



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**HIGH COURT CIVIL APPEAL NO.6 OF 2014**

SOMOIRE KEEN.....1<sup>ST</sup> APPELLANT

J. KEEN INVESTMENTS LTD.....2<sup>ND</sup> APPELLANT

**VERSUS**

PELEZIA BAKARI SALIM.....RESPONDENT

**JUDGEMENT**

1. The two issues raised by this appeal are likely to be resolved by the answer to the question posed by the Court of Appeal in JOSEPH MUTHEE KAMAU & ANOTHER VS. DAVID MWANGI GICHURU & ANOTHER (2013) eKLR as follows:-

**...is jurisdiction conferred as at the time when the Plaintiff is filed; at the time of hearing the suit; or at the time of writing and delivery of judgement. Can jurisdiction be acquired retroactively?**

2. Pelezia Bakari Salim (the Respondent) was the Plaintiff in a claim for damages for personal injuries arising out of a road motor accident which occurred on or about 7<sup>th</sup> March 2012. The Appellants were the Defendants in that matter. For purposes of this Appeal Parties are referred to in their litigating positions at Trial. Liability was agreed between the Parties at the ratio of 80% : 20% in favour of the Plaintiff against the Defendants. After taking evidence on quantum the learned Trial Magistrate entered judgement as follows:-

(a) Loss of future earnings.....Kshs.9,360,000/=.

(b) Special damages.....Kshs.125,336/=.

(c) General damages.....Kshs.2,000,000/=.

3. Although the Defendants had challenged the Judgement of the Lower Court on the twin issues of liability and quantum, at the hearing of the Appeal, the Defendants choose to pursue two issues only:-

(a) That the trial court lacked jurisdiction to hear the matter.

(b) That the award on quantum was erroneous and excessive and should be set aside.

4. It is agreed by both sides that the learned Trial Magistrate who was then a holder of the position of Resident Magistrate did not have pecuniary jurisdiction to make the award of Ksh.11,485,336/=. The

Defendants thought that the pecuniary jurisdiction of the learned Trial Magistrate was Ksh.2,000,000/= while the Plaintiff submitted that it was Ksh.3,000,000/=.

5. The Learned Trial Magistrate herein, Hon C.I Agutu, held the position of Resident Magistrate at the time she became seized of the Trial and at the time she delivered Judgment therein on 2<sup>nd</sup> December, 2013. Through the Statute Law (Miscellaneous Amendment) Act, 2012 (Act No.12 of 2012), Section 5 of the Magistrates Court Act (Cap 10) was amended to, inter alia, enhance the pecuniary jurisdiction of a Resident Magistrate to Kenya Shillings Two Million. Clearly therefore the learned Trial Magistrate acted in excess of this jurisdiction when she made an award of Ksh.11,485,336/=.

6. This Court is urged by the Defendants to find that the entire Trial and Judgement was a nullity for want of Jurisdiction. Counsel for the Appellant cites the decision in **RUTH NDUNI MWITHUI VS. MOMBASA LINER & ANOTHER (2012)** eKRL in support of that position.

7. The Plaintiff on the other hand urged me to either order a re-trial for purposes of quantum or to substitute the award for the sum of Ksh.3,000,000/= being the maximum amount (as wrongly asserted by the Plaintiff) the Trial Magistrate could award.

8. The straight forward solution to this matter is to follow the decision in **JOSEPH MUTHEE KAMAU** (*supra*). There the Court of Appeal held:

**“When a suit has been filed in a Court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of Kagenyi V. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special Damages where the liquidated sum claimed exceeds the Court’s pecuniary jurisdiction. However, this does not apply to the present case in a claim for General Damages where it is the Respondents who appointed, through their own assessment, what the amount of Damages they would claim. The Respondents are permitted to limit the amount of General and Special Damages they would like to claim in order to bring themselves within the pecuniary jurisdiction of a particular Court. The decision of Justice J.B. Ojwang in ARMITRAL BAGWANJI SHAH V. MASH EXPRESS LTD & OTHERS (Nairobi HCCC 1095 OF 2005 (Unreported) is in accord”.**

9. The Court will proceed to carry out its own assessment of the damages but subject to the maximum of Kshs.2,000,000/= which the Plaintiff had placed on herself by having her matter heard and finalized by a Resident Magistrate.

### **Special Damages**

10. This need not be controversial. The Plaintiff pleaded a sum of Ksh.125,336/= and proved Ksh.141,000/= (not Ksh.189,336/= as held by the Trial learned Magistrate as the invoice of Ksh.49,336/= was prove of a demand made and not prove of payment). But that matters little because, as correctly held by the Magistrate, the amount pleaded was only Ksh.125,336/=. The Plaintiff could not get more than the pleaded amount. There is no reason to fault the Learned Trial Magistrate for making this award.

### **Loss of earnings**

11. The Plaintiff pleaded that prior to the Accident she was a hardworking businesswoman earning a monthly sum of Ksh.50,000/=. Having suffered the injuries, and in particular the amputation of her right upper limb she could no longer engage in gainful activity. In her evidence she stated that she met this accident as she was enroute to Kampala to buy clothes. She reiterated her earnings.

