



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 161 OF 2013

EDWARD MUIRURI GATETE MBURU.....APPELLANT

VERSUS

SUSAN KITHEKA.....RESPONDENT

J U D G M E N T

Outline and background historical facts

1. In this appeal the challenge is on the quantum of damages awarded which the appellant consider too high as to amount to an outright erroneous estimate of damages.
2. According to the pleadings and proceedings before the trial court, the Respondent is said to have suffered:-
 - a) **“Compound, comminuted, segmented and displaced fractures of the left radius,**
 - b) **Compound, comminuted, segmented and displaced fractures of the left ulna**
 - c) **Comminuted fractures of the upper left tibia extending into the joint margins.**
 - d) **Fracture of the left clavicle, leaving scars.**
 - e) **Severe chest injuries with - lung contusion**
 - **Fractures of the 2nd, 3rd, 4th, 5th left ribs**
 - **Pneumonitis**
 - f) **Head injuries with: - 1x2cm laceration on the left forehead.**
 - **Left red eye**
 - **Concussion.**
 - g) **15x8cm hematoma on the left hip, leaving a large surgical scar**
 - h) **Several bruises on the left upper arm**
 - i) **Several laceration on the dorsum of the left hand**
 - j) **12cm circular cut wound and several others on the right forearm and right hand.**
 - k) **Hypertensive heard disease**

l) Neck injury with muscle spasm

m) Paralysis of the left upper limb, with muscle power grade 2 and several surgical and traumatic scars on the entire limb.

n) Bruises on both legs

o) Large semicircular scar is visible on the right wrist and it limits the movement of the joint.

p) Was admitted at Kilifi District Hospital then transferred to Pandya surgeries including open reduction and internal fixation.

q) Re-admitted for plating and secondary suturing from 8/6/10 – 12/6/10

r) Still undergoing treatment and physiotherapy”.

3. Those pleaded injuries were confirmed in evidence of the Respondent PW 2 Dr. Deborah and PW 4 Dr. Ndegwa, PW 1 with very little doubt being raised on accuracy thereof at cross-examination. The sum total of the evidence was that the Respondent suffered extensive soft and bone tissue injuries and was left with paralysis with a total permanent disability of some 40%. The cost of removing metal implants was approximated by PW 4 at between Kshs.200,000/= and 250,000/=. The defendant called no evidence but produced a medical report by Dr. Theuri Isaac. That report agrees with the previous ones in critical aspects of the plaintiffs injuries save for permanent disability which it set at 25% and cost of removing the remaining implants at Kshs.30,000/=.

4. After listening to the evidence, in a reserved judgment dated the 17/9/2013, the trial court rendered itself in the following words:-

“The 3 Medical reports submitted show that the Plaintiff sustained the following major; Fracture of clavicle, comminuted fractures on left radius and, tibia ulna bones, fractures on the 2nd, 3rd, 4th, 5th ribs. There also agreement that as a result of the accident she is unable to use her left upper limb. It is also common in all the reports that the Plaintiff has metal implants which need to be removed. The injuries sustained in my view are therefore serious and have led to the left upper limb being weak and unable to be used.

Taking into account the injuries sustained and guided by the authorities cited, I find that an award of Two Million (2,000,000/=) shillings would be adequate compensation for pain, suffering and loss of amenities.

Counsels for the plaintiff submitted that there is uncontroverted evidence that the Plaintiff lost the complete use of her left hand. Counsel submits that she is therefore entitled to an award of loss of earning capacity. He submits that at time of accident Plaintiff was a sales lady with Practor and Alan earning an income of Kshs.14,810 per month. Counsel submitted that at time of accident she was aged 36 years and would have worked for 24 years before retirement.

Mr. Olwade for the Defendants submits that this claim should fail for the reason that loss of earning capacity and or future earnings are in the nature of special damages which claim must be specifically pleaded and proved. He submits that in the prayers in the plaint, there is no claim of loss of earning capacity and therefore the claim under this head must fail. He invited the court to the decision on this issue in Joseph Wando Okoth vs Corrugated Sheets.

On perusal of the amended plaint it is clear that the Plaintiff did indeed pray in prayer (c) loss of earning capacity and retaining house help. Though the plaintiffs left hand is weak and may not resume the work she was doing the plaintiff on being cross examined by Olwande said:-

“I can start a business and do the same to sustain myself”

It therefore means that the Plaintiff is not totally incapacitated as not to do any other job or occupation. She on her own admission can do so. For loss of future earning capacity I therefore award her Kshs.400,000/=.

The Plaintiff produced documents and receipts to support payments of Kshs.1,351,681/= for treatment and drugs. The fact that they may have been paid by other parties in my view, does not disentitle her from recovering the same from Defendants as they were expenses consequent upon the accident. I find the same proved. I therefore enter judgment for Plaintiff against the Defendant for:-

1. General damages for pain, suffering and loss of amenity Kshs.2,000,000/=.

2. Loss of future earning Kshs.400,000/=

3. Special damages Kshs.1,354,381/=

Total Kshs.13,754,381/=”

4. The parties had agreed on the apportionment of liability and therefore the only issues for determination here are:-

- i) Was the award of Kshs.2,000,000/= for pains suffering and loss of amenities manifestly excessive regard being had to the injuries suffered.
- ii) Was the award of Kshs.1,354,38/= as special damage double compensation on the basis that it had been settled by another insurer.
- iii) Was award of Kshs.400,000/= on account of loss of earning capacity merited.
- iv) Did the trial court ignore the submissions by the defendant?
- v) What orders should be made as to costs?

Analysis and determination?

5. The court's duty to assess damages involves judicial discretion which an appellate court should not interfere with lightly and freely. It is also not open for an appellate court to substitute its own discretion for that of the trial court. This court being an appellate court can only interfere if it be demonstrated that an error in principle was committed and short of that the award would not have been made by a reasonable judicial mind properly directing itself.

6. As for general damages awarded, it is clear from the records that parties cited to court decisions they considered to support their respective proposals for general damages. It cannot be denied that the record does not show that the trial court gave any regards to the submissions offered by the 2nd defendant, the current appellant. However a scrutiny of those submissions, reveal that they largely concentrated on the principle that comparable injuries ought to attract comparable awards and that awards should be kept reasonable so as not to hurt the economy. Very little was urged on the reasonable sum to be awarded.

7. When it sought to guide the court by a decided cases, the appellant cited to court a decision made in 2004 and in a matter where the injuries pleaded and proved were nowhere near comparable to those at hand. To this court even if the trial court had taken full regard of those submissions they would have been of little guide on the question of sum awardable for general damages for pains and suffering and loss of amenities. In the decision of the Court of Appeal in *Wambaira & 17 Others vs Kiogora & 2 Others [2004] eKLR*, the Court of Appeal infact increased the awards for soft tissue injuries from Kshs.5000/= to Kshs.50000/= and those for fractures the court found the award of Kshs.100,000/= for simple fractures not to have been too low. In coming to that determination the court of appeal said:-

“It is our view that had the learned Judge considered recent decisions relating to soft tissue injuries, we think she would have awarded more than 5,000/=”.

8. Being of the view that the decision cited by the appellant would not have assisted the court, it would have left the court with the sets of decisions cited by the plaintiff and the 1st defendant. Those were duly considered by the trial court who gave the reasons for arriving at a figure it did assess, in this court opinion the trial court exercised its authority property devoid of any error and cannot be faulted.

9. That damages should not be overly exorbitant or too high is not to say that the court can only give stingy awards. The awards must serve the intended purpose to compensate the injured without necessarily enriching him or punishing the tortfeasor. Awards for pains, suffering and loss of amenities must not be kept to what court gave one decided or earlier. They must reflect the realities in life including the incidence of inflation and the attendant erosion of the value of money if they are to be compensatory. That to this court is what Madan J A had in mind when he did say and hold in *Ugenya Bus Service vs James Kongo Gachoi CACA No. 66 of 1981:-*

“I also know that the days of small and stingy awards are long gone even without the curse of inflation they were niggardry.

I remember but ignore them. We have inflation with us. We all have to live with the exhorbitance which the inflation has brought into our lives”.

10. I am hesitant to say that an award of Kshs.2,000,000/= for the Respondents very extensive injuries should be termed too high. I therefore find that grounds 1, 2 & 6 lack merit and the same are hereby dismissed.

Did the award of Kshs.1,354,391/= amount to double compensation and contrary to the law of insurance?

11. There was sufficient evidence that the plaintiff incurred hospital bills and the same was paid. The dispute is with the payment of Kshs.952,400 paid by Kilifi-Mariakani Water and Sewerage Company Ltd, the employer to the Respondents husband. There was never any suggestion at trial and even during submissions that Kilifi-Mariakani Water and Sewerage Company was an insurer so as to invite the principle against double compensation in the law of insurance. That the payment were made by third parties was adequately and properly considered by the trial court when it dismissed the submission that such costs must only be paid by the litigant to be awarded. I find no merit in this ground of appeal as well and disallow it.

Was the award of Kshs.400,000/= for loss of earning capacity justified?

12. The uncontroverted evidence laid before the trial court was that at the time of the accident the Respondent was employed as a Van Salesperson with **Proctor and Allan** at a monthly salary of Kshs.14,810/= It was also in evidence that as a result of the accident, the

Respondent wholly lost the use of her left hand. On cross examination, by the 2nd Appellants counsel she said that she was on contract renewable every six(6) months had worked for 5 years and that the contract was never renewed after the accident because she could not work.

13. Clearly there was ample evidence that the plaintiff suffered permanent loss of a limb due to the accident and that her contract was not renewed after the accident because he would not work. That was enough to conclude that as a result of the accident and the resultant injury, agreed by three professionals to have resulted into a paralysis and inability to use her left hand, she was unable to keep working as a van sales person. To this court an injury that results in a permanent disability is enough proof of reduced earning capacity.

14. Once it is established that there is reduced capacity, it is not a burden on the litigant to prove that he was wholly unemployable. It is enough that he was not able to continue working and earn as before. Reduction in that capacity is enough. However where the injury results into loss of employment as was in this matter, damage are due and payable and being at large, it calls upon the court to exercise the discretion and assess same.

15. Here the court did exactly that and came to a sum of Kshs.400,000/=. It is not the law that loss of earning capacity must be calculated as special damages. It is a general damages item and no mathematical calculations are invited as suggested by the 2nd Appellant. It is to be noted that the Respondent gave evidence on 6/6/2012 when the accident had taken place on 30/6/2010, some 24 months earlier. At the time she gave evidence she had not got another job. Infact in her evidence in chief she said that she was on a wheel chair for one year. Even if the court was to take into account the period upto the time the Respondent gave evidence as the period of loss and employed the multiplier principle, the lost salary for the 24 months only would have come to about Kshs.400,000/=.

16. But damages for loss of earning capacity is not necessarily to the period one stays out of gainful employment. It may even extend to a period after he gets another employment provided evidence is led that the subsequent earnings are lower or suppressed by the disability arising from the accident.

17. However, the mandate of the trial court was to assess damages at large. In doing so, he was exercising a discretion. I have not been satisfied that there was committed any error of principle in that exercise of discretion to warrant my intervention and I find no merit on grounds 4 & 5 which are hereby dismissed.

18. In totality the appeal fails entirely and the same is hereby dismissed with costs to the Respondent to be paid by the 2nd Respondent, ALIYA A. SAID.

Dated and delivered at **Mombasa** this **16th** day of **November 2018**.

P.J.O. OTIENO

JUDGE