



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 54 OF 2016

MOSES KAUMBUTHU SILAS.....1ST APPELLANT

EMBU COUNTY GOVERNMENT.....2ND APPELLANT

VERSUS

MARGERIE MARIGU KARIUKI.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellants herein being aggrieved by the judgement of the learned Chief Magistrate Hon. M.N. Gicheru in CMCC No. 316 of 2015 delivered on the 19th September 2016 filed this appeal which is grounded on the following;

- a) That the learned Trial Magistrate erred in law and in fact in awarding general damages at Kenya Shillings 7,000,000/= while the Respondent had not suffered complete paralysis as per the medical reports.*
- b) That the learned Trial Magistrate erred in law and in fact in refusing to consider the defendant's authorities merely because they were a year old.*
- c) That the learned trial magistrate erred in law and in fact in awarding general damages without consideration of recent or any authorities as required by law.*
- d) That the learned trial magistrate erred in law and in fact in relying on irrelevant and extraneous considerations thereby arriving at the wrong decisions.*
- e) That the learned trial magistrate erred in law and fact in failing to give a comparable award in relation to the injuries sustained.*
- f) That the learned trial magistrate erred in law and in fact in failing to award damages within the limits set out by decided cases.*
- g) That the learned trial magistrate erred in law and in fact in awarding loss of earning capacity for a period of fifteen years while it is clear that the respondent's earning capacity is not fully diminished.*

2. Consequently, the appellants prayed for orders that;

- a) The appeal herein be allowed with costs.*
- b) The learned trial magistrate's judgement be set aside and/or varied as this honourable court may deem fit.*
- c) Any further or other orders that this honourable court may deem just and proper to so grant.*

3. The parties agreed to file written submissions in argument of this appeal.

B. Appellants' Submissions

4. The Appellants submitted that it was trite law that in considering damages to be awarded, comparable injuries should be compensated by

comparable awards.

5. It was further submitted that the trial court failed to agree with authorities submitted by the appellants herein during trial, while agreeing with those relied on by the respondents.
6. It was further submitted that decisions by courts should be within limits set out by decided cases and also within limits that the Kenyan economy can afford as large damages are inevitably passed to the members of the public in the form of increased insurance and fees.
7. It was further submitted that this was so especially in the instant case since the appellants' despite being vicariously liable can only obtain the decretal sums through taxpayers.
8. It was further submitted that the trial court arrived at its decision based on the respondent's description of herself as a quadriplegic which was a far cry from the injuries suffered by the respondent and that this was a misrepresentation by the respondent's counsel.
9. The appellants stated that the trial magistrate provided a 15-year multiplicand whereas the appellants' earning capacity had not diminished.
10. Regarding whether the trial magistrate had erred in law and fact in making the determination, the appellants relied on the case of **MWANGI VS WAMBUGU [1984] KLR 453** that stated that an appellate court shall only interfere with a trial court's decision where a wrong principle was regarded in the final determination.
11. It was stated that there was an error by the trial magistrate in exercising its discretion in determining the issue of quantum since he agreed with the appellants that the respondent's authorities were grossly inconsistent with the injuries suffered.
12. The appellants further submit that judicial discretion is never exercised capriciously or whimsically and relies on the case of **MBOGO & ANOTHER VS SHAH 1968 EA**. The appellants further relied on the case of **MATIBA VS MOI & 2 OTHERS [2008] KLR 670** where it was stated that a court of appeal will only interfere with a trial court decision where the trial judge acted on matters which he shouldn't have acted on or took into considerations things which he ought not have done.
13. Consequently, the appellants stated that the trial court had misdirected itself in the application of its discretion and failed to consider authorities it provided and further acted on a mistake of fact in regarding the respondent as a quadriplegic and in providing awards from loss of earning capacity as though the respondent's earning capacity had been fully diminished.
14. The appellants further submitted that allowing the trial court's judgement to stand would lead other courts to determine the matters in the same way and hence lead courts to award excessive damages.
15. The appellants further submitted that if the trial court had misunderstood the nature of the injuries he ought to have called the author of the medical reports and the respondent herein in order to provide a comparable award within the legal limits.
16. The respondent relied on the cases of **KENYA PORTS AUTHORITY VS KUSTHON (KENYA) LIMITED [2009] 2EA 212**, **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE & ANOTHER VS A.M. LUBIA & ANOTHER [1982-88] 1KAR 727**, **B.G. SAINT VS KEVIN HOGAN [1953] EACA 85**, all which speak on the conduct of appellate courts sitting on first appeal from decisions of the trial courts.
17. The appellants' concluded by submitting that the appellants' had shown clear grounds for appeal and hence its appeal ought to be allowed.

C. Respondents' Submissions

18. The respondent stated that it is not clear from the appeal what aspect of the judgement that aggrieved the appellants because no request for quantification and award of damages by the trial magistrate for variation or reviewed by this court was made.
19. The respondent further states that the trial court duty was to determine the quantum of damages as both parties had filed consent on liability and special damages.
20. The respondent further submits that in their reports, the doctors of both parties agreed as to the nature of the injuries suffered as being permanent and causing major disabilities.
21. The respondent further submits that the learned trial magistrate had considered the injuries suffered as confirmed by the medical reports as well as relevant and applicable authorities in arriving at his judgement.
22. The respondent relied on the case of **KENYA BUS SERVICES LTD VS JANE KARAMBO GITUMO Civil Appeal No. 241 of 2000** which provided that an appeal court will not interfere with the quantum of damages awarded by a trial court unless satisfied that the trial court acted on a wrong principle of law, or it has misapprehended the facts or that the award was so inordinately high or low so as to represent a wholly erroneous estimate of damages.
23. The respondent submitted that the trial court while exercising its discretion had taken into account the full impact of the injuries suffered by the respondent herein and that the trial court had not acted on a wrong principle of law or taken into account an irrelevant factor or adopt a wrong approach and that in fact the court should have awarded a higher award in light of the respondent's injuries.

