



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.41 OF 2013

(Appeal from the judgment of Hon. K. Sambu (PM) dated and Delivered

on 21st March 2013, in the original Kisii CM Civil Case No.352 of 2010)

JENNIFER KERUBO OMUNDI----- APPELLANT

VERSUS

THE REGISTERED TRUSTEES

CATHOLIC DIOCESE OF KISII-----RESPONDENT

JUDGMENT

1. The Appellant herein **JENNIFER KERUBO OMUNDI** was the plaintiff before the lower court. Her case was that she sustained multiple soft tissue injuries as a result of a road traffic accident that occurred on 6th November 2009 along Kisii-Migori Road near Ritoke area when the Respondent's motor vehicle registration number KZQ 130 veered off the road and hit her as she stood on the grass verge. The Appellant filed **Kisii CMCC No.352 of 2010** against the Respondent seeking damages for pain, suffering and loss of amenities and loss of earning capacity. The Appellant also sought special damages, cost of future surgical intervention, costs of the suit and interest thereon.

2. Upon the commencement of the trial and after the trial court had taken the evidence of the Appellant, the parties entered into a consent on liability in which the Appellant agreed to shoulder 20% liability with the Respondent bearing 80% liability. The trial court then entered judgment on liability in those terms and proceeded to assess damages after receiving the parties' written submissions on quantum. According to the plaint the Appellant's injuries were as follows:

- a) Blunt trauma to the left hip joint leading to dislocation of the hip bone,**
- b) Blunt trauma to the left knee,**
- c) Deep cut wound on the left leg,**
- d) Deep cut wound on the left thigh,**
- e) of the left shoulder joint,**
- f) Degloving injury on both gluteal areas.**

3. Then the trial court entered judgment, for Appellant as follows:

- a) **Liability be and is apportioned between the parties in the ratio of 80:20**
- b) **Ksh.500,000/00 general damages**
- c) **Kshs.7,000/00 special damages**
- d) **Kshs.56,000/00 being the cost of future surgical intervention.**

Net award Ksh.450,400/00 together with interest thereon at court rates.

- e. **The defendant be and is hereby condemned to pay costs of the suit.**

4. It is the above judgment that is the subject of this appeal, more specifically in respect to the award of general damages. In the Memorandum of Appeal, the Appellant has set out 3 grounds of appeal as follows:

- 1) **The learned trial magistrate failed reasonably and sufficiently to appreciate the gravity and extent of the appellant's injuries and the resulting permanent physical disability suffered by the appellant and thereby arrived at an erroneous estimate of damages.**
- 2) **The learned trial magistrate's award failed, reasonably, to take into account lost earning capacity suffered by the appellant as a result of her injuries.**
- 3) **The learned trial magistrate misapprehended the totality of the evidence before him and the filed written submissions and thereby made an award of general damages which was too low given the circumstances.**

5. When the appeal came up for directions on 13th November 2014, parties agreed to canvass their arguments on appeal by way of written submissions. Mr. Nyamurongi appeared for the Appellant while Mr. Karanja acted for the Respondent.

Appellant's Submissions

6. In his written submissions filed in court on **12th June 2015**, Mr. Nyamurongi, advocate for the Appellant consolidated all the grounds of appeal into one and stated that the appellant was aggrieved by trial courts' findings on quantum while arguing that the award was so low, in comparison to the injuries sustained by the Appellant together with the attendant incapacity that it would not constitute just compensation in the circumstances.

The Appellant argued that the court needed to re-evaluate the evidence tendered before the trial court with a view to coming up with its own findings on a just compensation.

7. The Appellant relied on the case of **Selle –vs- Associated Motor Boat Co. Ltd [1968] EA 123** which sets out the guidelines on the exercise of judicial discretion in the making of award of damages as precedent of previous recent judgments, the nature of injuries sustained together with their severity, the consequence of incapacity and or deformity and lastly, the influence of inflation on the value of the shilling.

8. In this regard the Appellant submitted that the trial magistrate did not aptly address his mind and properly evaluate the evidence on record touching on the Appellant's loss of earning capacity thereby erring in failing to make an award for that loss of earning capacity.

9. The Appellant's counsel highlighted the fact that the Appellant's medical report prepared by Dr. Ogando indicated that the Appellant has suffered deformity with incapacity assessed at 45%. The

Appellant further relied on the case of **Sosphinaj Company Ltd & Anor. –vs- Daniel Ng’ang’a Kanyi [2006] eKLR 41** wherein an award of Ksh.420,000/= general damages for loss of earning capacity was made for the Plaintiff who was incapacitated following an accident and was unable to continue with her farming activities.

The Appellant prayed that her appeal be allowed and a reasonable award be made on account of loss of earning capacity.

Respondent’s Submissions

10. Mr. Karanja advocate for the Respondent in his written submissions filed on 22nd September 2015 stated that it is now settled law that an appellate court can only interfere with an award of damages if it is shown that there was an error in principle by the trial court or that the damages awarded are so high or so low as to be a wholly erroneous estimate and an error of principle must be inferred. The Respondent referred to the cases of: **Charles Mokuwa –vs- Judy Wairimu Mirangu [1996] eKLR2**, **James Mukatui Mayia –vs- B.M.A Bayusuf & Sons Ltd [2013] eKLR 4** and **Butt –vs- Khan [1981] KLR 349**.

11. The Respondent submitted that the Appellant claimed loss of earning capacity due to disability before the lower court without specifying the amount claimed or attempting to compute the same.

12. The Respondent contended that the Appellant relied on 4 authorities before the lower court and prayed for an award of Ksh.400,000/= general damages for pain and suffering and loss of amenities yet the court awarded her Kshs.500,000/= for pain and suffering and loss of amenities but did not make any award for loss of earning capacity as the same was not proved.

13. The Respondent supported the trial magistrate’s finding while stating that the Appellant did not furnish any evidence to prove that she was employed anywhere or her earnings thereof save that she was unable to work on her farm or perform domestic chores. It was the Respondent’s contention that the Appellant did not give evidence to show what she was growing in her farm, what quantities or the size of the farm. The Respondent relied on the following authorities to fortify his position that the Appellant needed to prove her earnings: **Mumias Sugar Co. –vs- Wanalo [2009] eKLR** and **Douglas Kalafa Ombeva –vs- David Ngama [2013] eKLR**.

14. The Respondent further submitted that in the event this court makes a finding that the Appellant is entitled to an award of damages for loss of earning capacity, such an award has to take into consideration the amount of general damages already awarded being Kshs.500,000/= and that incapacity was assessed at 45%. The Respondent proposed a multiplier of 10 years against a monthly earning of Kshs.4,007/= going by the minimum wage for general workers as at November 2011 as per the **Regulation of Wages (General) (Amendment) Order 2011, L.N. No.64 of 2011**.

Determination

15. From the record of appeal and the submissions by counsels for both parties, I have identified the main issue for determination to be:

- Whether the Appellant is entitled to damages for loss of earning capacity.

16. From the Appellant’s submissions before this court it is clear that the Appellant does not have any problem with the trial court’s findings/award of Kshs.500,000/= general damages for pain, suffering and loss of amenities together with the award of Kshs.7,000/= special damages and Kshs.56,000/= for future medical attention.

17. The Appellant specifically took issue with the trial courts failure to make an award of general damages for loss of earning capacity.

Which brings me to the question of whether from the evidence on record, the Appellant proved that she

was entitled to damages for loss of earning capacity.

18. This being a first appellate court, I am under an obligation to re-evaluate the evidence on record with a view to making my own determination on the same bearing in mind the fact that I neither saw nor heard the Appellant testify.

19. In respect to loss of earning capacity, the Appellant testified as follows:

“I am now walking on clutches (sic) following the sustained injuries. I used to work on my shamba as well as in my domestic chores but I am unable to take up my responsibilities towards the support of my children, I am married with five children.”

20. The medical report in respect to the Appellant’s injuries prepared by one Dr. Ezekiel Ogando Zoga on **11th June 2010**, which was produced as an exhibit before the lower court contained the following remarks in conclusion:

“Following the road traffic accident Jennifer sustained some injuries on the left hip joint which was dislocated and is not well reduced and cannot use the limb.

She also sustained multiple STI which have healed with scar. She needs major operation at a cost of Ksh.56,000/= to reduce the hip joint to restore some forchi. Permanent disability is 45%.”

21. In his judgment, however, the trial court had this to say in regard to the Appellant’s claim for loss of earning capacity:

“No evidence was led in proof on loss of earning capacity and would therefore make no finding under this head.”

22. The trial magistrate further noted that the Appellant was during the trial, which took place on 8th January 2012, almost 3 years after the accident, still walking with the aid of crutches.

23. From the evidence tendered before the lower court and the trial magistrate’s own findings and observation that the Appellant was still walking with the aid of crutches as at the time of the hearing of the case, it is quite clear to me that the nature of injuries that the Appellant suffered were so severe that they left her incapacitated. Indeed, Dr. Zogas medical report assessed the Appellant’s level of incapacity at 45%.

24. In view of the above findings on the Appellant’s incapacity, I find that the trial magistrate misapprehended the evidence and erred when he declined to make any findings on damages for loss of earning capacity.

25. I find that there was sufficient evidence before the trial court consisting of the Appellant’s testimony and the medical reports to demonstrate that the Appellant was injured to the extent of not being able to continue with her chores as a mother and a wife, and to till her shamba. The appellant did not have to prove that she was, prior to the accident, in a salaried employment in order to qualify for the award of loss of earning capacity.

26. In **Butler –vs- Butler [1984] KLR**, Nyarangi J, held:

“It was immaterial at the time that the respondent had not been in salaried or similar employment.”

27. Having found that the claim for loss of earning capacity was proved by the Appellant on a balance of probabilities, I now turn to the question of the assessment of the damages payable to the Appellant under this heading. The Respondent’s counsel has submitted that since the Appellant did not specifically prove

her earnings from her farming engagements, the court adopts an assessment using the minimum wage payable to general workers to be multiplied with 10 years that the Appellant would have actively worked in the shamba to be further multiplied by 45% level of assessed incapacity. I do not however agree with this mode of assessment of damages.

28. The Court of Appeal had the following to say in respect to assessment of damages for loss of earning capacity in **Mumias Sugar Company Ltd –vs- Francis Wanalo [2007] eKLR**;

“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.”

29. The Appellant’s submissions in respect to assessment of damages was in tandem with the above Court of Appeal authority when he stated that this court makes a reasonable award for loss of earning capacity.

30. I find that the correct legal position therefore is that the court has a discretion to make any award for general damages for loss of earning capacity depending on the circumstances of the case.

31. In the instant case therefore, after fully re-evaluating the evidence on record, the circumstances surrounding the case and after taking due consideration of the fact that the trial court had already made an award of Kshs.500,000/= general damages for pain, suffering and loss of amenities, I find that an award of Kshs.250,000/= general damages for loss of earning capacity would be adequate compensation for the Appellant under this heading. This award will be subject to the agreed apportionment.

32. In the end therefore, I allow the Appellant’s appeal, set aside the judgment of the trial court dated 21st March 2013 and substitute the same with judgment in favour of the Appellant against the Respondent for Kshs.650,400/= made up as follows:

- **General damages for pain, suffering and loss of amenities - Kshs.500,000.00**

- **Damages for loss of earning capacity - Kshs.250,000.00**
- **Future medical expenses - Kshs. 56,000.00**
- **Special Damages - Kshs. 7,000.00**

- TOTAL - Kshs.813,000.00**

- **Less 20% contribution - Kshs.162,600.00**

- TOTAL AWARD - Kshs.650,400.00**

Interest shall accrue on the said amount from the date of this judgment until payment is made in full.

33. The Appellant will have the costs of this appeal and the costs of lower court case.

Dated, signed and delivered in open court this 3rd February 2016

HON. W. OKWANY

JUDGE

In the presence of:

Mr. Nyamurongi for the Appellant

N/A for the Respondent

Omwoyo: court clerk