IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO 51 OF 2011

BETWEEN

JOHN WAMBUGU NDUNG'U ……... 1ST APPELLANT

DOLPHIN COACHES LIMITED ……..…….. 2ND APPELLANT

AND

DAVID KAGOTHO IRIBE …….....…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Koome, J. as she then was) dated 6th June, 2008

in

NAKURU H.C.C.C No 15 of 2006

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JUDGMENT OF THE COURT

On 18th September, 2005 at about 10.30 p.m. whilst in the course of transporting a consignment of potatoes using motor vehicle registration number KAD 102 J, make Mitsubishi (Canter), from Elburgon to Nairobi, the said vehicle developed a mechanical problem at Marula on the outskirts of Naivasha, forcing the respondent and his turn boy to stop and alight, with a view to assessing the precise nature of the problem. According to the respondent, he parked the Canter on the left hand side of the Nakuru-Nairobi highway, and placed life saver signs both at the front and at the rear of the Motor Vehicle to alert oncoming traffic of their presence. For good measure, tree branches were also placed at the front and rear of the vehicle with a similar intention.

They also placed stones behind the Canter's tyres to secure it as they assessed the mechanical fault, which turned out to be a broken half shaft. Having discovered the cause of their woes, the respondent was of the view that the shaft be taken to Gilgil for welding. About 20 minutes lapsed from the time the respondent and his turn boy stopped, with the respondent mainly at the rear end of the Canter. Suddenly, there was noise and a glare of light from the front of the motor vehicle followed by a bang. The noise and the light was from motor vehicle registration number KAR 303 H, make Nissan(Bus) driven by the first appellant

who was the servant or agent of the 2nd appellant. It had lost control and veered off its lane while travelling from Nairobi. Moments later, it hit the respondent's broken down Canter causing it to move and finally rest upon his right leg thereby causing him serious injuries. The respondent attributed the accident to the 1st appellant's negligence and sued both appellants before the High Court at Nakuru.

The appellants filed a joint statement of defence wherein they denied the averments made by the respondent in his amended Plaint including the occurrence of the accident and the acts of negligence attributed to them. They also leveled accusations of negligence on the respondent, and placed reliance upon the doctrine of *volenti non fit injuria*. At the trial, the respondent, his turn boy, a police officer, the respondent's turn boy and the owner of the Canter testified. Highlights of their evidence included;

- ***Confirmation that a road accident occurred on 18th September, 2005 along the Nairobi-Nakuru Highway involving a Canter Registration number KAD 102 J and a Bus Registration number KAR 303 H.***

- ***Confirmation of injuries to some of the occupants of the said Motor Vehicles with the Respondent being hospitalized and undergoing amputation of his right leg followed by a lengthy stay at various hospitals. The total bill incurred was to the sum of Ksh 135, 345.***

- ***Traffic Court proceedings instituted against the 1st appellant wherein he was found guilty of the offence of careless driving.***

- ***Confirmation that the Bus was owned by the 2nd appellant, and that the 1st appellant was driving it on the material date.***

- ***Confirmation that the respondent earned a sum of Ksh 12, 000 monthly as salary.***

- ***Confirmation that the respondent's health and economic status changed on account of the accident.***

The appellants closed their case without calling a single witness.

After considering the merits of the case, the trial court (Koome, J. as she then was) found the appellants wholly liable for the accident and entered judgment in favour of the respondent on 6th June, 2008. She granted the respondent's prayers in the following terms:

General damages for pain and suffering	
& loss of amenities	***- Ksh 1, 300,000***
Damages for loss of future earnings	***- Ksh 1, 440,000***
Special damages for medical expenses	***- Ksh 133,155***
Total	***Ksh 2, 873, 155***

It is that decision that is the subject of the present appeal alleging that the learned Judge erred by;

- ***Misdirecting herself that the respondent had proved his claim as pleaded in the Plaint.***

- ***Disregarding that the burden of proof lay on the respondent to prove the salary he earned which he failed to do.***

- ***Making a finding that the respondent was earning a salary of Ksh 12, 000 yet***

(i) he had nothing to show to prove that he earned Ksh 12, 000 per month,

(ii) his employer had:-

Nothing to show that he had employed the Plaintiff; that he was the owner of the subject vehicle; and Never kept any records of payment.

They also complained that;

- ***The award for "General damages for pain and suffering and loss of amenities" in the sum of Ksh 1, 300, 000 by the learned Judge is excessive and unreasonable in the absence of conclusive evidence of the respondent's income.***

- ***The award of general damages for 'loss of amenities' in addition to damages 'loss of future earnings' are duplicated awards and unreasonable".***

Mr. Mahida, learned counsel for the appellants, submitted that the appeal was on quantum only. Counsel then turned on the respondent's evidence before the trial court to the effect that he earned Ksh 12, 000 per month, noting from the record that both the respondent and PW 4 his employer did not produce evidence to support this claim.

Learned counsel contended that no evidence had been tendered in support of the claims of loss of salary, lost earnings and loss of future earning capacity. Furthermore, the respondent's submissions in this regard before the trial court ought not to have been treated as evidence. It was submitted that the head of loss of future earnings awarded at Ksh 1, 440, 000 was not pleaded, and, should not have been granted as the respondent was bound by his pleadings. Moreover, the general damages took that aspect into account. In conclusion, learned counsel accepted the award under general damages "though high", considering the level of disability.

Mr. Mutonyi, learned counsel for the respondent commenced by arguing that the respondent's monthly income of Ksh 12, 000 had been proved. The respondent was a duly qualified and licensed driver; and was at the helm of the Canter on the material date. Moreover, the respondent had tendered oral evidence with regard to his earnings, which was not unusual in Kenya's circumstances; or for the cadre which the respondent belonged to. At any rate, PW 4 had testified that he used to pay the respondent the sum of Ksh 12,000. This was therefore the best evidence, which remained uncontroverted. It was further submitted that proof of ownership of the Canter which had been written off and sold was immaterial.

Mr. Mutonyi contended that loss of future earnings had been properly awarded. Both loss of earnings and loss of future earning capacity had been pleaded in the amended Plaint, with the latter disallowed, and properly so. Counsel defended the award for loss of future earnings as it had been made properly. He concluded that the learned trial Judge used the proper approach in computing the award of damages and cannot be faulted in that regard.

In reply, Mr. Mahida submitted that the learned trial Judge relied on the case of ***MUMIAS SUGAR COMPANY LIMITED V FRANCIS WANALO [2007] eKLR***, as the basis for her findings on damages. The said case had made a distinction between loss of future earnings and loss of earning capacity, which had to be proved by a party claiming the same and the respondent had not done so.

We have considered the rival submissions by learned counsel and examined the record as required of us in a first appeal, alive to the fact that we did not have the benefit of seeing the witnesses as they testified. Our role is spelt out succinctly in ***SELLE VS ASSOCIATED MOTOR BOAT CO [1968] E.A. 123.*** Liability is undisputed hence the only issue in contention is quantum.

This Court in ***GEORGE KIRIANKI LAICHENA VS MICHAEL MUTWIRI-CIVIL APPEAL NO. 162 OF 2011*** expressed itself as follows:-

> ***"It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated in H.West& Son Ltd Vs Shephard [1964] AC 326 at page 353:-***
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> ***"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of, his own assessment".***

Nonetheless, there are principles which have stood the test of time.

In ***BUTT VS KHAN [1981] KLR 349***, Law J.A at page 356 held:-

> ***"an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".***

This appeal turns principally on the computation of damages for loss of future earnings. The multiplicand of Ksh 12, 000 came under sustained attack from the appellants, with their main contention being that the same was not proved before the trial court.

In ***JACOB AYIGA MARUJA & ANOTHER VS SIMEON OBAYO (2005)*** **eKLR** this Court held that:-

> ***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed"***.

The above holding is on all fours with the respondent's testimony, which the learned Judge believed, as follows: - ***"I was employed as a driver." "I had a Driver licence No C240778 issued on 2002"***. ***"That is my driving licence I wish to produce it as exhibit (substituted by a certified copy as EXHIBIT No 13)." "I used to be paid Ksh 12,000"***. His employer (Naftali) stated as follows:-

> ***"At the time of the accident I used to pay David (K) sh 12, 000 per month"***. ***"I used to pay him anytime"***.

Accordingly, we find and hold that the respondent proved his employment and the earnings therefrom on a balance of probabilities. Considering the cadre of employment he belonged to prior to the accident, it would be unrealistic to demand that he prove his earnings using the matrix of pay slips, bank account statements; PAYE contributions and the like as would be expected of formalized employment.

Given that the respondent had proved his actual earnings, the learned Judge was within rights to award him the sum of Ksh 1, 440, 000 as damages for future earnings as an item distinct from the loss of future earning capacity which is considered in assessing general damages. In this the learned Judge properly

understood and applied the ***MUMIAS SUGAR*** case (supra) in which this Court adopted the approach of assessment comprehensively dealt with in ***MOELIKER VS REYNOLLE & CO LTD [1977] 1 WLR 132*** and we need not rehash the same. They were not inordinately high as to amount to an erroneous estimate.

Similarly, we see no reason to disturb the award for special damages as the same was duly proved before the trial court.

The upshot of the foregoing is that this appeal stands dismissed with costs before both courts awarded to the respondent.

Dated and delivered at Nakuru this 16th day of June, 2016

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

…….

JUDGE OF APPEAL

P.O. KIAGE

……

JUDGE OF APPEAL

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