IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 54 OF 2012

BETWEEN

MADRUGADA LIMITED ……...……APPELLANT

AND

COSMAS KIPKOECH SIGEI …….RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Maraga, J. as he then was) dated 3rd June, 2010

in

NAKURU HCCC NO 176 'B' OF 2005

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JUDGMENT OF THE COURT

On 7th April, 2005 ***COSMAS KIPKOECH SIGEI*** (the respondent) was in the course of his employment at a stable owned by ***MADRUGADA LIMITED*** (the appellant company) when his left hand was crushed by an oat- crushing machine which he was single- handedly operating thereby causing him severe injuries leading to amputation of the said limb. He filed suit against the appellant company initially seeking:- general damages; special damages to the sum of Ksh 1,500; costs of the suit; interest on both heads of damages; and any other relief which the trial court deemed fit to grant. Subsequently, the respondent amended his plaint and struck off the name of Johnty Backley, whom he had wrongly enjoined to the suit. The cost of fitting a prosthetic arm to the respondent's amputated limb and that of a doctor's report sanctioning the same were tabulated at Ksh 1, 037, 000 and Ksh 5, 000 respectively in the amended plaint. Cumulatively, the respondent's claim for special damages amounted to the sum of Ksh 1, 042,000. Prior to the hearing, the appellant and the respondent recorded a consent on liability with the former conceding the same at 65%, while the latter conceded at 35%. This concession found its way to the trial court's judgment which was entered in favour of the respondent to the sum of Ksh 3, 480, 000 less 35% contribution of Ksh 1, 218, 000, bringing the net award to Ksh 2, 262, 000.

The net award of Ksh 2, 262, 000 now forms the crux of this first appeal wherein the appellant contends that the same was excessive on account of the trial Judge's alleged failure to consider the

evidence and submissions lodged by the appellant. The appellant is equally aggrieved by the learned trial Judge's finding that the respondent had suffered total loss. The said grievances were ventilated before us at the hearing by ***MR. WAMASA***, learned counsel for the appellant who submitted that the appeal was on quantum only. He contended that 'lost years' was the same as 'loss of earning capacity' save that the respondent was not required to plead loss of earning capacity. He submitted that the respondent did not abide by the said requirement, and only mentioned that limb of the claim when he testified that he earned Ksh 2, 600 per month. Learned counsel further submitted that the respondent was a manual labourer and was bereft of training in any skill. Moreover, the respondent had not received any training to be a horse rider; and could therefore execute other tasks post-amputation.

The learned trial Judge's decision to award the respondent both loss of earning capacity and a prosthetic arm came under attack with Mr. Wamasa contending that a prosthetic limb is not similar to a natural hand. He submitted that the respondent should have changed his lifestyle and ventured into any other activities other than riding horses. Reliance was placed on the case of ***NZOIA SUGAR COMPANY LIMITED VS CAPITAL INSURANCE BROKERS LIMITED [2014] eKLR*** in support of the foregoing proposition. Counsel argued that damages must be pleaded and faulted the respondent's attempt to introduce the same belatedly during the trial. We were urged to consider the holding of this Court in ***MBAKA NGURU & ANOTHER VS JAMES GEORGE RAKWAR [1998] eKLR*** in this regard. For the avoidance of doubt counsel made it known to us that the appellant's main quarrel was the award made under the head of 'loss of earning capacity'.

MR. BOSEK, learned counsel appeared for the respondent and submitted that he did not see any reason why this Court should interfere with the award of the trial court. According to him the learned trial Judge was categorical about the difference between 'loss of earnings' and 'loss of earning capacity'. He cited a decision of this Court namely ***MWANGI & ANOTHER VS MWANGI [1996] LLR 2859*** as the one which informed the learned trial Judge's decision to make an award for loss of earning capacity. Counsel submitted that loss of earning capacity falls in the realm of general damages, and that the same can come under several sub-headings. He cited the case of ***NAOMI WANJIKU RUMANO VS ALICE WANJIKU RUMANO &ANOTHER- NAIROBI HCCC NO 233 OF 1999*** wherein the appellant was awarded for domestic help; and argued that what the respondent was awarded for the prosthetic limb was much less than what was claimed.

Counsel submitted that the appellant did not specifically state the fact that 'loss of earning capacity' was not pleaded. At any rate the prosthetic limb was mainly for cosmetic and balance purposes. He contended that there was need to categorize general damages; and that the same is not the only category of damages. Counsel further submitted that the pleadings and evidence before the trial court supported the respondent's claim. He distinguished the present appeal from that of ***MBAKA NGURU & ANOTHER VS JAMES GEORGE RAKWAR*** (Supra) submitting that herein evidence had been tendered. Furthermore, permanent disability was not consented to herein as it was in the ***RUMANO CASE*** (Supra). He urged us to dismiss the appeal.

Mr. Wamasa's reply to the foregoing was that there was no cross-appeal.

We have already intimated that this is a first appeal. Briefly put our roles herein is to reconsider the evidence, evaluate the same and draw our conclusions therefrom, bearing in mind that we did not get to see or hear the witnesses as they testified. Due allowance is called for in this regard. Liability is undisputed leaving quantum as the only issue in contention. On an appeal against quantum, the words of this Court in ***GEORGE KIRIANKI LAICHENA VS MICHAEL MUTWIRI-CIVIL APPEAL NO 162 OF 2011*** are germane;

> ***"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:-***

'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 inevitable 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'".

In essence the appellant's main complaints stemmed from the quantum of that head of damages known as 'loss of earning capacity' for which the learned trial judge awarded the sum of Ksh 780,000; and the award for the fitting of a prosthetic limb for which the learned trial Judge awarded the sum of Ksh 700, 000.

However, the same cannot be looked at in isolation as the entire appeal is premised on quantum.

Nonetheless, we must keep in mind the provisions of **Rule 86 (1)** and **104 (a)** of the **Court of Appeal Rules** ('the rules') to wit:-

"86 (1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make". (Emphasis ours)

"104 At the hearing of an appeal-

(a) No party shall, without the leave of the Court, argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the superior court on any ground not relied on by that court or specified in a notice given under rule 93 or rule 94". (Emphasis ours)

Scrutiny of the appellant's memorandum of appeal reveals that it does not make reference to the complaints we have pointed out hereinabove. Moreover, from the record the appellant did not seek leave to canvass the grounds of ' loss of earning capacity' and the quantum awarded towards the cost of fitting the prosthetic limb, which ought to have been specifically pleaded in the memorandum of appeal in our considered opinion. It follows therefore that we are now obliged to look at the global sum of Ksh 2, 262, 000 awarded by the trial court, in light of the appellant's submission that it was excessive.

In ***BUTT VS KHAN [1981] KLR 349***, Law J.A. (as he then was) held as follows at page 356:-

"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".

The holding in ***NAOMI WANGUI RUMANO VS ALICE WANJIKU KIMANI& ANOTHER-NAIROBI HCCC NO 223 OF 1996*** was instrumental in assisting the trial court to arrive at a finding on quantum in the absence of authorities from the appellant in its record. Our analysis of the said case is that it was on all fours with that before the trial court except for the award of a domestic help which was made therein to assist the plaintiff to get by. The learned trial Judge's decision to award a global sum of Ksh 700, 000 was in keeping to the holding of the said case and the appellant's submissions before him. Judgment was entered for the plaintiff in the ***RUMANO CASE*** (supra) in the sum of Ksh 2, 235, 780 sometime in January, 2001. On 3rd June, 2010 the trial court entered judgment for the respondent to the sum of Ksh 2, 262, 000 having taken into account his concession on liability. The learned trial Judge also took into account the then prevailing inflationary trend and properly so.

In view of our analysis hereinabove, we are of the considered opinion that the learned trial Judge kept within the guidelines set out in the ***KHAN CASE*** (supra) and we see no reason to interfering with his finding on quantum. We therefore find no merit in this appeal and accordingly dismiss it with costs.

Dated and delivered at Nakuru this 2nd Day of August, 2016

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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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