



Kibet v Alunda (Civil Appeal 115 of 2019) [2024] KECA 64 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 64 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 115 OF 2019
F SICHALE, LA ACHODE & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

WYCLIFF KEMBOI KIBET APPELLANT

AND

HORKYNNGS KILIRU AGANDA ALUNDA RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret (S.M. Githinji, J.) delivered and dated 27th November 2018 in HCCA No. 82 of 2018)

JUDGMENT

1. Wycliffe Kemboi Kibet, the appellant, is before us on a second appeal. Through a memorandum of appeal dated 18th June 2019, the appellant is dissatisfied with the judgment delivered on 27th November 2018 by S.M. Githinji, J. of the High Court in Eldoret HCCA No. 82 of 2015. The appellant raises one ground of appeal, to wit, that the learned Judge erred in law in holding that a claim for loss of future earnings, which must in law be specifically pleaded and proved, could nonetheless be allowed on the exercise of discretion by the court.
2. At the trial before the Magistrate's Court, the case for the respondent, Horkynngs Kiliru Aganda Alunda, was founded on the plaint dated 13th November 2014. From that plaint, the respondent's averment was that on 1st October 2014 while he was walking 10 metres off the Kitale-Matunda road, he was knocked down by lorry registration number KBR 221C belonging to the appellant. The respondent's case was that he was 38 years at the time working as a salesman and earning Ksh.25,000 per month. He also pleaded that he sustained severe bodily injuries and was admitted at Moi Teaching and Referral Hospital for almost a month where his left leg was amputated. The respondent prayed for an award of special damages as pleaded and general damages. After the trial, the court found the appellant 100% liable for the injuries sustained by the respondent and awarded him Ksh.1,900,000 as general damages, Ksh.1,428,000 for loss of future earnings, Ksh.50,000 for the artificial limb and Ksh.100,176.20 as special damages.



3. The appellant was dissatisfied with the decision of the trial court and challenged the judgment at the High Court on quantum. The first appellate court found as follows:

“It therefore follows that loss of future earnings is a special damage claim which must be specifically pleaded and strictly proved. Though the respondent pleaded it, he did not prove it. The court therefore used its discretion, and given the permanent disability suffered by the Respondent placed the diminution in earning capacity at 7,000 and used a multiplier of 17 years to get 1,428,000/-.

... The trial court in exercise of its discretion fairly found that a normal person in Kenya can at least earn 7,000/- per month. By doing so, the court arrived at meeting the ends of justice in the matter. Holding it otherwise would have been unfair to the Respondent who lost the use of his left leg in the said accident and the decision does not occasion an injustice.”

4. On 24th October 2023 when this matter came up for hearing, Mr. Ombati appeared for the respondent while there was no appearance for the appellant. However, the firm of M/S Manani, Lillan, Mwetich & Co. Advocates had filed submissions dated 26th April 2022 on behalf of the appellant. Mr Ombati had on his part filed submissions dated 25th April 2022 which he sought to rely upon.
5. For the appellant, counsel relied on the cases of *Nathan Nyambu Maghanga v Bernard M. Wanjala & Another* [2016] eKLR and *Douglas Erick Nyakundi v Rongai Workshop Ltd & Another* [2016] eKLR to highlight the realm of this Court’s jurisdiction on second appeals. Counsel proceeded to submit that loss of future earning capacity is a special loss while loss of earning capacity is a general loss. Counsel pointed out that the appellant did not tender any evidence to warrant being awarded damages for loss of future earning capacity. Counsel relied on the cases of *Mumias Sugar Company Ltd v Francis Wanalo* [2007] eKLR and *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR in support of his submission on the difference between the two awards. According to counsel, the High Court judge therefore erred in upholding the award by the trial court for loss of future earning capacity as the claim was not proved. In conclusion, counsel urged us to allow the appeal and set aside the learned Judge’s award on this head by finding that the award for loss of future earning capacity fell into the category of special damages which ought to have been specifically proved but was not proved.
6. For the respondent, Mr Ombati submitted that the respondent had sued for both general and special damages and that part of the general damages was for loss of future earning capacity and not loss of earnings. Counsel relied on the case of *Fairley v John Thombsen Ltd* [1973] 2 Lloyds Law Reports 40 to urge that loss of future earning capacity is a general loss and not a special loss which must be specifically proved. Counsel further pointed out that there was evidence that the appellant was 100% paraplegic. Counsel relied on *Butler v Butler* [1984] KLR 225 to urge that the High Court properly awarded the damages for loss of future earning capacity. Counsel consequently urged us to dismiss the appeal with costs.
7. This being a second appeal, our mandate sprouts from section 79D as read with section 72(1) of the *Civil Procedure Act*, Cap 21 which circumscribes our jurisdiction to determining appeals where the appealed decision is contrary to the law or the appealed decision failed to determine some material issue of law, or where there was a substantial error or defect in the application of the procedure provided by the *Civil Procedure Act* or by any other law which may possibly have produced error or defect in the appealed decision.
8. Upon review of the record of appeal, the memorandum of appeal and submissions by counsel, this appeal raises the following issues for determination: whether the award in respect of the respondent’s plea for “loss of future earning capacity” was for a special loss or a general loss; whether the court erred



in affirming the exercise of discretion by the trial court in assessing awardable damages; and, who bears the costs of this appeal.

9. On the first issue, we advert to the respondent's plaint dated 13th November 2014 where at paragraph 9 he averred that:

“As a result of the matters complained above, the plaintiff who was 38 years old at the time of the accident was working and he was earning Ksh.25,000/= monthly suffered permanent disability of up to 40% hence he cannot engage in any meaningful employment to earn a living and thus he has lost his future earning capacity for which he claims compensation from the defendant.” [Emphasis ours]

10. From the quoted averment, it is evident that the respondent's claim was for “future earning capacity”. In that respect, two questions arise; whether a claim for loss of “future earning capacity” is the same as a claim for loss of “future earnings”; and whether a claim for loss of “future earning capacity” is a claim for a special loss. Perhaps, an earlier decision of the Court in *James Mukatui Mavia v M A Bayusuf & Sons Limited* [2013] eKLR proffers an exemplary guide on this subject. In that case, it was opined that:

- “31. Turning to the claim for loss of earning capacity, there appears to have been a mix up in the learned trial judge's mind as to the nature of the claim the appellant was putting forward. Lord Denning in *Fairley v John Thompson Ltd.* [1973] 2 Lloyd's Report 40, 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. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.”

32. In *Moeliker v Reyrolle & Co Ltd* (1977) 1 WLR 132 Browne LJ at page 140 par B said in reference to loss of earning capacity:

“This head of damages generally only arise where a plaintiff is at the time of trial in employment but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damage from an actual loss of future earnings which can already be proved at the time of trial.”

33. In the *Butler v Butler* (supra) Case, the High Court awarded damages for pain and suffering and for loss of earning capacity under separate heads to a lady who had suffered severe injuries as a result of a road traffic accident. Due to her injuries, the plaintiff would never be able to find a suitable job. Though the appellate court faulted the use of the multiplier/multiplicand method of calculating damages for loss of earning capacity, it concurred with the High



Court that the plaintiff was entitled to damages under his head. Nyarangi JA stated that:

“Having however been injured to the extent of not being able to find a suitable job, the Respondent had lost her capacity to earn.”

34. In *Butler v Butler* (supra) KLR 225 the justification given, for awarding the plaintiff damages under the head of loss of earning capacity while employed, is to compensate the plaintiff for the risk that the disability has exposed him to of either losing his job in the future or in case he has lost his 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 as at the date of trial is to compensate the plaintiff for the risk that he will not get employment or find suitable employment in the future. (See also *Mumias Sugar Co. Ltd V Francis Wanalo* (2007) eKLR Civil Appeal 91 of 2003.”

[Emphasis ours]

11. From the above excerpt, and in particular the sections we have underlined, it is clear that a court will accept an invitation to make an award for “loss of earning capacity” once it is established that there is a risk that the level of disability suffered by a plaintiff diminishes his chances of returning to work at the same level, working the same hours or that the disability may be long-term. This, in other words, can be equated to a diminished earning capacity which decreases an individual’s earning ability as a result of the disability. It is, however, distinguishable from “loss of earnings” which ordinarily is an assessment of the actual loss of earnings as a result of the accident. In this regard, the current known earnings of the claimant are used to determine what the plaintiff is awarded. This is a special loss because it is a known loss which can be calculated. The claim must therefore be specifically pleaded and proved as special damages. It does not matter whether a party infuses the word “future” into the two distinct claims as either way, the end result is that “loss of earning capacity” concerns the estimated loss that the plaintiff is likely to suffer in future while “loss of earnings” is actual and determinable as it is tied to the plaintiff’s current earnings.
12. However, it matters what class of damages each of them falls and how a plaintiff is required to surmount the evidentiary burden associated with each type of claim. On this, it was stated in *S J v Francesco Di Nello & Another* [2015] eKLR that:

“The correct position as in the *Fairley case* (supra) was restated by this court in the case of *Cecilia Mwangi & Another v Ruth W. Mwangi* CA No. 251 of 1996 as hereunder;

“Loss of earning 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 proved on a balance of probability.”
13. It is therefore our finding that the inclusion of the word “future” by the respondent when pleading for “loss of earning capacity” was irrelevant and did not mutate the plea to that of “loss of future earnings”. In our view, the finding of the High Court that the respondent pleaded for special damages was as a result of a mix-up of the two distinct and separate heads of damages. It is clear from the respondent’s plaint that he pleaded for an award of “loss of earning capacity” which is a claim for general damages measured by the potential earnings that the plaintiff will lose as a result of the injuries sustained in the accident.



14. The next issue for determination is whether the first appellate court erred in affirming the trial court's exercise of discretion in entering an award for "loss of future earning capacity". The appellant's complaint is that the first appellate court's affirmation that the trial court correctly exercised discretion in making an award of special damages was unconscionable in law. We have however already made a finding that the respondent had made a claim for general damages for "loss of earning capacity". He did not make a claim for "loss of earnings" which is a claim for special damages. In addressing this issue, we start by pointing out that award of general damages is a discretionary issue for the trial court. Ours as an appellate court is to assess whether discretion was exercised judiciously in order to decide whether to interfere with the award. That the exercise of discretion by the trial court in the award of damages can only be interfered with in limited circumstances has been expressed in several decisions of this Court including *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & Another (No 2)* [1985] eKLR where it was 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."

15. Having said the foregoing, what should the court consider when assessing damages? In *S J v. Francesco Di Nello & Another* (supra), guidance was provided as follows:

"The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of *Ossuman Mobamed & Another V Saluro Bundit Mobumed*, Civil Appeal No. 30 of 1997 (unreported) wherein the following passage, in the case of *Kigaragari v Aya* [1982 – 1988] IKAR 768 is employed;

"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

16. We agree with the cited decision. Applying the law to the evidence on record, we do not find any impropriety in the manner in which the trial court exercised its discretion. There was evidence that the respondent suffered permanent disability hence affecting his performance at work. Though the method adopted by the trial court in assessing the damages was more suitable for calculating special damages, the formula of adopting a multiplicand of Kshs.7,000.00 and a multiplier of 17 years for assessing "loss of future earning capacity" for a 38-year old litigant was not unreasonable and neither did it result in an excessively high or low award. We therefore decline the invitation to interfere with the trial court's discretion.

17. In conclusion, we find this appeal to be without merit and dismiss it save to state that the first appellate court erred in finding that the claim for "loss of future earning capacity" was a claim for special damages.

18. The final issue for our determination is with regard to the costs of this appeal. Under Rule 33 of the Court of Appeal Rules, 2022 this Court is empowered to make any necessary incidental or consequential orders, including orders as to costs. Section 27 of the *Civil Procedure Act* legislates that costs follow the event unless the court or judge for good reason otherwise order. The Supreme Court in



Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others [2014] eKLR reiterated this legal position while also outlining the various factors a court can consider in exercise of such discretion. Considering that it was the erroneous exposition of the law by the first appellate court which may have misled the appellant to lodge this appeal, we find that it is in the interests of justice that each party bears their cost.

19. For the reasons stated in this judgment, we find this appeal to be without merit and dismiss it with an order that each party shall bear their own costs of the appeal.

20. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

