IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: NAMBUYE, OKWENGU, & KIAGE, JJA)

CIVIL APPEAL NO. 242 OF 2009

BETWEEN

DAUGLAS ERICK NYAKUNDI MASIRA.....APPELLANT

AND

RONGAI WORKSHOP LIMITED.....1ST RESPONDENT

PETER KARENGE MUNGAI.....…….....….2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kericho

(Ang'awa, J.) dated 18th March, 2009

in

H.C.C.C. No. 88 OF 2007)

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JUDGMENT OF THE COURT

The appellant **DAUGLAS ERICK NYAKUNDI MASIRA** moved to the High Court at Kericho and presented a plaint dated the 1st day of August 2007, directed against the respondents, **RONGAI WORKSHOP LTD** and **PETER KARENGE MUNGAI** the 1st and 2nd respondents respectively.

In it, the appellant sought both special and general damages, costs, interest and any other relief that the court would deem fit to grant.

The cause of action arose from a road traffic accident which occurred on the 3rd day of June 2007 near Kericho Teachers College, involving the appellant as a pedestrian and motor vehicle registration number KVP 367 lorry make Leyland and pulling trailer Z9569, owned by the 1st respondent. It was being driven by the 2nd respondent in his capacity as the driver, servant and/or agent of the 1st respondent.

It was the appellants averment that the said accident occurred as a result of the 2nd respondent's negligent

manner of driving as particularized in the plaint. The appellant continued to aver that the vehicle driven by the 2nd respondent veered off the road and then came and hit the appellant who was off the road. In consequence thereof the appellant suffered injuries particularized in the plaint in respect of which he sought the reliefs specified above.

The respondents entered appearance and refuted the appellant's claims vide a joint defence dated the 10th day of August 2007. They denied the appellant's averments and put him to strict proof. In the alternative and without prejudice to the foregoing the respondents averred that if any accident occurred then the same was occasioned by the negligence attributed to the appellant whose particulars were also given in the defence. They prayed for the appellant's claim to be dismissed with costs to them.

At the close of the pleadings both sides agreed on two issues for determination by the court namely:-

(1) To what extent is either party to blame for the accident of 3rd June, 2007

(2) What is the quantum of damages payable to the plaintiff following the injuries suffered in the said accident.

Upon setting down the suit for hearing, parties narrowed down issues for determination through a number of consents as set out here under:-

(1) On the 3rd day of February, 2009, on special damages;

"Judgment be and is hereby entered for the plaintiff against the defendants on special damages only of Kshs 185,600/= (one hundred and eighty five thousand, six hundred only) subject to liability to be determined by the court or parties."

(2) On the 18th day of February 2009 on liability:-

"1. LIABILITY

By consent, there be judgment of the plaintiff in favour of plaintiff against the defendant at apportionment of :-

30% against plaintiff and

70% against defendants

(3) On 4th March 2009, on loss of earning capacity;

"Upon reading a consent letter dated 4th March 2009 and signed by M/s Meroka and Company advocates for the plaintiff and M/s Siganga and Company Advocates for the defendants it is ordered:

(1) That by consent of the parties herein the court to assess loss of earning capacity suffered by plaintiff at the rate of Kshs 4,000/- per month for a period to be determined by the court and the total sum thereof be subjected to liability earlier agreed of 30:70% in favour of the plaintiff.

(2) THAT by consent also the court do proceed to assess general damages for pain and suffering suffered by the plaintiff on a day now agreed as 17th March, 2009"

On the 17th day of March 2009 the trial opened with an opening address given by the appellant's advocate then on record for him in which the learned counsel alluded to the consents set out above which had narrowed down issues for determination by the court. There is a clear indication in the said address that the amount for loss of earning capacity had been agreed at the rate of Kshs 4,000/- per month. The said learned counsel suggested a multiplicand of thirty (30) years. He also made a proposal for the quantum

for pain and suffering at Kshs 1.5 million. Learned counsel for the appellant also cited supportive case law. Thereafter the appellant took the witness stand and gave evidence in support of the assessment of damages in his favour. He was cross examined on his testimony by counsel for the respondents. The respondents' learned counsel elected not to call any evidence in rebuttal.

Both learned counsel made oral submissions on quantum. Of relevance to the appeal is the following submissions made by the appellant's counsel that was captured on the record:

"I wish to point out injuries are serious and renders him incapacitated and not health (Sic). He will need assistance throughout his life. 45 years period. The court shall award lump sum and reduce period to 20 years."

In reply the respondents learned counsel had this to say:-

"I would point out evidence by plaintiff left a gap. On the nature of initial treatment of the plaintiff. A reasonable term would be 20 years."

In his judgment the learned trial Judge correctly made observations that parties had mutually agreed on the issue of the quantum of special damages and the ratio of blameworthiness for the causation of the accident at 30:70% in favour of the appellant. The learned judge also correctly observed that what was left for her to determine was quantum of damages under two items (heads) one, general damages for pain, suffering and loss of amenities; and two, general damages for incapacity.

After assessing the evidence and case law relied on by both sides, the learned judge delivered herself thus on these two heads of damages:-

"20. My finding herein is that indeed the plaintiff did suffer pain and suffering. I am satisfied that he now has lost amenities being the use of his right leg. He is now 20 years old and has been incapacitated by his loss.

21. I would accordingly find as a fair award herein of Kshs 800,000/-.

22. I now turn to the issue described by the advocate for the plaintiff as incapacity. This claim I believe must mean loss of earning capacity? Or loss of future earning capacity? The advocate relying on the same authorities indeed was referring to a multiplicand of Kshs 4,000/= agreed to by both parties and a multiplier of 30 years and not 45 years referred to by the plaintiff. If this is so them (sic) a sum of Kshs 1,440,000/= million would be asked for.

23. I have looked and (sic) the pleadings before this court and found that the same does not plead this head of damages. This is a claim that must not only he (sic) pleaded but must be strictly proved. I declined to make an award herein and would accordingly dismiss this claim."

The learned Judge then went ahead as was expected of her to make a suggestion of what she would have awarded under this head had the appellant pleaded and succeeded on that claim:

"C) Loss of incapacity agreed multiplicand 4,000/= suggested multiplier 30 years.

Nil not pleaded now particularized.

Total Kshs 985,600/=

Less 30% 295,680/=

Award to plaintiff 70% 689,920/="

The appellant was aggrieved by the learned judge's decision not to award him damages under the head of

loss of future earning capacity. He is now before us raising seven (7) grounds of appeal that the learned judge erred in law:-

- by failing to have due regard and to take into account the various issues agreed by the parties and to appreciate the fact that she was bound by the parties agreed issues

- by failing to have due regard and to take into account the various consent judgment entered into by the parties especially the one on loss of earning capacity dated and filed on 4th March 2009.

- misdirected herself by finding that the claim for loss of earning capacity is not properly pleaded in the plaint and consequently in proceeding to dismiss the same

- when she failed be guided by the parties submissions on quantum of damages payable to the appellant under the head of loss of earning capacity

- when without giving any reason whatsoever, she found that a probable award under the head of loss of earning capacity would have not exceeded ksh. 900,00/= and thereby ignored the defendant's submissions for ksh. 1,440,000/=

- misdirected herself and relied on extraneous matters in arriving at her finding on the head of loss of earning capacity

- by failing to appreciate the extent of the injuries suffered by the appellant and the effect they have and will continue to have on the appellant's life

- under the circumstances of the case, the learned judge failed to do justice before her"

During the hearing of this appeal learned counsel ***Mr. Meroka I. O.*** made submissions on behalf of the appellant whereas learned counsel Mr. Tombe C. W. O. did so on behalf of the respondents.

In summary, Mr. Meroka argued that the appellant's grievance in this appeal is only one. It is against the learned judge's failure to award him failure on the part of the appellant both to plead and prove the said head of damages. Counsel urged that contrary to the mentioned erroneous finding by the learned judge, the appellant had not only pleaded this head of damages, but there was also a consent endorsed on the record by both parties agreeing on the multiplicand of Kshs 4,000/= per month as the loss of earning capacity. Parties then made submissions on an appropriate multiplier of twenty (20) years which the learned judge ought not to have ignored. He therefore urged us to reverse the findings of the learned judge allow the appeal and calculate the damages under this head.

To buttress his arguments, Mr. Meroka referred us to the case of **Attorney General versus Waiyera [1983] eKLR** for the proposition that loss of future earnings can never be part of an award of special damages for the simple reason that they are not quantifiable or ascertainable at the date of trial. They can only be claimed as part of general damages. Also referred to was the case of **Munyiri versus Ndunguya Nyeri CA No. 60 of 1983** and **Flora Wasike versus Destimo Wamboko [1982-88] KAR 625** in both of which the case of **BrookeBand Leipig Ltd versus Mallya [1975] EA 266** was approved for the proposition that:-

"a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a conflict between the parties."

In response to the appellant's submissions, Mr. Tombe urged us to dismiss the appellant's appeal on the grounds that the learned judge fell in no error when she disallowed the head of damages complained of as the same had not been properly pleaded; second, the learned trial judge was right in distinguishing the loss of earning capacity from future earnings; third, there is evidence that the learned judge included loss of future earning capacity in the general damages head that was allowed; four, there was nothing to show that the appellant had been in any gainful employment; and lastly that the learned judge was perfectly in

order to act on her own motion to correct an initial consent which had been erroneously endorsed by both parties.

To buttress his argument Mr. Tombe relied on the case of **Arkay Industries Limited vs. Amani [1990] KLR 310** for two holdings namely:-

"First that the assessment of damages is essentially a matter of judicial discretion; and second, that for a superior court to interfere with a lower courts assessment of damages, it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred".

Mr. Tombe also relied on the case of **Samson Omari versus Simon Kamau & another [2007] eKLR** in which the case of **Mumias Sugar Company Ltd versus Francis Wanalo C A No. 91 of 2003** approved the proposition that compensation for loss of future earnings is awarded from real assessable loss proved by evidence while compensation for diminution in earning capacity is awardable as part of general damages.

In reply to the respondents' submissions Mr. Meroka reiterated his earlier submissions that they had made all the relevant pleadings and provided the necessary information to assist the learned trial judge assess damages under this head.

This being a first appeal, our mandate is as set out in Rule 29 (1) of the Rules of the Court that is to re-appraise the content of the record and draw inferences on the issues in controversy as between the parties. In **Selle versus Associated Motor Boat Co. [1968] EA 123,** the Court of Appeal for Eastern Africa stated that a first appeal is like a re-trial whereby the first appellate court is obligated to re-consider the evidence, evaluate it itself and draw its own conclusions but always bearing in mind that it neither saw nor heard witnesses and to remember to make due allowance for that. There is also a second precaution in the same decision that the 1st appellate court is not necessarily bound to follow the has clearly failed in some point to take account of particular circumstance or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (See ***Abdul Hameed Saf versus Ali Mohamed Sholan [1955], 22EA. CA270).***

In **Jabane versus Olenja [1986] KLR 664,** this Court added that interference with the trial courts' findings of fact is permissible in instances where such findings are based on no evidence or the judge is shown demonstrably to have acted on wrong principles on reaching the findings.

We have given due consideration to the content of the record in the light of the rival arguments set out above. In our view, only one issue falls for our consideration that is whether the learned trial judge fell into an error when she held that damages for loss of future earnings had neither been pleaded nor proved.

Prayer (b) of the plaint dated 1st August, 2007 that was filed in the High Court by the appellant read thus:-

"General damages for loss of earning capacity and pain, suffering and loss of amenities."

It is evident from the above that the appellant twined into that prayer two heads of general damages namely the item for loss of earning capacity and the item for pain, suffering and loss of amenities. It is therefore not correct as found by the learned judge that there was no pleading for loss of earning capacity. Mr. Tombe for the respondent has argued that the claim was not properly pleaded. In his authorities that he has cited to us for guidance that is the case of **Samson Omari versus Simon Kamau & another** (supra), the decision in **Mumias Sugar Company case (supra)** was approved for the proposition that compensation for diminution in earning capacity is awarded as general damages and it is also pleaded as such.

Nowhere in his submissions to us did Mr. Tombe point out any part in the proceedings before the High Court where he raised the issue that the pleadings for this item was not proper. Nor has he pointed out

what wrong the appellant committed by twining up the two items under general damages in one prayer. It is so plainly clear that there are two distinct items of general damages in the said prayer which the court was required to assess distinctly one after another.

As for proof and in the light of the case law assessed above, these are pleaded at large and left to the court to assess. Both parties were alive to this principle and that is why they consented to having the learned trial judge do the assessment.

The consents entered into as set out above remain intact. Mr. Meroka has submitted, and rightly so, that the learned trial judge ought not to have ignored them. Mr. Tombe on the other hand submitted that the learned judge was entitled to act on her own motion to either set them aside or ignore them where convinced that these were not properly entered into. No case law has been cited to us to support that assertion. The only case law that we have before us is what Mr. Meroka cited to us namely; **Munyiri versus Ndunguya Nyeri CA No. 60 of 1983** and **Flora Wasike versus Destimo Wamboko [1982-88] KAR 625** in both of which the case of **BrookeBand Leipig Ltd versus Mallya [1975] EA 266** was approved which stated clearly that such consents are valid, unless interfered with in accordance with principles that justify interference with a validly entered into contract. Mr. Tombe has not pointed out any such factors that could justify the court's intervention.

It is therefore our finding that the learned judge was plainly wrong, and we are inclined to interfere with the exercise of her judicial discretion in withholding this relief from the appellant.

We find that the multiplicand for the loss of earning capacity was agreed by the parties at Kshs 4,000/= per month, and choice of a multiplier settled at twenty (20) years. Therefore the learned Judge ought to have calculated Loss of future earning capacity as follows Kshs 4,000/= x 12 x 20 = Kshs 960,000/= less 30% contribution of Kshs 288,000/= leaving a balance of Kshs 672,000.00. as general damages for loss of future earning capacity.

Accordingly we set aside the order for dismissal of the appellant's claim for loss of earning capacity and substitute it with an award of Kshs. 672,000/=.

The amount will carry interest at court rates from the date of judgment in the High Court.

The appellant will have costs of the appeal and the court below.

Dated and delivered at Nakuru this 14th day of April, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR