



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 295 OF 2017

TITUS NGANGA.....1ST APPELLANT

BARI JOHNSON.....2ND APPELLANT

VERSUS

SAMUEL MUIRURI MBUGUA.....RESPONDENT

(Being an appeal from the judgment delivered on 19th May, 2017

by Hon. D.W. Mburu (Principal Magistrate) at Chief Magistrate's Court

at Milimani Commercial Court Civil Case No. 6432 of 2014)

JUDGMENT

1. The Respondent, Samuel Muiruri Mbugua who was injured in a road traffic accident on 15th February, 2014 filed suit claiming damages, future medical expenses and loss of earnings from the Appellants, Titus Nganga and Bari Johnson. Liability was settled by consent at 90% against the Appellant and 10% against the Respondent.

2. The Respondent in his evidence described himself as a businessman engaged in dealing in fruits. He testified that he was injured on both legs and hands. That he was treated at Kenyatta National Hospital and discharged. That he spent Ksh. 12,330/= as medical fees, obtaining the police abstract and obtaining the copy of records of the motor vehicle involved from Kenya Revenue Authority. The Respondent gave his earnings as Ksh.16,000/= per month and stated that he can no longer do the same work and required surgery at a cost of Ksh.500,000/=.

3. PW2 Dr. Nassin Bhanji a Consultant Surgeon and traumatologist described the Respondent's injuries as a fracture of the left lower leg (both tibia and fibula), lacerations of the right lower leg and soft tissue injuries in the forehead, chest and left arm. The medical report dated 2nd August 2015 produced shows the treatment included X-rays, immobilization of the left leg in a plaster of paris, dressing of the lacerations and medication. That the Respondent was left with a malunion of the ankle fracture which requires correction using a metal plate and screws at a cost of Ksh.500,000/= in a private hospital and physiotherapy at Ksh. 2500/=per session. The subsequent removal of the implant was approximated at Ksh.250,000/=. The doctor charged Ksh.16,000/= for the report and Ksh.15,000/= for court attendance.

4. The Appellants' side called Dr. Kamau David, an Orthopedic and trauma Surgeon who testified and produced his medical report dated 3rd March, 2016. The doctor described the Respondent's injuries as a comminuted fracture of the distal tibia-fibula and fracture of the medial malleolus. That X-rays showed a malunion of the tibia/fibula fracture and a non-union of the medial malleolus fracture. The doctor assessed the Respondent's disability at 7% and the cost of corrective surgery at Ksh.250,000/= approximately and Ksh.150,000/= for the removal of the implants.

5. The trial magistrate awarded the Respondent as follows:

“(a) General damages Ksh.600,000/=

(b) Loss of earnings/ earning capacity Ksh. 396,000/=

(c) Future medical costs	Ksh. 840,000/=
(d) special damages	<u>Ksh.27,180/=</u>
Total	Ksh1,863,180/=
Less 10%	<u>Ksh.186,318/=</u>
Net award	<u>Ksh.1,676,318/=</u>

6. The Appellant was aggrieved by the said judgment and appealed to this court. The grounds of appeal can be summarized as follows:

- (a) The award of future medical expenses, loss of earnings/earning capacity and special damages was excessive.
- (b) That the Respondent had not pleaded and proved loss of earnings/earnings capacity.
- (c) That the trial magistrate failed to consider the Appellant's submissions on future medical expenses and loss of earnings.
- (d) That the award of general damages was too high

7. The appeal was canvassed by way of written submissions. I have considered the said submissions.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. The two medical reports are essentially in agreement on the injuries sustained by the Respondent and the need for future medical treatment. The issue is the quantum of general damages, future medical expenses, loss of earnings and loss of earning capacity.

10. The Respondent's counsel had submitted in the lower court for an award Ksh.1,100,000/= as general damages. The case of **Joseph Kitheka v Stephen Mathuka NBI HCCC 1750/99** was relied on. The total award made was Ksh.1,296,000/= for fractures of the tibia, fibula, radius, ulna, blunt injuries in the head and bruises.

11. The Appellant side had submitted for an award of Ksh.200,000/= as general damages. Reliance was placed on the case of **SDA Transami (K) Ltd v Scholastic Nyambura [2012] eKLR** where an award ksh.250,000/= was made for a compound fracture of the right tibia and fibula, deep cut wound on the left leg and multiple wounds on the right leg.

12. It is noted that the authorities cited are rather old. The passage of time and the incidence of inflation must be taken into account. The authority cited by the Respondent also bears much more severe injuries than in the case at hand.

13. I have also looked at the following other cases:

(a) **Akamba Public Services v Abdikadir Adan Galgalo [2016] eKLR** where an award of Ksh.500,000/= was made as general damages in the year 2016 for a fractured right tibia bone malleolus and right fibula bone with blunt injury to the right ankle and soft tissue injuries where permanent incapacity was assessed at 3%.

(b) **Florence Njoki Mwangi v Chege Mbitiru [2014]eKLR** where an award of general damages of Ksh.700,000/= was made for fractures of the femurs and degloving injuries to the right knee and right ankle.

14. Taking these authorities into account, I find that the award of Ksh.600,000/= general damages herein is within the range of comparable awards. There is therefore no need to interfere with the same. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

15. The cost of future medical expenses was pleaded at Ksh.750,000/=. The Respondent's doctor assessed the cost of corrective surgery at Ksh.500,000/= and the removal of the implants at Ksh.250,000/= in a private institution. It is however noted that the initial surgery was

carried out at Kenyatta National Hospital, a public institution. There is no explanation given why there is need to change to a private institution.

16. The Appellant's doctor assessed the total cost of corrective surgery at Ksh.250,000/= at a private hospital and stated that the cost would be less at a public hospital. The removal of implant was approximated at Ksh.150,000/= at a public hospital. This comes to a total of Ksh.400,000/=.

17. Both doctors are specialists in their area of study which is relevant to the case at hand. The Respondent's doctor did not give any assessment of the costs at a public institution while the Respondent's doctor assessed the cost of physiotherapy at Ksh.90,000/= at Ksh.2,500/= for 3 months three times a week. The Appellants' doctor saw no need for physiotherapy. The trial magistrate awarded the Respondent's claim for future medical expenses as prayed which came to a total of Ksh.840,000/=. However, taking into account that the Respondent's initial surgery was carried out at a public institution which is less expensive, I would agree with the evidence by the Respondent's doctor that Ksh.400,000/= in total would be sufficient for the corrective surgery including the removal of the implants. I will accept the evidence of the need for physiotherapy but at about half the price at Ksh.50,000/= in a public hospital, taking cue from the evidence above. Thus the total future medical expenses comes to Ksh.450,000/=.

18 In the amended plaint dated 7th October, 2016, the Plaintiff prayed for loss of earnings at Ksh.16,000/= per month from the date of the accident on 15th February, 2014. The trial magistrate awarded Ksh.396,000/= at Ksh.11,000/= per month for three years. The Respondent had prayed for an award of Ksh.16,000/= per month which was not proved and the trial magistrate adopted minimum labour wages.

19. As stated by the Court of Appeal in **S J v Francesco Di Nello & another [2015] eKLR:**

“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 earning 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.

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings. The correct position as in the Fairley case (supra) was restated by this court in the case of Cecilia Mwangi & another v Ruth W Mwangi CA No. 251 of 1996 as hereunder;

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 proved on a balance of probability.”

20. Taking into account the award of Ksh.600,000/= general damages for pain, suffering and loss of amenities, the award of Ksh 396,000/= loss of earnings from the date of the accident to the date of the judgment appears to overlap with the award of general damages and would make the awards excessive in the circumstances of this case.

21. There was no loss of earning capacity. None of the doctors mentioned any incapacity to earn a livelihood.

22. The Ksh.27,180/= special damages claimed was proved as per the receipts produced.

23. The total award therefore works out as follows:

(a) General damages	Ksh.600,000/=
(b) Future medical expenses	Ksh.450,000/=
(c) Special damages	<u>Ksh.27,180/=</u>
Sub Total	<u>Ksh.1,077,180/=</u>
Less 10%	<u>Ksh.107,718/=</u>
Total	<u>Ksh.969,462/=</u>

24. In the upshot, the judgment of the lower court is set aside and substituted with judgment for the sum of Ksh.969,462/= plus interest and costs in the lower court. The appeal having been partially successful, each party shall bear own costs of the appeal.

Dated, signed and delivered at Nairobi this 13th day of Nov., 2018

B. THURANIRA JADEN

JUDGE