



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 84 OF 2011

COAST BUS (MSA) LTD.....APPELLANT

VERSUS

HARRISON KENGA HARE.....RESPONDENT

(An appeal from the Judgment of Hon. L. Mutende, Senior Principal

Magistrate delivered on 3rd May, 2011 in Mombasa RMCC No. 115 of 2007)

JUDGMENT

1. On 25th May, 2011, the appellant herein, Coast Bus (Mombasa) Ltd., filed a memorandum of appeal raising the following grounds of appeal, that:-

i. The Learned Magistrate erred in law and in fact in misapprehending and misunderstanding the principles applicable in computation of loss of future earnings and by making an estimate (sic) award of Kshs. 500,000/- for loss of future earning (sic) based on a multiplier of 15 leading to a grossly erroneous award under this head;

ii. The Learned Magistrate erred in law and in fact in awarding the respondent Kshs.1,400,000/= in general damages for pain and suffering which award is manifestly excessive in the circumstances of the injuries sustained by the respondent;

iii. The Learned Magistrate erred in law and in fact when she failed to consider properly the parties submissions on quantum and the cases cited for comparable injuries to those sustained by the respondent thereby awarding the respondent an award that was inordinately excessive in the circumstances and above the award of Kshs. 1,600,000/= submitted by the respondent; and

iv. The Learned Magistrate's award is unreasonable and unjustified.

2. The appellant prays for orders that;

a. The appeal herein be allowed with costs;

b. In the alternative, this Honourable Court does take up the submissions of the parties, and or reassess the evidence and issue a judgment thereon;

c. The Senior Principal Magistrate's judgment delivered on 3rd May, 2011 be set aside; and

d. Such further or other orders as this Honourable Court may deem just to grant.

3. Counsel for the parties filed their written submissions which they highlighted. Ms. Adagi, Learned Counsel for the defendant/appellant argued that the award for loss of future earning capacity was arrived at due to misdirection on the part of the Hon. Magistrate who failed to appreciate the principles applicable in damages for loss of earning capacity and future earnings when it awarded an estimated figure of Kshs. 500,000/=. She relied on the case of **Nicholas Njue Njuki vs Eliud Mbugua Kahuro** [2014] eKLR, where the court made a distinction between loss of earning capacity and loss of earnings. She referred to the case of **Mwangi & Another vs Mwangi** [1996] KLR (CAK) which was cited in **Nicholas Njue Njuki's** case (supra) in which the Court of Appeal stated that loss of earnings is a special damage claim which has to be pleaded and specifically proved. Loss of earnings is awarded after prove through evidence. Counsel stated that Kshs. 500,000/= was awarded as an estimate for loss of earnings and an award was also made for general damages.

4. Ms. Adagi further submitted that the award of Kshs. 1.4 Million made for pain and suffering was excessive after taking into account the injuries sustained by the respondent. She stated that the Hon. Magistrate totally relied on an authority cited by the respondent where injuries were severe in nature. She argued that the general damages awarded were not in tandem with the pleadings. She invited the court to read the authorities she had referred to in her written submissions.

5. Mr. Tarus, Learned Counsel for the respondent opposed the appeal. In reference to the case cited by Ms. Adagi of **Nicholas Njue Njuki** (supra), he indicated that the issue of loss of earnings and loss of earning capacity were addressed. He submitted that the same issues were also dealt with in the case of **Fairly vs John Thompson Ltd.** (1973) 2 Lloyds Report 40, cited by Counsel for the appellant wherein Lord Denning stated that it is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Counsel therefore argued that the award of Kshs. 500,000/= was what the respondent would have earned in the future and that the said award, was prayed for in the amended plaint.

6. Counsel for the respondent cited the case of **British Transport Commission vs Gourley** [1955] 3 ALL ER 796 where Lord Goddard said that in an action for personal injuries, the damages are always divided into two main parts, special damage which must be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and which is not specially pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.

7. Mr. Tarus emphasized that from the above authority, there can only be an estimate of future earnings, which the Hon. Magistrate estimated at Kshs. 500,000/=. In regard to the medical report produced by Dr. Ndegwa, Counsel submitted that he testified that the respondent suffered 100% total disability. Counsel also relied on the case of **Dunn vs British Coal Corporation** [1993] 1 ICR 396 and submitted that in his view, loss of earning capacity is diminished earnings.