12. What the Plaintiff did not do was to state her age. She also did not provide any documentary evidence to prove that she was indeed a businesswoman and the amount that business yielded. In assessing damages under this head, the learned trial Magistrate held:

*“The Plaintiff testified under oath that she was in self employment and usually travelled to Kampala to buy clothes, garments and beauty products and that she usually made an interest of Kshs.50,000/= (fifty thousand) but did not produce concrete evidence. On this head I will approximate her earnings at Kshs.30,000/= per month. The Plaintiff was aged 39 years at the time of the accident. I will take the retirement age to be 65 years. Loss of future earnings is therefore (Kshs. 30,000x12x26)= 9,360,000/=.*

13. Although the Trial Court did not state the basis for holding that the Plaintiff was 39 years old, that information of age was found in the Medical documents produced by the Plaintiff. In the discharge summary of 1<sup>st</sup> June 2012 by Nightingale Medical Centre her age was put at 38 years. This was repeated in the P3 form prepared on 9<sup>th</sup> November, 2012. In the Medico Legal Report prepared on 20<sup>th</sup> February, 2013 by Dr. Manasseh Onyimbi her age was 39 years. In the absence of evidence to the contrary, there was a basis to hold that, on the balance of probabilities, the Plaintiff had proved that she was about 38 years old at the time of the accident.

14. The issue of earnings is more problematic. No documentary evidence was led to prove that the Plaintiff made the earnings claimed or even in the least that she was a Businesswoman. The Trial Magistrate therefore erred in using a multiplicand of Ksh.30, 000/=. That said many Kenyans in the informal sector do not keep detailed and proper books of Accounts. Where this is lacking, the solution would be to fall back to the minimum monthly wages prescribed by the Government for persons engaged in a similar trade to the claimant. In this way some justice is done to the claimant.

15. The Plaintiff was running a shop at the Kisumu Bus stop. While her work was certainly more sophisticated than that of a shop assistant, that category of occupation under the Regulation of Wages would be the closest fit to what she was doing. The minimum basic monthly wage for a shop assistant at Kisumu at the time of the accident was Ksh.10,239 (See Legal Notice No.64 of 2011 (The Regulation of Wages General Amendment Order, 2011).

16. The retirement age in Public Service is currently 60 years. Thus Court has no reason to hold that it is not the reasonable age for retirement in the Private Sector as well. The Plaintiff would therefore have another 22 years of employment/trade. A multiplicand of 22 is appropriate.

17. The unfortunate feature of the Medico Legal report prepared by Manasseh Onyimbi is that it does not give the Degree of Incapacity suffered by the claimant. But he says this of the severity of the injuries:-

- “i. Head trauma including the neck and brain concussion, with loss of consciousness.
- ii. Lacerations with torn muscular tissues at the forehead and both upper lips.
- iii. Soft tissue chest injury.
- iv. Traumatic amputation of right upper limb with complete loss of the shoulder joint.
- v. Extensive lacerated wounds on the right thigh with severe loss of muscle from the hip joint down to the ankle joint”.

Although the Plaintiff may not have suffered complete incapacity, the injuries left her badly impaired. In the words of the Doctor she sustained *“Debilitating grievous harm”*.

18. The importance of the Degree of Incapacity is that the Multiplicand to be used should correlate with the Permanent Incapacity of the victim. Here, the Medical evidence is completely unhelpful. The question of the Degree of Incapacity is an Expert Opinion of a Medical Professional. The Court does not have the expertise and tools to take an objective position.

19. When all the aspects of the claim for Loss of Earnings are considered together, the inevitable and unfortunate conclusion is that the Plaintiff did not provide sufficient material upon which the Court would

assess her claim. Unlike, the Trial Court I would find that Loss of Earnings was not proved.

**General damages**

20. The claimant sustained “**massive damages** inflicted on the vital limbs, worse leading to complete amputation of the whole right arm plus extensive muscular damage of the right lower limb leaving her in a devastating clinical state of disability. The same have left her extremely in a psychologically traumatizing sense of social stigma. The same have extremely limited her expected physical activities and performance of essential domestic chores. The prognosis for her reasonable recovery may take a long period of time, in the tune of 6-10 years. Complete recovery cannot be achieved for life”.

For these injuries the Trial Court made an award of Ksh.2,000,000/=.

21. The Trial Magistrate may in fact have been conservative. Recently, on 27<sup>th</sup> October, 2015, Chitembwe J. in **Umoja Rubber Products Ltd Vs. Bobson R. Lewa (2015)**eKLR made an award of Ksh.2,200,000/= for an amputation of her left hand below the elbow. In the instant case the Plaintiff suffered a complete amputation of whole of her Right Upper Limb with loss at the Shoulder Joint. The award should have been more than Ksh.2,000,000/= but as there was no Cross-Appeal I leave the matter there.

**Conclusion**

22. This Court has found that the Award of Special Damages and General Damages for pain and suffering made by the Trial Court cannot be faulted. The Award is as follows:-

(a) General Damages for pain and suffering Ksh...2,000,000/=.

(b) Special Damages..... Ksh.125,336/=.

**TOTAL ----- Kshs.2,125,336/=.**

Yet because the Pecuniary Jurisdiction of the Trial Court was Ksh.2,000,000/=, an award in excess of the sum would be made without Jurisdiction. For this reason I cap the award of Damages at Ksh.2,000,000/=. But so that the Plaintiff can reap the fullest interest available on the Damages, I would breakdown the award as follows:-

1) Specials .....Ksh.125,336/=.

2) General Damages.....Kshs.1,874,664/=.

**TOTAL .....Kshs.2,000,000/=.**

The award of the Trial Court is set aside and substituted for the above.

23. The Appeal has succeeded to some extent and the Appellant shall have half costs of the Appeal.

**DATED AT NAIROBI THIS 15<sup>th</sup> DAY OF JUNE, 2016.**

**F. TUIYOTT**

**JUDGE**

**READ, DELIVERED AND DATED AT NAIROBI THIS 14<sup>th</sup> DAY OF JULY, 2016.**

.....

**KORIR**

**JUDGE**

**PRESENT:**

W Korir Wangoda for Appellant

Orwasa - Court Clerk