24. Consequently, the respondent submitted that the appellants had not demonstrated any grounds or justification for this court to interfere with the trial court's decision and further noted that the appellants had already paid half the decretal sum to the respondent and deposited the balance as security in court. As such, the respondent submitted that the appeal lacked merit and ought to be dismissed with costs.

D. The Determination

25. In the instant case, the appellants submitted that the trial court acted on a mistake of fact in regarding the respondent as a quadriplegic, a term the appellants cite the respondent herein as using, and cite this as one of the grounds why his appeal should be allowed.

26. A review of the court record reveals that despite assertions by the appellants' counsel, this is not the case. In his judgement, the learned trial magistrate states clearly that he relies on the medical reports provided by counsels for both the appellants and respondent herein.

27. The medical reports by both Dr. Stephen Maina Wambugu & Charles Mutinda Muli are in agreement that the respondent suffered permanent disabilities, a point the trial magistrate noted. As such, it is my opinion that contrary to the submissions by the respondent, the trial court was clear on the nature and extent of injuries suffered by the respondent. It is therefore not correct to say that the judgment was based on the respondent's description of herself as a quadriplegic.

28. Indeed, a further review of the proceedings, submissions and judgement of the trial court reveal that it is on that basis that the trial court considered in dismissing the authorities relied on by the respondent herein in her submissions.

29. The appellants in their grounds for appeal states that the trial court failed to consider its authorities merely because they were a year old. The appellants also cited that the trial magistrate erred as he awarded general damages without consideration of any recent laws. The appellants further alleged that the trial magistrate failed to award damages within the limit set by decided cases.

30. It is my opinion that these allegations by the appellant are not only misleading but unfounded. It is clear from the judgement by the learned trial magistrate that he did consider the submissions by the appellants. He clearly states in his judgement that he considered the authorities and submissions of the parties.

31. The principles on which an appellate court will disturb an award in damages are well settled. The principle is that an appellate court will only interfere in 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.

32. 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 entirely 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.”

33. In the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES (1976) & ANOTHER VS LUBIA & ANOTHER (NO. 2) [1985] eKLR** the Court of Appeal enunciated principles for ground the appellate court by observing that:

“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. This Court follows the same principles.”

34. I have perused the decisions relied on by the parties. The respondent relied on the case OF **KANA VS MANOJ SHAH & OTHERS HCCC NO 334 of 2009** in which the court made an award of Kshs 7,000,000 in 2015 in respect of a plaintiff who had become a quadriplegic.

35. The appellant relied on the decision in **NGURE EDWARD KAREGA VS YUSUF DORAN NASSIR Civil Suit No. 157 of 2012 eKLR** in which the court awarded Kshs. 5,000,000 /= for permanent disability with a complete loss of sensation from the nipples to the feet.

36. I am in agreement with the appellants and the trial magistrate that the injuries suffered by the plaintiff in the case relied on by the respondent herein during trial, **KANA VS MANOJ SHAH & OTHERS HCCC No. 334 of 2009** are more severe. I am persuaded by the authority relied on by the appellant **NGURE EDWARD KAREGA VS YUSUF DORAN NASSIR Civil Suit No. 157 of 2012 eKLR**. I also note that there is a time difference of 1 year 4 months from the time the decision was delivered in the **NGURE case (supra)** to the time the trial court rendered its judgement. I do not find this time sufficient to increase inflation of the general damages from 5,000,000/= - 7,000,000/=.

37. In the present case, and noting the extent of the disability suffered by the respondent, which are not at variance in the medical reports, I am satisfied that the award for general damages of the trial court was inordinately high. I accordingly resolve this issue in favour of the appellant.

38. In regard to the issue of earning capacity as raised by the appellant, I am guided by 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.”

39. 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.”*

40. The respondent was 42 years old at the time of the accident. Parties agree that despite evidence of her earnings of Kshs. 9,000/=, the minimum wage at the time is taken as the principal. The mandatory retirement for civil servants in Kenya is 60 years and it is presumed that the respondent would have worked for not less than 15 more years.

41. Considering all the factors relevant, I find that the multiplier of 15 years was appropriate in the circumstances. The award of general damages is hereby set aside and substituted with an award of Kshs. 5,500,000/=.

42. The awards are as follows: -

a) Pain, suffering & loss of amenities - 5,500,000/=

b) Loss of earning capacity - Kshs. 1,620,000/=

c) Special damages - Kshs. 3,000/=

Total Kshs. 7,123,000/= less 20% contribution Kshs. 1,424,600/= equals to Kshs. 5,695,000/=

43. The total amount payable to the respondent is **Kshs. 5,695,000/=** plus costs of the court below.

44. Each party to meet its own costs of this appeal.

45. It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 20TH NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Kibiti for Ithiga for Respondent