8. On the issue of pain, suffering and loss of amenities, Mr. Tarus relied on the case of **S.G. vs Hewitt** [2013] 1 ALL ER 1118 where the court held that it would have been concerned to ensure that the claimant was obtaining proper damages for the injury he sustained, not only for pain and suffering but also in taking account of the probable impact of the injury on his earning capacity and on his ability to look after himself independently.

9. Counsel argued that the court cannot disturb an award just because an appellant does not agree with it. He indicated that Dr. Ndegwa recommended crutches for the respondent and observed that it was better for his leg to be amputated. Counsel added that there is no standard formula for establishing the amount of pain that an injured party suffers as each case is determined on its own merits. In his view, the award of

Kshs. 1.4 Million was justified.

10. To amplify the foregoing submission, he referred to **Blackshaw vs Lord & Another** [1983] 2 ALL ER 311 and **Reddy vs Bates** [1984] ILRM 197, where in the latter case the court held that it could not set aside the verdict of a jury on the grounds that the damages are excessive unless, adopting a view of the facts which is most favourable to the plaintiff, no reasonable proportion exists between the amount awarded and the circumstances of the case. Mr. Tarus prayed for the appeal to be dismissed with costs to the respondent.

11. In response to the foregoing, Ms. Adagi stated that the authorities relied on by Counsel for the respondent of **British Transport Commission vs Gourley** and **Dunn vs British Coal Corporation** (supra) support the appellant's submissions that loss of future earnings must be specifically pleaded and proved. She prayed for the appeal to be allowed with costs to the appellant.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- i. If the Hon. Magistrate misdirected herself in making an estimated award of loss of earning capacity; and
- ii. If the general damages awarded for pain and suffering were excessive.

12. This being a first appeal, this court is reminded of its duty by the authority of **Selle vs Associated Motor Boat Company** [1968] EA 123 at p. 126, where Sir Clement de Lestang VP stated thus:-

“ An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such 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 witness and should make due allowance in that respect. In particular this court is not bound necessarily to follow the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

13. PW1, was Dr. Stephen Kanegeni Ndegwa. His evidence was that on 16th April, 2007, he examined the respondent who had been injured in a road traffic accident on 4th May, 2006. The respondent had a displaced fracture on the left femur, displaced fragment on the left tibia and fibula. He was treated at Coast General Hospital for 6 months. He was taken to theatre where the fracture of the left femur was opened and a plate inserted. The compound fracture was treated with an external fixator. The fractures were confirmed through x-ray and traction was done. He was given pain killers, antibiotics and put on physiotherapy. The respondent was given crutches which he was using as at the time he testified.

14. PW1 further stated that when he saw the respondent, he still complained of pains on the left leg and thigh and of pus oozing out of the left knee. He also complained of inability to resume his normal duties. PW1 paid the respondent a home visit as he was bed ridden. The respondent's lower leg was shorter by 7 centimeters and the left knee had gone into disuse. The left thigh was scarred and maligned. His left leg had a malfunction with a permanent scar. The left ankle joint was stiff. PW1 concluded that the injuries were severe. He formed the opinion that the respondent would not be able to walk again without the aid of crutches. He could benefit from amputation above the knee. He indicated that the cost of future amputation was Kshs. 100,000/=, cost of a good artificial limb was Kshs. 200,000/=, it needed replacement after every 7 years, alternatively the cost of a good wheel chair with a life (span) of 30 years would be Kshs. 30,000/= and monthly payment of a worker to push it would be Kshs. 5,000/= per month. PW1 produced the medical report as plf. exh. 1. He charged the respondent Kshs. 3,000/= and produced the receipt as plf. exh. 2. He charged Kshs. 3,000/= for court attendance and produced the receipt thereof as plf. exh. 3.

15. On cross-examination, PW1 explained that the figures he had given in his report are the ones they use in hospitals and the charges are published in a booklet for the Kenya Medical Practitioners and Dentists Board.

16. PW2, Harrison Kenga Hare, the respondent herein testified that he was employed by Coast Bus Mombasa Ltd. (appellant), as a Loader/Turn Boy. He was a permanent employee who had worked for the appellant for 17 years. He used to travel by bus from Mombasa to Nairobi. On 4th May, 2006, he was going to Nairobi aboard motor vehicle registration No. KAP 918G. He was sitting at the front. When at Makindu, their vehicle rammed into a lorry that was ahead of them. The accident occurred between 7-8.00 p.m. His left leg got fractured at the knee. He was treated at Voi hospital and later at Coast General Hospital. He produced his discharge card from hospital as plf. exh. 4.

17. At the time of testifying the respondent informed the court that he was still in pain and his leg was deformed and full of scars. He was unable to sleep and was still going to the clinic. He blamed the Driver of the bus, one Albert, for being negligent. In the respondent's view, the bus was being driven at a high speed, he could see that as he was near the Driver who failed to control the bus thereby ramming into the lorry. The bus rolled after hitting the lorry. He produced an LD form he was given by the appellant as plf. exh. 5. It was the respondent's evidence that he used to earn Kshs. 300/= per day and he would work every day which translated to Kshs. 9,000/= per month. He was unable to work after the accident. His leg was amputated. The company paid him nothing yet he had children in school who depended on him. He stated that he could not seek employment because he was on crutches. He was examined by PW1 who prepared a medical report. He paid Kshs. 3,000/= to the Doctor.

18. The respondent further testified that he depends on help and was not able to bathe/clean himself. He thus needed Kshs. 200,000/= for amputation and to hire services of a helper. He also needed an artificial limb. The respondent stated that he had fastened his seat belt at the time of the accident. He prayed for damages for pain and suffering, for what he has spent and what he needs. He prayed for costs as well.

19. On cross-examination, the respondent indicated that he could not remember when he was employed by the appellant but he had worked for 17 years. They had not been given letters of appointment. He used to be paid Kshs. 300/= which he used to sign for. He stated that the appellant's vehicle was on its lane and the lorry was also on the same lane going towards Nairobi. He was admitted in hospital for 7 months. His wife took care of him but it was difficult relying on her. He reiterated that he was not able to work and was in pain throughout, although he used to receive treatment.

20. The police abstract was by consent produced as plf. exh. 7. The Hon. Magistrate considered the evidence tendered, the written submissions of Counsel on record and found the appellant vicariously liable for the actions of its employee, the Driver of the Motor vehicle registration No. KAP 918G. She declined to award the estimated cost of an operation at the sum of Kshs. 100,000/= and wages for a domestic worker at Kshs. 5,000/= per month. She awarded a sum of Kshs. 1,400,000/= for pain and suffering and an allowance of Kshs. 500,000/= being the amount the respondent could have earned in future. She awarded special damages of Kshs. 1,000/=. She found the appellant 100% liable for the accident.

LOSS OF EARNING CAPACITY

21. At the hearing of this appeal, Mr. Tarus went to great lengths to distinguish what constitutes loss of earning and loss of earning capacity and in his written submissions stated that *loss of future earning capacity* is the same as loss of earning capacity, which refer to a loss of earnings or impaired earning capacity. In his view, the Hon. Magistrate awarded Kshs. 500,000/= being what the respondent could have earned in future, thus being compensation for future earning capacity.

22. Ms. Adagi's position however was that loss of earnings is a special damage claim which has to be pleaded and specifically proved, to this end she relied on the case of **Mwangi & Another vs Mwangi** (supra). In citing the said case, Judge Ngaah stated as follows in the case of **Nicholas Njue Njuki vs Eliud Mbugua Kahuro**:-

“It is not rare that whenever the issue of whether evidence is necessary to prove loss of earning capacity arises, there is always the tendency to lose sight of the distinction between “loss of earnings” (particularly future earnings) and loss of earning capacity.”

23. In the case of **Cecilia W. Mwangi & Another vs Ruth W. Mwangi** [1997] eKLR otherwise referred to as **Mwangi & Another vs Mwangi**, the Court of Appeal had the following to say:-

“Loss of earnings 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 also have to be proved on a balance of probability.” (emphasis added)

24. In **Clarke vs Rotax Aircraft Equipment Ltd.** [1975] 3 ALL ER 794, referred to by the respondent’s counsel in his written submissions, the Court stated thus:-

“Damages awarded for loss of earning capacity were analogous to damages for loss of future earnings the loss of future earnings arises from the plaintiffs inability to perform the same job as he had been performing before, and this in turn arises from the loss of earning capacity which he has suffered.”

