REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & KANTAI, JJ.A.)

CIVIL APPEAL NO. 59 OF 2010

BETWEEN

SAMUEL KARIUKI NYANGOTI.....APPELLANT

AND

JOHAAN DISTELBERGER.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (M. Ang'awa, J.) delivered on 28th October, 2003

in

H.C.C.C. NO. 1015 of 2001)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the judgment of the High Court (**Ang'awa, J.)** in a suit for damages as a result of a road traffic accident. The appeal is limited to the appellant's claim for damages for pain, suffering and loss of amenities, motor vehicle assessor's fees and loss of user of the damaged motor vehicle.

[**2**] On 9th October 2000, the respondent's motor vehicle registration number KAH 210C collided with the appellant's motor vehicle registration number KAL 219L along Thika-Garissa road. Thereafter, the appellant filed a suit against the respondent alleging that the accident was caused by the respondent's negligence and claimed various heads of damages. The respondent filed a defence denying negligence and averred that the accident was caused by the appellant's negligent driving. After the trial, the High Court determined the respondent as liable for negligence to the extent of 90% while the appellant was liable for contributory negligence to the extent of 10%. There is no appeal against that finding.

[**3**] The High Court ultimately awarded the appellant Kshs.100,000/- as general damages for pain, suffering and loss of amenities. However, the High Court dismissed the appellant's claim for Kshs.5,460/- being the assessor's fees and also his claim of Kshs.1,032,000/- for loss of user of the motor vehicle for one year.

By the appeal the appellant seeks the enhancement of the award for pain, suffering and loss of amenities to Kshs.250,000/- and the allowance of the claim for assessor's fees and for loss of user of the motor vehicle for one year.

[**4**] The appeal against the award of Kshs. 100,000/- for pain, suffering and loss of amenities is an appeal against the quantum of damages. The principles upon which an appellate court would interfere with an award of damages by a trial court are well established by many authorities of the Court. An appellate court will only interfere for misdirection or non direction – that is, if the trial judge has taken into account a factor he should not have or failed to take into account something he ought to have taken into account, or if the award is so high or so low that it amounts to an erroneous estimate. (**Kitavi *v* Coastal Bottlers Limited [1985] KLR 470**), **Kimatu Mbuvi t/a Mbuvi & Bros *v* Augustine Munyao Kioko [2006] eKLR.**

[**5**] The grounds of appeal state that the award was too low as to represent an erroneous assessment; that the award did not accord with the level of awards made for similar or comparable injuries; and that the award was not in accordance with the settled principles for assessment of damages for pain, suffering and loss of amenities. [**6**] The appellant testified that he sustained a crack of the patella of the left leg. The medical report dated 3rd April, 2000 shows that the appellant sustained a fracture of the left patella and blunt trauma on the chest, both shoulder joints and left knee joint. The fracture was initially treated conservatively but non-union of the fracture patella occurred and the appellant had to undergo open reduction and internal fixation using metal implants. At the time of preparation of the medical report – six months after the accident, the fracture had not united but it was expected to unite in about 3-4 months when the metal implants may be removed.

The appellant stated at the trial, slightly more than 2 years after the accident, that his leg had not healed and that the metal implant had not been removed; that he was still experiencing pain, could not sit for long and could not drive big vehicles.

At the trial, the appellant's counsel suggested an award of Kshs.250,000/- citing three authorities. The defendant's counsel suggested an award of Kshs.170,000/- citing two authorities.

[**7**] We have studied the three authorities relied on by the appellant's counsel in the High Court. In **Fredrick Ndeto Matheka *v* Eastern Bus Services, High Court Civil Case No. 5796 of 1993** (unreported), the plaintiff sustained multiple injuries including head injury, soft tissue injury, fracture of the patella, which left him with severe knee disability and pain and metatarsal fracture. The High Court gave different awards for each of those injuries awarding Kshs.170,000/- for fracture of the patella – total Kshs.305,000/- in June 1998. The learned Judge disapproved the method of itemised computation of damages in respect of each injury and disregarded the authority.

In **Samuel Gathu Kamau v David Kaniu Gathungu & Another – High Court Civil suit No. 1932 of 1987** (unreported), the High Court awarded shs. 275,000/- for a broken leg in July 1998. The judgment does not disclose what part of the leg was broken but it does show that the fracture necessitated two operations to fix it with screws. The High Court distinguished that case with the present case on the ground that the injuries were severe and that the appellant sustained a fracture of a knee cap and not a leg. Those are the only authorities that the trial judge considered.

The appellant's counsel had also relied on **Sammy Waweru Njoka vs. Njenga Karume t/a Kiambu Tobacco Wholesalers, High Court Civil Suit No. 3395 of 1993** (unreported) where an award of shs.350,000/- was made in January 1998 to a plaintiff who had sustained fracture of the left ankle and fracture of the patella of the right knee requiring an operation. The respondent had relied on the case of **Richard Karimi Macharia *v.* Ephantus Macharia Mwangi & Another, High Court Civil case No. 710 of 2000** (unreported) where **Ang'awa J.** awarded Kshs.150,000/- in January 2000 for fracture of tibia and femur and deep cut wound on the ankle. In **Isana Magumba Kirambi *v.* John Kipngetich Koskei & 2 Others – High Court Civil Case No. 5141 of 1991** (unreported), also relied on by the respondent, Ang'awa J. awarded Kshs. 250,000/- in February 2009, for compound fracture of tibia and fibula.

[**8**] Although the awards for pain and suffering and loss of amenities are at large and dependent on the discretion of the trial judge, the courts should ensure consistency in the awards for similar or comparable injuries and that the awards are within the limits of decided cases. (**Kigaragari *v.* Aya [1985] KLR 273).** The general principle is that the figure awarded must be basically a conventional figure derived from awards in comparable cases and the damages must be assessed by reference to the value of money at the date of trial.

[**9**] In making the award, the learned judge did not make any comments on the degree of pain and suffering that the appellant suffered or was likely to suffer, nor on the severity of the injury, and the attendant loss of amenities. The medical report made six months after the accident indicated that the appellant had already undergone an operation to fix the fracture, that he had surgical scar, that he would undergo a second operation for the removal of metal implants and that he would suffer post traumatic osteoarthritis of the joint. Although there was no current medical report at the trial, the appellant stated that the leg had not healed and was suffering pain and that he could not drive big vehicles.

The award of Kshs.170,000/- for fracture of patella in **Fredrick Ndolo Matheka** (Supra) in June 1998 five years before the award under appeal was brought to the attention of the learned judge. The learned judge wrongly refused to be guided by the award on the basis that it contained itemized award for several injuries. It is on the basis of that award that the respondent's counsel recommended an award of Kshs. 170,000/- for the appellant. The award of Kshs.275,000 in **Samuel Gathuru Kamau** made five years before was also a relevant guide.

[**10**] On our consideration of the appeal, we are satisfied that the learned judge did not take into account the relevant factors including inflation and the level of awards for comparable injuries and as a result arrived at an erroneously low award in the circumstances. In our view, the appropriate award should have been Kshs. 200,000/-. [**11**] The learned judge further erred in finding that the claim of Kshs.5,460/- as assessor's fees was not strictly proved. The claim was pleaded as special damages. The Assessor, Michael Ndegwa Githinji, gave evidence that he assessed the appellant's vehicle and charged Kshs. 4,500/- and Kshs. 960/- for his expenses – total Kshs. 5,460/-. The fee note of Kshs.5,460/- and the Assessment Report which was accepted by the learned judge were produced. We are satisfied that the appellant strictly proved the special damage and the claim should have been wholly allowed.

[**12**] In addition to the claim for special damages which included the value of the vehicles, assessor's fees which was allowed, other than the latter, the appellant also claimed damages for loss of user or loss of earnings for one year. In support of that claim, he pleaded that he was using his vehicle as a matatu and earning Kshs.3,500/-per day net, and that the vehicle was completely damaged in the accident. He also claimed for total loss of the vehicle before the trial and with leave of the court in the amended plaint, to claim Kshs.1,032,000/- as loss of user and Kshs. 600,000/- as the value of the vehicle. The claim for loss of the vehicle less salvage was allowed. The claim for loss of user of the motor vehicle was dismissed on the ground that the appellant did not produce documents – books of accounts and tax returns relating to the income from the vehicle.

[**13**] At page 328 paragraph 863 of **Halsbury's Laws of England – Fourth Edition** re-issue, the authors state in respect of loss of use of profit-earning chattel which is destroyed:

> ***"The measure is the value of the Chattel to the owner as going concern at the time and place of the loss so that he might be in a position to purchase a replacement. Loss of user profit for a period until a replacement could be obtained may also be awarded, together with costs arising from the disturbance of any current engagement, the costs of adapting, transporting and insuring any replacement and wasted wages and standing charges. Interest may be awarded on the sum.***

The value of prospective future earnings of the lost chattel cannot merely be added to the market value since the earning capacity of the chattel will have been taken into account in arriving at its capitalised value and mere addition would result in duplication."

