award for loss of earning capacity was not pleaded and ought not to have been awarded. He further contended that in any case, the award could not be justified as the respondent had not laid any evidential basis for the award of loss of earning capacity.

3. The respondent urged the court to uphold the award of the trial court as the appellant had not established any basis for the appellate court to interfere with the award. He urged that the award of general damages was reasonable in the circumstances and that all the evidence supporting it was uncontroverted. As concerns the award for loss of earning capacity, counsel for the respondent pointed out that the claim was pleaded in the plaint and that it was supported by the medical evidence.

4. The injuries sustained by the respondent were particularised in the plaint as follows: injury on the right temporal-occipital, c-shaped and stitched, loss of hair on the occipital area, multiple irregular depressions on the head, baldness on the right temporal region, deformed right upper limb with contractures and right side extradural haematoma (acute). Both parties agreed to admit the reports of Dr Ogando and Dr George Mugenyia by consent.

5. It was not disputed that after the accident, the respondent was admitted to Kisii Level Five Hospital where he was subjected to a CT Scan of the head, a craniotomy and evacuation of a blood clot from the inside of the skull. When he was examined by Dr Ogando on 23rd April 2014, the respondent was complaining of a severe headache and double vision on the right eye. Dr Ogando concluded that following the road accident, the respondent sustained a severe head injury resulting in diplopia (double visions) due to injury on his nerves. He opined that as a result the respondent was unable to concentrate on his daily activities and because of his defective eyesight, he was predisposed to other injuries. He noted that the respondent was likely to develop post-traumatic epilepsy and would require lifetime follow up by an ophthalmologist and neurologist and assessed disability at 50%.

6. Dr Mugenyia examined the respondent on 15th September 2014 and confirmed that he had suffered injuries on the head as a result of the accident. He noted that the respondent had dysarthric speech and slight weakness of the left upper limb. He observed that since the accident, he had not resumed cycling to enable him to go back to his hawking business. He complained of recurrent headaches and scalp pains with double vision in the right eye. He assessed permanent disability at 20%.

7. Before the trial court, the respondent proposed a sum of Kshs. 1,500,000/- as general damages for pain and suffering and Kshs. 864,000/-

for loss of earning capacity. He relied on **Kornelius Kweya Ebichet v C & P Shoe Industries Limited NRB HCCC No. 1152 of 2002 [2008]eKLR** where the plaintiff suffered blunt trauma on the forehead and a compound fracture of the tibia and fibula. Both doctors who examined him noted that he would be subject to lifelong pain and morbidity. He was awarded Kshs. 1,000,000/- in 2008 as general damages. In **Rebecca Mumbua Musembi v Lucy Kinyua NRB HCCC no. 410 of 2006 [2014]eKLR** the plaintiff sustained loss of 12 teeth, compound fractures of the right tibia and fibula in the middle third, compound comminuted fractures in the upper third of the left tibia and fibula, an undisplaced fracture of the right acetabulum and right pubic rami, internal fixation of the fractures and reconstruction surgery with metal plates and extensive surgical scars. She was awarded Kshs. 2,700,000/- as general damages in 2014.

8. The respondent proposed Kshs. 300,000/- as general damages by relying on the case of **Issac Mwenda Micheni v Mutegi Murango NRB HCCC 335 of 2004 [2004]eKLR** where the plaintiff suffered a fracture of the left tibia and fibula together with soft tissue injuries including a wound on the scalp, cut wound on the knee and bruised right forearm and was awarded Kshs. 100,000/- in 2004.

9. In order to determine this appeal, I am alive to the well-worn principle that that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Butt v Khan [1981] KLR 349**).

10. As counsel for the respondent pointed out, the nature and extent of the respondent's injuries is not contested as confirmed by the two medical reports produced in evidence. The issue for determination is the extent of damages. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

11. I would also add what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR** that:

The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.

12. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Kigaraari v Aya [1982-88] 1 KAR 768 Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

13. I have considered the injuries sustained by the respondent and it is evident that he sustained a serious head injury that required a craniotomy. Both doctors awarded the respondent disability. The difference arose from the fact that Dr Ogando examined the respondent two months after the accident while Dr Mugenya saw him seven months after the accident. What is clear is that the respondent will continue to have disabilities due to the nature of the injury. The case cited by the appellant in my view does not reflect the seriousness of the respondent's injury while the cases cited by the respondent reflect cases where the claimant had multiple injuries.

14. I now turn to consider the issue of loss of earning capacity and whether it should be pleaded on or not. The respondent has not set out in the plaint the basis for loss of earning capacity although in his testimony, he told the court that he could not carry goods for his shop while in cross-examination he stated that he used to earn profit of Kshs. 3000/- but since the accident he cannot buy stock himself and has to engage a boda boda rider to do the work.

15. Loss of earning capacity is compensation for the diminution of earning capacity and is usually awarded as part of the general damages under the heading of general damages for pain, suffering and loss of amenities. Chesoni Ag. JA in the case of **Butler v Butler [1984] KLR 225** stated that:

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 as the learned Judge did in this case.

16. This claim is to be distinguished from loss of earnings which is a special damage claim. As the Court of Appeal stated in **Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR** thus:

Loss of earning 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. (emphasis)

17. It follows from the principles I have outlined that it is not necessary to plead the claim for loss of earning capacity, however, it must be established and proved on the balance of probabilities. In the case of **SJ v Frances Di Nello & Another [2015] eKLR** the Court of Appeal expressed the difficulty faced by courts in making awards under this head when it said:

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 assign 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.

18. Dr Mugenya noted in his report that the respondent had not resumed cycling to enable him go back to his hawking business. In his testimony, the respondent confirmed that he could no longer ride a bicycle and comfortable carry goods. In cross-examination, he admitted that he was still operating his shop though he had to engage someone to assist him. In my view, this was a proper case for the court to consider the award for loss of earning capacity as an integral part of the award for general damage for pain, suffering and loss of amenities. As the basis of calculating a separate award was not pleaded nor proved, I would set aside the separate award for loss of earning capacity.

19. I reject the appellant's proposal as it does not reflect the seriousness of the respondent's head injury. The head injury resulted in a craniotomy and resulted in permanent disability as assessed by both doctors. The cases cited by the respondent show claimants who suffered other multiple severe injuries and are on the higher side, I therefore assess general damages at Kshs. 1,000,000/-.

20. I allow the appeal and set aside the award of loss of earning capacity and general damages and substitute it with an award of **Kshs. 1,000,000/-** for general damages which shall be subject to the agreed contribution and shall attract interest from the date of judgment before the subordinate court.

21. I award the appellant costs of the appeal which I assess at **Kshs 70,000/=** all inclusive.

DATED and DELIVERED at KISII this 12th day of October 2018.

D.S. MAJANJA

JUDGE

Mr Mose instructed by Mose, Mose and Milimo and Company Advocates for the appellant.

Mr Nyatundo instructed by Nyatundo and Company Advocates for the respondent.