25. A reference to the amended plaint filed on 20th June, 2008, in paragraph 9 reveals that the respondent prayed for general damages for pain and suffering and loss of amenities and loss of earning capacity. Therefore going by the decisions cited in the preceding paragraphs, Mr. Tarus was correct in submitting that loss of earning capacity was a general damage claim. The respondent in his evidence in the lower court was categorical that as a result of the injuries he sustained, he will not be able to work ever again and relies on his wife for assistance. He cannot even bathe on his own. The Doctor, PW1 was of the opinion that the respondent suffered 100% disability.

26. The Court of Appeal in **Butler vs Butler** [1984] KLR 225 held 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.”

27. The respondent in this case did include a claim for loss of earning capacity in the amended plaint as a

general damage claim. Bearing in mind the guidelines in **Butler vs Butler** (supra). I fail to see any misdirection on the part of the Hon. Magistrate in having made an award of Kshs. 500,000/= to the respondent for loss of earning capacity.

DAMAGES FOR PAIN AND SUFFERING

28. In making an award of Kshs. 1,400,000/= for pain and suffering, the Hon. Magistrate considered the written submissions of the Counsel for the parties herein, the cases they cited in support of their rival positions and the evidence on record.

29. The respondent in the lower court sought general damages in the sum of Kshs. 1,600,000/= and relied on the case of **Edward Njoroge Gichomo vs Patrick Simiyu Wekesa & Another**, Eldoret HCC No. 32 of 1998, where the plaintiff who had suffered multiple injuries, as the respondent herein, was awarded general damages of Kshs. 1,600,000/=.

30. The appellant's Counsel in the lower court prayed for an award in the sum of Kshs. 400,000/= in general damages. She relied on the cases of **Josephine M. Kimaiyo vs Simon N. Karichu & 3 Others**, where an award of Kshs. 500,000/= was made in the year 2001 for similar but "very serious injuries". They had also relied on the case of **Vinod Karsan L Kalyan Jesani vs Zainabu Yusuf**, Mombasa HCC No. 36 of 1998 where an award of Kshs. 700,000/= was made in the year 2003 for similar but "very very serious" injuries where the plaintiff lost power in the legs and the case of **Razi Amin Kulaten vs Claus Kruger & Another**, Civil Appeal No. 61 of 2003 wherein the Court awarded Kshs. 600,000/= for similar but "very serious" injuries where the plaintiff who was a Driver was unable to resume driving.

31. The Hon. Magistrate noted that the authorities relied upon by Counsel for the appellant were made between 8 to 11 years gone by, as at time of writing her judgment in the year 2011. She stated that she was guided by the authority cited by the respondent's Counsel and more importantly, she took into consideration the severe injury sustained by the respondent and his condition then and made the award of Kshs. 1,400,000/= for pain and suffering.

32. In the case of **Rushton vs National Coal Board** [1953] 1QB 495 it was held thus:-

" it is impossible to standardize damages for the circumstances of two different cases are never alike, either as to the nature or the effects of injury. All that the court can do is to ensure that no factor which ought to have been considered in the assessment of damages has been overlooked and no factor that ought not to be considered has been interpolated."

33. In **Butler vs Butler** (supra), the Court of Appeal said as follows in regard to assessment of damages:-

"the assessment of damages is more like an exercise of discretion by the trial Judge and an appellate court should be slow to reverse the trial Judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

34. Having considered the evidence tendered and submissions made in the lower court and the submissions made before me, my finding is that the award made by the Hon. Magistrate was not excessive in the circumstances of this case. The said Court had an obligation to consider the cost of inflation and make a reasonable award. I note that the case that the Counsel for the respondent relied on in praying for damages of Kshs.1,400,000/- was decided in the year 1998, yet the judgment in this case was delivered on 3rd May, 2011. The erosion of the buying power of the Kenyan shilling cannot be ignored between the years 1998 and 2011. The respondent suffered a severe injury that left him permanently incapacitated. He was in pain at the time he was testifying and pus was oozing out of his left knee, he had difficulties sleeping due to pain.

35. For the foregoing reasons, I find no reason whatsoever to persuade me to interfere with the judgment

of the lower court. The appeal is hereby dismissed. Costs of the lower court and this appeal are awarded to the respondent. Interest is also awarded to the respondent at court rates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 13TH DAY of JULY, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Adagi for the appellant

Mr. Tarus for the respondent

Mr. Oliver Musundi - Court Assistant