



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**CIVIL APPEAL NO. 73 OF 2011.**

**JULIUS MWAURA NDUATI )**

**JAMES MBURU )**

**GEOFFREY KUNGU MBAI ) ::: APPELLANTS.**

**VERSUS**

**GILBERT WEKULO JONATHAN :::RESPONDENT.**

**J U D G M E N T.**

This appeal arises from the decision and judgment of the chief magistrate at Kitale in CMCC No. 67 of 2011 in which the appellants, **Julius Mwaura Nduati**, **James Mburu** and **Geoffrey Kungu Mbai**, had been sued by the respondent, **Gilbert Wekulo Jonathan**, for damages arising from a road traffic accident which occurred on 19th March, 2010, along the Kitale -Webuye road in which the respondent suffered severe bodily injuries and his motor vehicle Reg. No. KAA 096G Peugeot 505 saloon extensively damaged.

Liability having been agreed at 80% against the appellants with the respondent bearing the remainder at 20%, the matter proceeded to trial only on quantum of damages. Thereafter, judgment was entered for the respondent against the appellants in the total of Ksh. 2,159,823/20cts made up of general damages in the sum of Ksh. 1,500,000/=, loss of earning capacity in the sum of Ksh. 480,000/=, loss of motor vehicle in the sum of Ksh. 300,000/= and special damages in the sum of Ksh. 419,775/=.

Being dissatisfied with the award, the appellants filed the present appeal on the basis of the grounds contained in the memorandum of appeal dated 10th November, 2011.

At hearing of the appeal, Learned counsel, **Mr. Akenga**, appeared for the appellants and relied on his written submissions filed herein on the 20th May, 2014 while Learned Counsel, **Mr. Alwanga**, appeared for the respondent and also relied on his written submissions filed herein on 20th May, 2014.

Both counsels orally and briefly highlighted the award made in respect of the loss of earnings.

After due consideration of the submissions in light of the grounds of appeal, it suffices to affirm that this is essentially an appeal on the quantum of damages. As such, the guidelines for observation by this court are those set out in the case of **Kemfro Afric Ltd t/a Meru Express Services Gathogo Kanini Vs. A.N. Lubia & Another [1982 – 88] 1 KAR 727**, in which the Court of Appeal stated that:-

*“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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount, is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”*

These are the same guidelines applied in the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR 5**, which was cited herein by the respondent.

With regard to general damages for pain, suffering and loss of amenities, and having considered the evidence adduced at the trial, it became apparent to this court that the serious injuries suffered by the respondent were not disputed. The sum of Ksh. 1.5 million awarded under that head by the Learned trial magistrate was reasonable and compared well with the authorities relied upon by the plaintiff. Therefore, there is no tangible reason for this court to interfere with that award.

As for loss of earning capacity, such is treated as general damages as opposed to loss of earning, which is classified as special damages and must as a matter of course be specifically pleaded (see, **Cecilia W. Mwangi Vs. Ruth W. Mwangi (1997) e KLR**)

Loss of earning capacity must be proved on a balance of probabilities.

In assessing damages under the head, the Learned trial magistrate applied a multiplier of four (4) years and a multiplicand of Ksh. 10,000/= and awarded a sum of Ksh. 480,000/= on the basis that the respondent was a person dealing in spare-parts as a way of earning income.

Indeed, in his testimony, the respondent stated that he operated a spare parts business and produced a permit for the same. However, he did not produce any records to establish and prove that the business was actually in operation and that it generated a monthly income of Ksh. 10,000/= per month.

A spare-parts business is not just any other business which can be operated without any form of records. It is not something akin to what we here call “Jua-kali”. It must have some records to confirm not only its existence but also operation if only to realize the meaning and intent of permit issued in respect thereof.

A permit alone was not sufficient to confirm that the business was a going concern and that it had to be halted due to injuries sustained by the respondent in the material accident.

It is therefore the opinion of this court that the award for loss of earning capacity was made without proper basis and was thus erroneous.

With regard to the award of Ksh. 300,000/= for the loss of the motor vehicle and Ksh. 419,775/- special damages, this court agrees with the Learned trial magistrate that there was no better evidence to establish the value of the motor vehicle loss than the evidence given by the motor vehicle assessor. This court also agrees that the claimed special damages were not only pleaded but also proved by necessary evidence.

All in all, this appeal succeeds only to the extent that the ward of Ksh. 480,000/= made by the trial court in favour of the respondent for loss of earning capacity is hereby set aside.

Otherwise, the respondent would be entitled to the rest of the award.

Each party shall bear own costs of the appeal.

Ordered accordingly.

**[Delivered and signed this 5th day of June, 2014.]**

**J.R. KARANJA.**

**JUDGE.**