



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL APPEAL NO. 354 OF 2006**  
**ROCKMASTERS LIMITED.....APPELLANT**  
**VERSUS**  
**ISAAC KABUE MIRINGU.....RESPONDENT**  
**(Being an appeal from the judgment of the Chief Magistrate U.P. Kidula**  
**delivered on 15<sup>th</sup> May, 2006 at Thika in CMCC No.6 of 2003)**

**JUDGMENT**

1. The Respondent (Plaintiff in the lower court) filed suit claiming damages arising out of injuries sustained on 28<sup>th</sup> April, 2001 while at work. The Plaintiff alleged breach of statutory duty of care by the Appellant (Defendant in the lower court). The Plaintiff claimed that the Defendant was his employer. In the alternative, the Plaintiff alleged negligence on the part of the Defendant, its servants and/or agents.
2. The Plaintiff prayed for judgment against the Defendant as follows:-
  - “(a) General damages for pain, suffering and loss of amenities**
  - b. Special damages for lost earnings and lost capacity to earn in future.**
  - d. Special damages.**
  - d. Costs of this suit**
  - e. Interest on special damages from the date of filing suit.**
  - f. Interest on general damages and costs.**
  - g. Any other relief this Honourable court may deem fit and just to grant.”**
3. The claim was denied by the Defendant. The Defendant in the alternative blamed the accident as solely caused and/or substantially contributed to by the Plaintiff’s negligence.

4. After hearing the case, the trial magistrate entered judgment in favour of the Plaintiff on a 100% liability basis as follows:

**“(a) General damages - 550,000/=**

**(b) Lost earnings - 175,800/=**

**(c) Loss of future earnings 1,280,160/=**

**(d) Special damages Nil**

**The total came to Ksh. 2,005,960/=”**

5. The Defendant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:-

(a) That the total award of Ksh.2005,960/= was manifestly excessive

(b) That the trial magistrate failed to consider the Defendant’s evidence and the submissions.

(c) That the trial magistrate erred in finding that negligence was proved against the Defendant.

(d) That the trial magistrate failed to appreciate the pleadings vis-a- vis the evidence adduced.

(e) That the special damages awarded for loss of earnings and loss of future earning capacity were not specifically pleaded and proved.

(f) That the judgment was against the provisions of Order XX rule 4 of the Civil Procedure Rules.

6. The plaintiff filed a cross – appeal on the following grounds:

(a) That the award was inordinately low.

(b) That the multiplier of 24 years and the multiplicand of Ksh.4,445/= adopted by the trial magistrate in the calculation for loss of future earning capacity was low.

7. By consent the parties agreed to canvass the appeal and the cross appeal by way of written submissions. The Respondent filed theirs but the Appellant did not file any. I have considered the submissions filed.

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 Plaintiff’s evidence was that he had worked for the Defendant as a loader for about 1½ years prior to the accident. His evidence was that at the material time he was carrying out his duties picking stones

which had been cut by the stone cutting Machine when the machine fell from it's rails and fell on him thereby injuring his right hand. The Plaintiff was rushed by his supervisors to a nearby clinic then later to Kenyatta National Hospital where he was admitted for two weeks.

10. The Plaintiff blamed the accident on the machine which he stated was defective and was being supported by a stone. That the stone broke and that was when the machine fell off it's rails. According to the Plaintiff, the machine was not properly maintained and used to break down constantly and had no competent attendant.

11. The Plaintiff produced a medical report by Dr. Omondi Afulo of Kenyatta National Hospital which reflects that he suffered a crush injury of the right ring and middle fingers. The report states that the said fingers were debrided at the metacarpophalangeal joint. Total permanent incapacity is reflected at 23%. Dr. Omondi was instructed by the Defendants side.

12.PW2 Dr. Moses Kinuthia who was instructed by the Plaintiff's side produced a medical report which reflects the same injuries. His evidence was that the amputation of the crushed fingers made the right hand to lose grip. He assessed the degree of permanent incapacity at 45%.

13.On the Defendants side Peter Njoroge Kamau the Defendant's supervisor testified. In his evidence he conceded that the Plaintiff was at the material time working for the Defendant. He stated that the Plaintiff was a casual employee who worked as a loader. That the Plaintiff was loading a lorry with stones when a stone that the Plaintiff had thrown into the Lorry fell off the lorry and injured the Plaintiff's hand while the Plaintiff was in the process of picking another stone. The supervisor denied that the Plaintiff was injured by the machine. He further stated that the machine is handled by the operator and the rail adjusters but not by loaders.

14. The supervisor explained that the machine runs on rails like a train. He denied that the machine was placed on stones and stated that if the machine has a mechanical problem, it's the mechanic who deals with the same and not the loaders. He further testified that the loaders pick the stones after the machine has finished cutting the same.

15. From these two different versions of the evidence regarding how the accident occurred, I agree with the finding of the trial magistrate that the explanation given by the Plaintiff is more probable. The Defendant's version that a stone that fell from the lorry is the one that injured the Plaintiff's hand is not convincing. DW1 has not given evidence that details whether he trained his eyes on the Plaintiff and specifically on the stone in question especially taking into account that there were other workers at the site including those arranging the stones inside the lorry. According to Dr. Moses Kinuthia's (PW2) medical report, the injuries sustained by the Plaintiff were consistent with the mode of injury explained by the Plaintiff. I am satisfied on a balance of probability that the Plaintiff proved the particulars of negligence enumerated in his plaint. There was no safe system of work. The Plaintiff would not have envisaged the machine would fall off the rails. I agree with the trial magistrate's finding that the Defendant was 100% liable for the accident.

16. On the quantum of general damages, the two medical reports are in agreement on the injuries sustained by the Plaintiff. The Plaintiff's two fingers were amputated. The two medical reports however differ on the degree of permanent incapacity. The Plaintiff doctor assessed the same at 45%. The Defendant's doctor assessed the same at 23%. Both reports however agree that the Plaintiff lost opposition and grip abilities. The Plaintiff who is right handed suffered functional deficit of the right hand. Being a manual worker his earning ability was diminished.

17. The Plaintiff in his plaint prayed for general damages, loss of earnings and loss of earning capacity. The judgment of the lower court has been attacked on the grounds that the Plaintiff was awarded special damages for lost earnings and loss of capacity to earn in future when the same were not specifically pleaded and proved. Loss of earnings is a special damage claim which must be specifically pleaded and proved. On the other hand loss of earning capacity is a diminution of earning power and is usually awarded as part of the general damages and proof is on a balance of probability. There is however

nothing improper if the award is made under separate headings as long as there is no overlap of the awards made. (See for example the following Court of Appeal decisions :-

- **Mumias Sugar Co Limited v Francis Wanalo [2007] eKLR.**
- **Sosphinaj & Co., Ltd & another v Daniel Nganga Kanyi CA Nakuru 315/2001 [2006] eKLR.**
- **S J v Francesco Di Nello & another [2015] eKLR).**

18. Turning to the case at hand, the trial magistrate made an award of Ksh.550,000/= as general damages for pain, suffering and loss of amenities. During the hearing in the lower court, the Plaintiff's counsel submitted for an award of Ksh.800,000/=. The Plaintiff's counsel relied on authorities with awards of general damages of Ksh.440,000/= to Ksh.600,000/=. Those awards were made in the year 1993. The Defendant's counsel on the hand submitted for an award of Ksh.200,000/= to Ksh.300,000/= and relied on authorities which were similarly old. Taking into account the passage of time and inflationary trends, I find the award of Ksh.550,000/= made by the trial magistrate reasonable.

19. In arriving at the foregoing finding, I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

**“...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....”**

20. The trial magistrate erred in calculating “Loss of future earnings” when the Plaintiff had not pleaded for the same. The Plaintiff pleaded for “lost earnings and lost capacity to earn in future.” As stated in the case of **Mumias Sugar Co (Supra)**:

**“The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”**

21. The task of assessing loss of earning capacity is not an easy one. In case of **SJ v Frances Di Nello (supra)** 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.”**

22. In the case at hand, my humble opinion is that the award of Ksh.500,000 for loss of earning capacity is reasonable.

23. The plaint is paragraph No. 7 particularized the special damages as including **“Lost earnings at the monthly rate under the general order, regulation of wages conditions of employment Act Chapter 229 Law of Kenya”** There was therefore a specific claim for the lost earnings. The trial magistrate calculated the lost of earnings from the period that plaintiff was injured to the date of the end of the trial at ksh.2,930/= per month which was the actual earnings of the Plaintiff. The award come to a total of Ksh.175,800/=. However taking into account the award of general damages of Ksh.550,000/= this award of Ksh.175,800/= is either an overlap of the award of general damages or makes the award inordinately high when looked at as a composite figure. Consequently, I set aside the said award of Ksh.175,000/=.

25. Order XX rule 4 of the then Civil Procedure Rules provided as follows.

**“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”**

The contents of the trial magistrate’s judgment reflects all the above elements.

26. With the foregoing, the award for loss of future earnings which was calculated by the trial magistrate at Ksh. 1,280,160/= is set aside and substituted with an award for Ksh.500,000/= for loss of earning capacity. The award of Ksh.175,000/= loss of earnings is also set aside. The total award is therefore Ksh.550,000/= general damages plus Ksh.500,000/= for loss of earning capacity which comes to a total of Ksh1,050,000/=. Consequently, the judgment of the lower court is set aside and substituted accordingly.

27. The appeal having been partially successful and the cross appeal having failed, each party to bear own costs of this appeal.

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of Feb., 2017

**B. THURANIRA JADEN**

**JUDGE**