That statement of the law is derived from **Gebosch Dredger v SS Edison [1933] AC 449**. However, a plaintiff is required to take reasonable steps to mitigate his loss.

[**14**] In **Moore & Another v Der [1971] 3 All ER 517**, it was held that although a plaintiff who has suffered damage for which the defendant was liable was, in mitigating his loss, bound to act with defendant's interest in mind as well as his own, the only requirement was that he should act reasonably and what was reasonable was dependent on the circumstances of each case and was a question of fact.

In **Ryce Motors Limited & Another v Elias Muroki**, **Civil Appeal No. 119 of 1995 (Mombasa) [1996] eKLR** referring to the case of **Peter Njuguna Joseph & Another v. Ann Moraa, Civil Appeal No. 23 of 1991** (unreported) this Court said in *obiter dictum*:

> ***"In our view, the statement in Ann Moraa's case that a plaintiff is entitled to wait until he is paid the pre-accident value of his destroyed property does not reflect the correct legal position. The position in law is that a man in the position of the respondent must take all reasonable steps to mitigate his damages and for this purpose there is no distinction between a damaged and destroyed article".***

In the instant case, there was no dispute on the respondent's liability in law for loss of user profits. The dispute was in the proof of such loss.

[**15**] In his written submissions **Mr. Asiyo**, learned counsel for the appellant submitted that the judge erred in failing to take into account that "matatus" are operated to earn an income, that the sector is informal and keeping of formal records is an exception. The appellant had bought the vehicle two months before the accident and had paid one installment of Kshs.50,000/- towards the purchase price which indicates that he was making enough money. He heavily relied on the cases of **Wambua vs. Patel & Another [1986] KLR 336** and **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v. Augustine Munyao Kioko [2006] eKLR** and **Chinese Technical**

Team for Kenya National Sports Complex & 2 others v. Chabari M'Ingaruni – Court of Appeal Civil Appeal No. 293 of 1998 (unreported).

The respondent did not file written submissions but **Mr. Akionga,** the respondent's counsel submitted that there was no documentary proof of the daily earnings of the matatu; that there was no concrete evidence that the matatu could make three trips; that the vehicle was involved in an accident one month after the purchase and that the judge made the correct finding. He relied on **Ryce Motors & Another vs. Elias Muroki** (supra) and **Sumner Limited Meru v. Moses Kithinji Nkanata [2006] eKLR**, for the proposition that earnings from a matatu are special damages which should be pleaded and strictly proved.

[**16**] The appellant claimed both special and general damages. The special damages which did not include loss of user were particularized. The respondent in his defence denied that the vehicle was a public service vehicle; that it earned the appellant the alleged sum per day and that appellant was entitled to damages for loss of earnings. The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of *restitutio in integrum* is applied in such cases.

[**17**] In **Wambua v Patel & Another [1986] KLR 336**, the High Court (**Apaloo, J**. as he then was), was faced with the problem of quantification of loss of earnings of a cattle trader who had been severely injured in a road traffic accident. Although the court in that case found that the evidence of the plaintiff's earnings to be very poor and that he had kept no books of account nor business books and had never paid any tax, the court said at p.346 para 25:

"***Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method"*** ….and added at p. 347 para 1 ***"But a victim does not lose his remedy in damages because the quantification is difficult."***

In **Kimatu Mbuvi's** case (supra), the Court of Appeal was grappling, *inter alia*, with a claim for loss of butchery business which the plaintiff closed after sustaining injuries in a road traffic accident. The claim was opposed on the grounds, amongst other things, that account books, income, tax returns or audited accounts were not produced. Nevertheless, the Court, guided by the previous decision including **Wambua's** case to which we have referred, computed the claim on the basis of the evidence available.

The case of **Chinese Technical Team for Kenya National Sports Complex** (supra), a claim for loss of use of a vehicle – a matatu, apparently written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts was produced upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

In **Peter Njuguna Joseph & Another v Anna Moraa** (supra), this Court assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

[**18**] It is fair to refer to the case of **Ryce Motors Limited & Another vs. Elias Muroki** (supra) relied on by the respondent. There, an award of Kshs.2,830,500/- as special damages for loss of profits to the respondent whose 26-sitter omnibus used as a matatu which was written off in an accident, was set aside for the reason that he had not supported his claim by acceptable evidence, notwithstanding that the appellants had admitted liability for the accident and liability had been apportioned between the appellants. The court said:

"These pieces of paper do not show at all if the alleged accounts were in "*respect of the matatu"* ***or the two matatus owned by the plaintiff as shopkeeper. The two pieces of paper in our view do not prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/- a day. He did not support such claim by an acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2830500 for special damages."***

[**19**] That decision is ex-facie inconsistent with the Court's previous decisions in so far as it implies that loss of profits from an income generating vehicle which is written off is strictly a claim for special damages and will fail unless specifically pleaded and strictly proved by documentary evidence. The term "**special"** and "**general**" damages have different meaning depending on the context in which the term is used – whether in the context of liability, proof of loss or pleadings (see **McGregor on Damages 15th Ed. PP.13-17**). The judgment does not disclose the state of pleadings but it seems from the judgment that the claim for loss of profits from the written-off matatu was pleaded as a claim for special damages and based on precise calculations. Whatever the case, from what we have already said particularly in the classification of a claim for loss of use of income generating chattel we prefer to be guided, and apply the said previous decisions of the Court.

[**20**] The appellant proved by evidence that his vehicle was operating as a matatu and that at the time of the accident, it was so operating. It was assessed as a write off and an award was made for loss of the vehicle. He claimed loss of user of Kshs. 3,500/- a day for one year. He gave evidence of the routes he was operating – Nairobi, Thika Matuu and that he was making three trips a day. He also gave evidence of what the vehicle earned for each trip and the expenses incurred per day including the cost of fuel and the fees he paid for the stage. He testified that the daily net income used to fluctuate from Kshs. 4,000/- to 3,500/- and that the records were lost during the accident.

The claim was rejected because the appellant did not have books of accounts or income tax returns to support the claim. The learned judge did not find specifically that the appellant's oral evidence was unreliable. In **Chinese Technical Team for Kenya National Sports Complex**, the Court said that there was nothing wrong in accepting and in relying on oral evidence to prove the pre-accident value of the vehicle.

[**21**] In **Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu**) (unreported) the court in allowing a claim for general damages for loss of user of a lorry relied on p.226 para 394 of Halsbury's Laws of England Vol. 11 3rd Edition which stated thus:

> ***"The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages***".
>
> The authors continue to say in the same passage thus:
>
> ***"Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess…"***

We have considered the evidence and are satisfied that the vehicle was earning approximately a net of Kshs. 2,000/- a day.

[**22**] The appellant was required to mitigate his losses. He filed the suit on 21st June 2001, seven months after the accident. The award for loss of the vehicle was made on 28th October 2003. It is unreasonable to hold the respondent liable for delay in filing the suit and for the delay in conclusion of the court process. There are also considerations it would be improbable that the vehicle would operate continuously for a whole year. It would probably be grounded occasionally for maintenance and for any other reason. There are no reasons given for claiming loss of use for one year or the steps the appellant took to mitigate the damages. In **Chinese Technical Team for Kenya National Sports Complex**, a period of 6 months was considered as a reasonable period for computing loss of user of a matatu which we also consider to be reasonable for this case. That would yield a figure of Kshs. 240,000 (2000 x 20 x 6) which we award to the appellant.

[**23**] For the foregoing reasons, we allow the appeal with costs to the extent indicated above. Consequently, we set aside the judgment of the High Court on quantum of damages and replace it with judgment on quantum of damages for a combined total as hereunder:

1. Special damages

Medical Hospital costs-Kshs.-19,760.00--

Copy of records-costs-Kshs.-200.00

Assessors fees--Kshs.-5,460.00--

2. Damages for pain suffering and loss of amenities--Kshs.-200,000.00--

3. Loss of motor vehicle (net)-Kshs.-525,000.00--

4. Loss of user (Profits)--Kshs.-240,000.00--

Total--Ks**hs.-990,420.00**

Less 10% contributory negligence-Kshs.-99,042.00--

-NET--Kshs. 891,378.00

The special damages (No. 1 above) shall earn interest from date of filing suit at court rates. The general damages (No. 2, 3, and 4) shall carry interest at court rates from the date of judgment.

Dated and delivered at Nairobi this 3rd day of March, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR