



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 11 OF 2014

BETWEEN

EDWIN OTIENO JAPASO APPELLANT

AND

EASY COACH BUS COMPANY LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. Gitari, CM dated 21st January 2014 at the Chief Magistrates Court at Kisumu in Civil Case No. 327 of 2010)

JUDGMENT

1. The appellant was injured in a road traffic accident which took place on 10th October 2004 along the Ahero-Kisumu Road. He was while travelling as a passenger in Nissan Matatu registration number KAH 435 S which collided with motor vehicle registration number KAR 885M owned by the respondent. According to the plaint filed in the subordinate court, he sustained the following injuries;

- (1) Fracture dislocation of the right little finger.
- (2) Soft tissue injuries to the chest.
- (3) Dislocation of the right hip with a fracture of the acetabulum.
- (4) Fracture of the pelvis involving both superior and inferior pubic rami bilaterally.
- (5) Lacerated cut wound on the anterior left leg.
- (6) Lacerated wound on the anterior right leg.

The appellant also sought special damages for the medical report, police abstract and transport expenses amounting to Kshs. 39,000/- and future medical expenses at Kshs. 4,000/- per month from the date of discharge for the rest of his life.

2. Although the respondent field a defence denying liability, the parties recorded a consent apportioning liability in the ratio of 80% to 20% in favour of the appellant against the respondent. Only the respondent testified and after considering the case, the learned magistrate entered judgment in favour of the respondent as follows;

General Damages – *Kshs. 1,500,000.00*

<i>Special Damages</i>	–	<i>Kshs.</i>	<i>4,600.00</i>
<i>Total</i>		<i>Kshs.</i>	<i>1,504,600.00</i>
<i>Less 20%</i>			
<i>Amount Due</i>		<i>Kshs.</i>	<i>1,203,680.00</i>

3. The thrust of the appellant's case is that the learned magistrate, in assessing damages, did not consider the nature and extent of the injuries sustained particularly having regard to his testimony, the level of treatment he received, the time he spent in treatment, the permanency of his injuries and the medical assessment by the medical practitioners. As a result, Mr Yogo, learned counsel for the appellant, urged that the award was inordinately low having regard to the cases he cited where the claimants had sustained comparative injuries. Counsel submitted that an award of Kshs. 8,000,000.00 would have been appropriate and sufficient to compensate the appellant. Counsel contended that the claim for future medical expenses was proved and was supported by the fact that the appellant suffered a permanent condition which would persist for the rest of his life. Counsel faulted the learned magistrate for dismissing the claim for loss of consortium when it was clear from the evidence that the appellant had suffered permanent incapacity.

4. The respondent supported the decision of the trial magistrate and was convinced that the award was reasonable in the circumstances and reflective of the nature and extent of the injuries sustained by the appellant. Mr Wekhomba, learned counsel for the respondent, contended that the learned magistrate appreciated the evidence and was guided by the authorities cited. He submitted that the claim for loss of consortium was not pleaded and that there was no medical evidence to support it. Counsel pointed to the fact that the appellant did not suffer any permanent disability and that no case for future medical expenses had been made out let alone pleaded.

5. This is the first appeal and as such this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Kiruga v Kiruga & Another [1988] KLR 348*). This mandate was succinctly summarised in *Peters v Sunday Post Ltd [1958] EA 424* as follows;

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide...

6. The appellant testified and produced the medical reports. He recalled that after the accident, he was assisted from the scene and taken to the then Nyanza Provincial General Hospital where he was found to have a fracture on the right small finger and on the hip bone head and pelvic bone. He also had slight injuries on the chest and both legs. He knew had a fracture hip as he could not stand or walk. After initial treatment, he was transferred to Aga Khan Hospital Kisumu where he was put on traction and later airlifted to Aga Khan Hospital Nairobi where he remained for two week as metal plates were fixed. Due to the expense at the Hospital, he was transferred to Equator Hospital for recuperation. He returned to Aga Khan and had the plates removed in December 2004.

7. The appellant further told the trial court that he was informed that the injuries were so severe that he needed a complete hip replacement. He was admitted to Nairobi Hospital from 26th March 2006 to 4th April 2006. After discharge, he was admitted again on 27th April 2006 as he suffered an infection. While he was in hospital, an X-ray showed that the two screws holding the artificial hip were broken and the cap on the hip eroded. He was again admitted on 6th December 2012 and discharged on 13th December 2012.

8. The appellant produced several medical reports prepared by the doctors who examined him. Dr S. O.

Owinga, a consultant surgeon, examined him and prepared a report dated 12th April 2005. According to the report, the appellant told him that he had some slight pains after walking a moderate distance and that he could not walk without a cane. He found the appellant to be in a fair condition. He noted that there was surgical scar that had healed. In his opinion the injuries sustained were severe and that there was a 30% risk of the appellant developing avascular necrosis and that he would also develop degenerative arthritis that would require total hip replacement in the future. He stated that the level of permanent disability was quite high.

9. Dr D. O. Raburu, a consultant surgeon, examined the appellant on 27th August 2005. The appellant complained of pain at the right hip joint and was walking with the support of a cane. When he examined him, the doctor confirmed that the appellant was in good general condition and his vital signs were normal. He observed that the right lower limb had shortened by 3cm compared to the left limb, the surgical scar on the groin had healed and that there was restricted movement of the right hip joint. Dr Raburu concluded that the that appellant had been treated over a prolonged period with multiple surgical interventions with satisfactory results however, there was still pain at the hip joint. He noted he was expected to suffer osteoarthritis on the hip joint in the future which required anti-inflammatory and analgesics drugs to manage. He also noted that there will be a need to remove the plates and screws. He assessed the degree of permanent disability at 25%.

10. In proposing the sum Kshs. 8,000,000.00 as general damages the appellant relied on several cases. In ***Christine Nandoka Lusweti v Kenya Bus Services Ltd* ELD HCCC No. 33 of 2005 [2015]eKLR**, the plaintiff sustained a fracture of the vertebrae which resulted in complete paralysis and loss of faecal and urinary incontinence and sexual function. She was awarded Kshs. 2,000,000.00 as general damages in 2015. In ***William Wagura Maigua v Elbur Flora Limited* NKU HCCC No. 248 of 2011 [2012]eLKR**, the plaintiff sustained paralysis of the limbs as a result of spinal injuries. He was awarded Kshs. 3,000,000.00 as general damages in 2012. The plaintiff in ***Patrick Mwangi Irungu v Charles Macharia Mwangi & Another* NKU HCCC No. 188 of 2005 [2008]eKLR** was awarded Kshs. 1,500,000.00 as a result of suffering paraplegia as a result of vertebral fractures. Finally, the plaintiff in ***Eva Mueni Wambugu v Simon Peter Githae & Another* MKS HCCC No. 202 of 2009 [2012]eKLR** was awarded Kshs. 3,500,000.00 after sustaining rib fractures and paralysis of both limbs as a result of vertebral fractures in 2012.

11. The respondent proposed the sum of Kshs. 200,000.00. It cited ***James Ngugi Kamoche v Joseph Muniu & 3 Others* HCCA No. 2727 of 1991 (UR)** where the plaintiff sustained a fracture of the neck of the left femur, fracture of the hip joint, pelvis and soft tissue injuries and was awarded Kshs. 400,000.00 in 1997 and ***Joshua Mwaniki Nduati v Samuel Muchiri Njuguna* NRB HCCC No. 6510 of 1991 [2005]eKLR** where the plaintiff was awarded Kshs. 250,000.00 in 2005 for fracture of the pelvis and right side ribs.

12. After considering the cases the learned magistrate remarked that, *“I find that this is not only exaggerated but is also not supported by the authorities cited where the Plaintiffs suffered more severe injuries I have considered the authorities cited. It should also be noted that awards should not be so low as to deny the plaintiff a reasonable compensation. I find the defendant citing the two cases unreasonable.... Considering all the authorities cited, I find that an award of Kshs. 1,500,000.00 is reasonable.”*

13. This being an appeal on the issue of quantum and it worth reciting the general principal upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal in ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5** held that;

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low

14. In this case, the nature and extent of injuries was not dispute, the issue is the level of compensation

the appellant was entitled to. The learned magistrate analysed and appreciated the evidence before her and I do not find any fault of her analysis on this matter. The appellant sustained serious injuries and underwent a rigorous regime of treatment that resulted in a hip replacement. The doctors who examined him agreed that he had pain due to the hip replacement and that he had to use a cane while walking as one leg was shorter. They also noted that he would suffer osteoporosis in the future and require a hip replacement.

15. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal 26 of 2013 [2014] eKLR** thus:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

This point has been emphasised by Lord Morris of Borth-y-Gest in **West (H) & Son Ltd v Shepherd [1964] AC. 326,345**, where he observed that:

But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

16. I have re-evaluated the injuries sustained and the cases cited by the parties. The cases cited by the appellant bore little relation to the injuries sustained by the appellant. In each of the cases, the claimants sustained injuries that led to some form of paraplegia which is a far cry from the injuries sustained by the appellant in this case. Paraplegia in most cases leads to total disability. The appellant could still walk although he was still limping in pain. The decisions cited by the respondent though relevant were very old and were not an indication of the prevailing level of awards. Simply stated it was the duty of the advocates to guide the court by citing relevant cases to enable the court arrive at a fair decision. An appellate court cannot be expected to fill in the gaps left by inadequate guidance given to the trial court.

17. I would only add that there was material misdirection on the part of the learned magistrate when she held that the appellant had not pleaded and proved loss of earning capacity as he was still in employment and had not proved loss of income or missed promotion opportunities. This finding is in direct contradiction to the appellant's uncontroverted testimony that although he was working, he could not go to field work in South Sudan as he used to and that he had not been promoted. I also note that the doctors assessed his disability capacity to the extent that it would affect his work. In **Mumias Sugar Company Limited v Francis Wanalo KSM Civil Appeal No. 91 of 2003[2007] eKLR**, the Court of Appeal observed that;

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 the 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.

18. While I find that the award of general damages was reasonable in light of the decided cases, I hold that had the trial court taken into account aspect of earning capacity and the fact that evidence was led on this, she may had come to different conclusion by either enhancing the award or making a separate award. Thus this court is entitled to intervene within the parameters set out in **Butt v Khan (Supra)**. Taking into consideration the nature of disability, I would enhance the award by Kshs. 500,000.00.

19. The appellant complained that he was not awarded the claim for loss of consortium yet he testified that he was unable to perform his conjugal duties. Counsel for the respondent submitted that this part of the claim was not pleaded and proved. The learned magistrate considered it and held that this part of the claim was not proved as none of the doctors alluded to it.

20. Following the case of **Best v Samuel Fox & Co. Ltd [1951] 2 KB 639**, the Court of Appeal in **Chege Kimotho & Others v Maria Vesters & Another [1988] KLR 48**, defined consortium as, “*companionship, love affection, comfort, mutual services, sexual-intercourse- all belong to the married state.*” The court held that this claim can only be made to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. There a plaintiff, like the appellant, who has himself suffered any injuries and as a result is unable to perform his conjugal duties would be properly compensated under the claim for loss of amenities and not as a claim for loss of consortium. In other words, the award of general damages subsumed any claim for loss of consortium.

21. I now turn to the claim for future medical expenses. The appellant pleaded the claim for that he would require Kshs. 4,000.00 per month as medical expenses until the end of his life. The doctors who examined the appellant agreed that the appellant would suffer as a result of the injuries he sustained, none of them explained the nature of treatment or anticipated cost. The doctors noted that the appellant would require hip replacement in future but they did not provide the cost and neither was this aspect of the claim pleaded. None of the doctors nor the appellant explained the nature and cost of future medical case. In **Kenya Bus Services Ltd v Gituma [2004] EA 91**, the Court of Appeal expressed the view that;

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded.

22. As result of the findings I have outlined, I allow the appeal only to the extent that I enhance the award of general damages by **Kshs. 500,000.00**. Interest shall accrue on the sum from the date of judgment in the subordinate court.

23. The appellant shall have one-quarter of the costs of this appeal.

DATED and DELIVERED at KISUMU this 5th day of September 2016.

D.S. MAJANJA

JUDGE

Mr Yogo instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Wekhomba instructed by Murimi Ndumia Mbago and Muchela Advocates for the respondents.