



IN THE COURT OF APPEAL

NAIROBI

(CORAM: KOOME, MUSINGA & MURGOR, J.J.A.)

NAKURU CIVIL APPEAL NO.88 OF 2017

BETWEEN

JUBILEE HAULERS LIMITED.....1ST APPELLANT

VIPUL PATEL.....2ND APPELLANT

DAVID KIMOSBEI KEMEI.....3RD APPELLANT

AND

BRIAN MUCHIRI WAIHENYA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (J. Mulwa, J.) delivered on 4th May 2017

in

H.C.C.C. No. 34 of 2014.)

JUDGMENT OF THE COURT

1. On 8th February 2014, **Brian Muchiri Waihenya**, the respondent, then a 19 years old third year student at Jomo Kenyatta University of Science and Technology, where he was studying for a Bachelors degree in Purchasing and Supplies Management, boarded a passenger Motor Vehicle registration number KAU 325B at Nakuru town heading to Mangu Farm in Rongai. He sat at the back of the vehicle but could see the front. A few kilometres from Nakuru along a section of the road where there are two climbing lanes, and one lane for vehicles going down to Nakuru, the respondent saw an oncoming lorry registration number KBR 566N that was pulling a trailer registration No. ZD 5367 (the appellants' motor vehicle) and it was being driven in a zig-zag manner. The passenger vehicle was on its left lane, but the appellants' vehicle was moving towards it. The appellants' vehicle collided with the passenger vehicle in which the respondent was travelling, as a result of which the respondent sustained very severe injuries.

2. The respondent filed a suit against the owners and driver of the lorry, the appellants. The respondent alleged that the said lorry was negligently driven, managed and/or controlled by the 3rd appellant. The particulars of negligence included driving the lorry at an excessive speed; driving without due care and attention for other road users, and failure to slow down or swerve to avert the accident.

3. The plaint indicated that the respondent sustained C5 complete spinal cord injuries, C6/C7 extension distractory injuries and a cut wound on the occipital region of the scalp. The respondent became paraplegic with 100% disability. The respondent claimed special damages as follows:-

(a) Medical report – Kshs.7,000

(b) Police abstract report – Kshs.100

(c) P3 Form – Kshs.1,000

(d) Search Certificate – Kshs.500

(e) Medical expenses – Kshs.426,389

4. The respondent's studies were curtailed as a result of the aforesaid injuries and claimed general damages, loss of earnings and earning capacity; a wheelchair and a replacement thereof every two years; future medical care including services of a nurse aid at a salary of Kshs.12,000 per month.
5. The appellants filed a joint statement of defence. They denied all the allegations in the plaint and more specifically that the 1st appellant was the registered owner of motor vehicle registration number KBR 566N and trailer registration number ZD 5367; that the 2nd appellant was the co-owner, and that the 3rd appellant was the driver of the said vehicle.
6. The appellants further denied occurrence of the said accident and all the particulars of negligence as pleaded by the respondent. But without prejudice to the foregoing denials, the appellants averred that if the said accident ever occurred as alleged, it was solely caused by or substantially contributed to by the negligence of the driver of motor vehicle registration number KAU 325B in which the respondent was travelling. They set out the particulars of negligence which included driving the said motor vehicle in a zig-zag manner; driving at an excessive speed; encroaching into the lane of motor vehicle registration number KBR 566N ZD 5367; and driving without due care and attention.
7. The appellants urged the trial court to dismiss the respondent's suit with costs.
8. During the hearing, only the respondent and his witnesses testified. The appellants did not adduce any evidence but made submissions. The respondent, who testified from a wheelchair, produced documents in proof of the fact that he was a third-year student at Jomo Kenyatta University of Science and Technology as pleaded.
9. Regarding occurrence of the accident, the respondent testified that on the material day he boarded motor vehicle registration number KAU 325B at Nakuru town and sat at the back; that near Mustard School he saw an oncoming trailer being driven in a zig-zag manner; that the trailer moved to their lane and collided with the vehicle he had boarded; that there were three lanes at the scene and their vehicle was on the far left lane when it was hit. **Mary Waihera, PW5**, who was also a passenger in the same vehicle as the respondent, corroborated the respondent's testimony as to how the accident occurred.
10. Following the collision, the respondent was hospitalized at Valley Hospital, Nakuru, Aga Khan Hospital and Kenyatta National Hospital; that he became paralysed and unable to walk; he was confined to a wheel chair; and had to drop out of university due to the severe injuries that he had sustained that left him in a paraplegic state.
11. The respondent produced a bundle of receipts as evidence of payment of various medical bills amounting to Kshs.885,844 which the learned trial judge awarded as special damages.
12. **Dr. Wellington Kiamba, PW2**, testified that the respondent required an electric wheelchair, bed and an electric belt to ease his movement. He also testified that the respondent would require a constant supply of diapers and permanent catheters for the rest of his life. The doctor assessed the respondent's permanent disability at 100%.
13. The respondent's father, **Stephen Waihenya Muchiri, PW3**, testified that he had engaged someone to attend to the respondent at a monthly salary of Kshs.12,000; and that a physiotherapist attends to the respondent three times a week at a fee of Kshs.1000 per session. He added that the cost of an electric wheelchair and bed as advised by Dr. Kiamba is Kshs.400,000 and Kshs.250,000 respectively. The evidence of PW3 was not controverted at all.
14. Regarding the point of impact, **Corporal Jackson Kombo, PW7**, produced the police abstract report and a police file. According to the witness, the sketch plan prepared by one Corporal Esther, which was unsigned, the point of impact between the two motor vehicles was on the left lane used by motor vehicle registration number KAU 325B. It was the oncoming vehicle registration number KBR 566N and its trailer that encroached on to the lane of the vehicle the respondent was travelling in. However, the investigation report, which was neither dated nor signed, indicated that the driver of motor vehicle registration number KAU 325 B was to blame for the occurrence of the accident. That contradiction was not explained.
15. In her judgment, the learned trial judge held that the 3rd appellant, who was the driver of motor vehicle registration number KBR 566N and trailer registration number ZD 5367, was wholly liable for the occurrence of the accident. The learned judge awarded Kshs.8,000,000 as general damages for pain, suffering and loss of amenities; Kshs.7,200,000 as damages for loss of earning capacity; Kshs.3,960,000 for nurse aid; Kshs.4,320,000 for future medical expenses; Kshs.3,960,000 for medical equipment and supplies; Kshs.250,000 for electric chair; Kshs.350,000 for electric bed; and Kshs.885,844 as special damages.
16. Consequently, judgment was entered for the respondent against the appellants jointly and severally in the sum of Kshs.28,925,844. As regards interest, a sum of Kshs.459,455 being a portion of special damages would accrue interest at court rates from the date of filing the suit, while the balance of the judgment sum would accrue interest at court rates from the date of the judgment, which was 4th May 2017.
17. Being aggrieved by the said judgment, the appellants preferred an appeal to this Court. They stated in their memorandum of appeal that the learned judge erred in law and fact in: finding them 100% liable; failing to find that it was the third party driver who was fully liable; making speculative awards on loss of earning capacity; applying a dependency ratio of ½; applying a multiplier of 30 years for a 19 year old person; awarding special damages of Kshs.885,844 while the respondent had only pleaded a sum of Kshs.426,389; making an award for loss of future earnings; making an exorbitant award for pain and suffering; and making a manifestly excessive award on general damages.
18. The appellants urged the court to reverse the trial court's finding on the issue of liability and hold that the respondent's case was not proved to the required standard or at all; alternatively, to set aside the awards on quantum and review the same. The appellants further prayed

for the costs of the appeal.

19. On the other hand, the respondent filed a notice of grounds for affirming the trial court's decision in its entirety.

20. When the appeal came up for hearing, both **Mr. Situma**, learned counsel for the appellants, and **Mr. Gekong'a**, learned counsel for the respondent, consented to rely on their respective written submissions which they had filed, without any oral highlights of the same.

21. The appeal was argued on three main issues; liability, quantum of general damages and award of special damages.

22. On liability, the appellants contended that their driver was not negligent and submitted that the respondent did not prove otherwise. The appellants faulted the learned judge for disregarding the investigation report simply because it was unsigned by the maker. The report indicated that it was the deceased driver of motor vehicle registration number KAU 325B who was to blame for the accident. The appellants added that their driver was not charged with any traffic offence and this was a pointer to the fact that the police did not consider him negligent or liable for the occurrence of the accident.

23. The appellants further faulted the learned judge for holding that the appellants failed to initiate third party proceedings against the driver/owner of the motor vehicle in which the respondent was a passenger. They stated that the driver of that motor vehicle died as a result of the accident; and that notwithstanding, failure to call a witness does not warrant a finding of full liability against a defendant. On the strength of this Court's decision in ***Haji v Murair Freight Agencies Ltd [1984] eKLR***, the appellants urged the Court to find that the two drivers were equally liable for the accident.

24. Turning to the various awards made, the appellants submitted that they were very high and not in keeping with the principle that was propounded by this Court in ***Sameer Jethwa v Francesco Di Nello [2015] eKLR*** that "***Damages must be within limits set out by decided cases and also within the context which Kenyan economy can afford.***"

25. With regard to the award for loss of earning capacity, it was submitted that this is a special damage claim that was not proved and therefore ought not to have been granted.

26. On the dependency ratio, the appellants' counsel submitted that the learned judge misdirected herself by using a ratio of half (½) instead of the one third (1/3), considering that the respondent is under the care of his parents.

27. Similarly, the award of general damages where the trial court awarded Kshs.8,000,000 for pain, suffering and loss of amenities was also said to be inordinately high and we were urged to interfere with it. The appellants' counsel cited the case of ***Nicholas Njue Njuki v Eliud Mbugua Kahuro [2014] eKLR*** where the High Court awarded Kshs.3,800,000 under the same head of damages for similar injuries as those sustained by the respondent.

28. Turning to the various awards made under the head of special damages, the appellants submitted that the plaint had not been amended to include them and neither had they been proved. The appellants argued that the claims on Nurse/Aid, Physiotherapy, Medical supplies, electric chair and electric bed were all special damages that had to be specifically pleaded and strictly proved but they had just been pleaded, not proved. We were urged to award only what was pleaded and proved.

29. Responding to the appellants' submissions, the respondent's counsel submitted that as far as the issue of liability was concerned, the respondent gave unchallenged evidence as to how the accident occurred, which was corroborated by PW5 (an eye witness), and PW7, Corporal Jackson Kombo who produced the police file and the police abstract report; while on the other hand the appellants failed to adduce any evidence in rebuttal. Consequently, the trial court was right in finding the appellants fully liable for the occurrence of the accident, the respondent's counsel submitted.

30. Regarding non-joinder of the owner and driver of motor vehicle registration number KAU 325B the respondent's counsel submitted that it was the appellants who expressly pleaded contributory negligence against the said driver but failed to take out third-party proceedings against him in terms of the provisions of ***order 1 rule 15*** of the ***Civil Procedure Rules***

31. Turning to other grounds of the appeal, the respondent's counsel submitted that the award on loss of earning capacity was not speculative but was based on the unchallenged ratio of ½ was justifiable in the circumstances of the case; that considering the young age of the respondent (19 years), a multiplier of 30 years was quite reasonable as it implied that he would have worked up to the age of 49 years instead of the normal retirement age of 60 years for Procurement Officers, as per the degree course which the respondent was undertaking; that in arriving at the sum of Kshs.7,200,000 for loss of earning capacity, the learned judge adopted a salary of Kshs.40,000 as opposed to the suggested figure of Kshs.100,000 that the respondent pleaded for awards to enable him get nursing services, physiotherapy, electric chair and an electric bed and adduced evidence in support of the said claims, and that special damages were properly pleaded and proved. We were urged to dismiss the appeal with costs.

32. This being a first appeal, the law requires us to conduct a retrial, evaluate the evidence on our own and draw conclusions thereon, but with the usual caveat that we did not see the witnesses as they testified and must therefore give due allowance for that. That task was well stated in ***Selle v Associated Motor Boat Co. Ltd [1968] E.A. 123*** as follows:-

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. The first issue for our consideration is liability. The appellants argued that the learned judge erred in law in holding them fully liable for the occurrence of the accident. In the plaint the respondent pleaded that the 3rd appellant drove the 1st appellant's motor vehicle negligently and caused it to collide with the passenger vehicle he was travelling in. The respondent had the burden of proof and he adduced evidence as to how the accident occurred. He stated that prior to the collision, he saw the 1st appellant's motor vehicle moving in a zig-zag manner towards the lane of the passenger vehicle he had boarded. That evidence was corroborated by PW5. Then there was the evidence of PW7 who stated *inter alia*:-

“The accident occurred on the lane used by KAU 325B towards Eldoret direction... Motor vehicle Reg. No. KBR (Trailer) encroached on to the lane of the other vehicle-saloon car. It went out of its lane.”

34. That evidence notwithstanding, the covering report, which was neither signed nor dated, seemed to indicate that the driver of motor vehicle registration number KAU 325B was to blame for the accident!

We agree with the learned judge that a document that is neither dated nor signed by the maker has no legal value, and we may add that it cannot be relied upon to controvert direct evidence that is clear as to how the collision occurred.

35. On the other hand, the appellants pleaded ***“the accident was solely caused by or substantially contributed to by the negligence of the driver of motor vehicle KAU 325B.”***

However, the appellants neither instituted third party proceedings against the owner of the said motor vehicle nor adduced any evidence in support of the aforesaid contention. No reason was advanced for that omission. The appellants' counsel simply told the trial court that the appellants would not adduce any evidence. In the circumstances, we do not understand how the appellants could have expected the learned judge to hold otherwise regarding liability. We respectively agree and adopt the holding of *Lesiit, J.* in ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR*** that:-

“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.”

36. We now turn to consider various grounds of appeal that challenge the learned judge's findings on quantum of damages. Ground 3 of the appeal states that, the judge ***“...made a speculative award on loss of earning capacity by basing it on speculative graduate salaries in Public Service Scale for the year 2014/2015 which was neither pleaded nor advanced by the respondent.”*** Although the appellants did not dispute that at the time of the accident the respondent was 19 years old, pursuing a degree in Purchasing and Supplies at Jomo Kenyatta University, they submitted that his future prospects were unknown and there was no basis of speculating that he would have obtained employment upon graduation. They further contended that the respondent did not proffer any evidence regarding his expected earnings. The appellants therefore urged the trial court not to award anything under that heading.

37. The record of appeal shows that the respondent told the trial court that upon the expected graduation he hoped to be employed as a Procurement Officer; that the minimum monthly salary for such officers is Kshs.100,000; but due to his injuries he could not do any work. Dr. Kiamba testified that the respondent had been declared a permanent paraplegic as he had no sensation from the armpits downwards and could not resume normal life.

38. Although the respondent's advocate had urged the trial court to adopt a multiplier of 40 years and a monthly salary and award Kshs.48 million for loss of earning capacity, the learned judge reasoned as follows:-

“I have looked at graduate salaries in Public Service Scales 2014-2015 period-Ministry of Finance. It is indicated as a Civil Service Pay Scale Order-2014. It is an average of Kshs.80,000/= gross. The plaintiff would have worked and improved his grades and salary or even venture into private enterprises upto the age of retirement, at 60, save for uncertainties of life.

Taking the above factors into account, a multiplier of 32 years is reasonable. He would have as expected for majority of people in the country, married and sire children.

Becoming a family man for the plaintiff is now a dream. The plaintiff suggested a salary of Kshs.100,000/=upon a multiplier of 40 years.

Considering the above factors I shall adopt a multiplier of 30 years and a salary of Kshs.40,000/= and a multiplicand of ½.

Thus $30 \times 12 \times 40,000 \times \frac{1}{2} = \text{Kshs.7,200,000/=}$

I award the above sum of damages for loss of earning capacity.”

39. We do not think the learned judge can be faulted for rejecting the appellants' submissions not to award anything under this heading. Compensation for loss of earning capacity is not the same as loss of earnings that must be strictly proved since it is a claim for special damages. Loss of earning capacity is awarded because of a person's diminished earning power resulting from an injury. There was sufficient evidence that the respondent's earning capacity had been considerably diminished, if not totally extinguished.

40. In ***S. J. v Francesco Di Nello & Another [2015] eKLR***, this Court stated as follows:-

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved”

41. In Mumias Sugar Company Limited v Francis Wanalo [2007] eKLR, this Court held that:-

“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.”

42. The factors that must be considered in a claim for, loss of earning capacity as stated in Butler v Butler [1984] eKLR include the age and qualifications of the claimant; his disabilities; the expected income; the remaining length of his working life, among others.

43. In our view, the learned judge took a correct view of the matter and cannot be faulted. The sum of Kshs.7,200,000 for loss of earning capacity was reasonable and we shall not disturb it. There was no claim for loss of dependency and the learned judge did not allude to that at all. Although the learned judge did not state why she applied a multiplicand of half (½) to the expected income, we believe she considered vicissitudes of life that may affect one’s income, including unemployment, failure of business if one is self-employed, and so on. A multiplier of 30 years for a 19 years old university student is not unreasonable. The retirement age for most employees is 60 years and there are prospects for self-employment thereafter.

44. There is no specific ground of appeal against the awards in respect of Nurse/Aid; physiotherapy, medical supplies; electric chair and electric bed. We shall therefore leave those awards undisturbed.

45. The next ground of appeal is against the award of Kshs.8,000,000 as general damages for pain, suffering and loss of amenities. There was no dispute that the respondent is a complete paraplegic with 100% permanent incapacitation; has incontinent of stool and must use pampers, has an indwelling catheter with urine bag and has to be on a wheelchair throughout his life.

46. The appellants suggested an award of Kshs.1,500,000 while the respondent urged the court to award Kshs.8,000,000 which the learned judge did. While we appreciate that assessment of damages is an exercise of judicial discretion that can only be interfered with if an appellate court is satisfied that in assessing the damages the court took into account factors it ought not to have considered or failed to take into account factors that it ought to have, and thereby arrived at a figure that was inordinately high or inordinately low, as held in Butt v Khan [1981] KLR 349, among other decisions, the court must also ensure that the amount awarded is reasonable and within limits set by other courts and which the Kenyan economy can afford.

47. Having considered the various authorities that were cited by both parties, and bearing in mind the award of Kshs.7,200,000 as loss of future earning capacity, which is a relevant consideration in assessment of general damages, we think the award of Kshs.8,000,000 was inordinately high. In the case of Nicholas Njue Njuki v Eliud Mbugua Kahuro (supra) that was cited by the appellants’ learned counsel, the plaintiff sustained multiple injuries that left him completely paralysed in the lower limbs, incontinent and unable to control his stool and urine, the trial court awarded him Kshs.3,800,000 for pain suffering and loss of amenities, on top of other awards that included loss of earning capacity, loss of consortium and Nursing care. The judgment was delivered on 24th September 2014. Considering the similarities in the two cases and bearing in mind the factor of inflation, we are of the considered view that an award of Kshs 4,000,000 would be reasonable for pain suffering and loss of amenities. We hereby set aside the award of Kshs.8,000,000 and substitute it therefor with an award of Kshs.4,000,000.

48. The last ground of appeal faults the learned judge for awarding special damages of Kshs.885,844 when the respondent had only pleaded Kshs.426,389. There is no dispute that the particulars of special damages as per the amended plaint amount to Kshs.426,389. During the hearing of the case, the respondent’s evidence was to the effect that the additional sum of Kshs.459,455 was incurred between the date of filing the amended plaint and the date of hearing. Since the respondent produced receipts totaling to Kshs.885,844 the learned judge awarded that sum and justified it by saying:-

“It is not practical that every time during the pendency of the suit the plaintiff would keep amending the plaint to add further medical expenses.”

49. With great respect to the learned judge, that reason was contrary to the well-established principle that special damages must be specifically pleaded and strictly proved. See Hahn v Singh 1985 KLR 716. It matters not that the appellants did not object to the production of receipts in respect of the additional sum of Kshs.459,455. We must therefore allow this ground of appeal, set aside the award of Kshs.885,844 as special damages and substitute therefor a sum of Kshs.426,389.

50. In conclusion, the compensation payable to the respondents, which we hereby allow shall be as follows:-

(a)	Damages	for	pain	and	suffering	-	Kshs.4,000,000/=
(b)	Loss	of	earning	capacity		-	Kshs.7,200,000/=
(c)	Nurse/Aid					-	Kshs.3,960,000/=
(d)	Physiotherapy					-	Kshs.4,320,000/=

(e)	Medical Supplies	-	Kshs.3,960,000/=
(f)	Electric chair	-	Kshs. 250,000/=
(g)	Electric bed	-	Kshs.350,000/=
(h)	Special Damages	-	Kshs. 426,389/=
	Total	-	Kshs.24,466,389/=

51. Interest on the sum of Kshs.426,389 being special damages shall accrue at court rates from the date of filing of the suit until payment in full, whereas interest on the other awards shall accrue at court rates from the date of the High Court's judgment until payment in full.

52. As the appellants have partially succeeded in the appeal, they shall be entitled to one quarter of the costs of the appeal but shall bear the costs of the High Court's proceedings.

Dated and delivered at Nairobi this 5th day of March, 2021.

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR