



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 19 OF 2014

BETWEEN

BAYUSUF FREIGHTERS LIMITED APPELLANT

AND

PATRICK MBATHA KYENGO RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.)

dated 6th June, 2013

in

H.C.C.C No. 155 of 2010)

JUDGMENT OF THE COURT

1. By a Plaintiff filed in the High Court, the respondent instituted a suit against the appellant seeking *inter alia* general and special damages for personal injuries sustained in a road accident that occurred on 2nd June, 2010.
2. It is the respondent's case that the appellant was the registered owner of motor vehicle registration number KBH 437Z and the respondent was employed as a turnboy/loader of the said vehicle. On 2nd June, 2010 at around 4:00 a.m. while transporting goods from Mombasa to Meru, the appellant's authorised driver negligently drove the said vehicle around Kenol-Sagana road causing it to loose control and overturn at Kambiti area. At the time of the accident, the respondent was in the cabin and had put on the safety belt. The respondent lost consciousness and woke up at Thika Hospital. He was later transferred to Bishop Kioko Hospital in Machakos where he was admitted from June to October, 2010. The respondent sustained the following injuries:-
 - crush injury with traumatic amputation of the left leg
 - Fracture of the radius
 - Fracture of the right ulna

- Severe degloving injuries right forearm and hand
- laceration wound right gluteal region

The appellant attributed the cause of the accident to negligence on the part of the appellant's authorised driver.

3. The appellant filed a statement of defence denying the averments made by the respondent. The appellant denied the occurrence of the said accident and in the alternative attributed the occurrence of the accident on the respondent's negligence. Further, in the alternative, the appellant averred that the accident was inevitable.
4. In his evidence the appellant testified that his left leg was amputated above the knee and he required to be fitted with a versatile prosthesis which would cost Kshs. 250,000/=. It was also his evidence that as a result of the injuries he sustained he had been permanently incapacitated at a degree of 85% and therefore sought loss of future earnings. He testified that at the time of the accident he was 26 years old and was earning Kshs. 8,121/= per month. The appellant closed its case without calling a witness.
5. After considering the merits of the case, the trial court (Wakiaga, J.) in a judgment dated 6th June, 2003 found the appellant 100% liable for the accident and entered judgment in favour of the respondent in the sum of Kshs. 4,188,560/= made up as herein under:-

General damages	- Kshs. 1,600,000/=
Future medical expenses-	Kshs 250,000/=
Loss of earning capacity	- <u>Kshs. 2,338, 560/=</u>
Total	<u>Kshs.4,188,560/=</u>

It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judge erred in law and fact in awarding general damages for pain and suffering which was manifestly excessive in the circumstances.***
 - ***The learned Judge erred in law and fact in awarding the respondent a multiplier of 30 years without the contingencies of the law which award was manifestly excessive in the circumstances.***
 - ***The learned Judge erred in law and fact in awarding the respondent damages which were not supported by law and the weight of evidence.***
6. Mr. Michucki, learned counsel for the appellant, submitted that only two issues arise for consideration by this Court namely, the multiplier used in calculating loss of the respondent's earning capacity and the general damages awarded for pain and suffering. He argued that based on the nature of injuries sustained by the respondent, the trial court ought to have awarded Kshs. 900,000/= as general damages for pain and suffering. On the issue of the multiplier used, he argued that 30 years was excessively high taking into account decided cases. Mr. Muchuki submitted that the applicable multiplier does not change with time like general damages do. He suggested that the multiplier should be 12 years.
 7. Mr. Gichimu, learned counsel for the respondent, submitted that the learned Judge exercised his discretion properly in awarding damages considering that the injuries sustained were very serious. He argued that in determining damages payable, the court takes into consideration the date of the judgment and not the date when the suit was filed. Mr. Gichimu submitted that the multiplier of 30 years was based on the current retirement age. He urged us not to interfere with the trial court's discretion which was based on sound reasons.
 8. We have considered the rival submissions by learned counsel and examined the Record of Appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our

own conclusions in the matter. It was put more appropriately in ***Selle -vs- Associated Motor Boat Co. [1968] EA 123.***

9. There is no dispute in respect of liability and 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:-

“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.”

However, there are clear principles which have been decanted overtime and will guide us in considering this appeal. 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 a figure which was either inordinately high or low.”

10. We see no reason to interfere with the award of general damages for pain and suffering issued by the trial court. This is because taking into account the nature of injuries, the cost of living and the depreciation of the shilling we find the sum of Kshs. 1,600,000/= reasonable. We also see no reason to interfere with the award of Kshs. 250,000/= that was given for future medical costs.
11. Turning to loss of earning/ future earning, we take note that at the time of the accident the respondent was 26 years old and was earning Kshs. 8,121/= per month. We concur with the learned Judge that the multiplicand should be 80% of his salary, that is 80% x Kshs. 8,121/= Kshs. 6, 496. We are of the considered view that the learned Judge erred in using a multiplier of 30 years because it was excessive compared to prior decisions of the court in comparable cases. In ***Mary Kerubo Mabuka -vs- Newton Mucheke & 3 others- High Court Civil Suit No. 196 of 2003***, the court applied a multiplier of 20 years wherein the deceased was 26 years old at the time of the accident. Further, in ***Sera Dora Juma -vs- BAT (1978) KLR 40***, the court applied a multiplier of 20 years to a man who was aged 29 years old at the time of the accident. This Court in ***Shabani -vs- City Council of Nairobi (1985) KLR 516***, expressed itself at page 527 as follows:-

“ There is no doubt that,

“ some degree of uniformity must be sought in the award of damages and the best guide in this respect isto have regard to recent awards in comparable cases in the local courts..”

Bhogal -vs- Burbidge (1975) EA 375 at page 289, Letter C-D per law Ag P.”

Therefore, the appropriate multiplier should have been 20 years. Consequently, damages of loss of earning should be Kshs. 6,496/= x 12 x 20 years = Kshs. 1,559,040/=.

12. The upshot of the foregoing is that the appeal partially succeeds. We set aside the award of damages granted by the trial court for loss of future earnings and substitute it with an award of Kshs. 1,559,040/=. The respondent is awarded a total sum of Kshs. 3,409,040/= as damages for injuries he sustained in aforementioned road accident. The damages are as set out herein below:-

General damages	- Kshs. 1,600,000/=
Future medical expenses-	Kshs 250,000/=
Loss of earning capacity –	<u>Kshs. 1,559, 040/=</u>
Total	<u>Kshs.3,409,040/=</u>

The appellant shall have half of the costs of this appeal.

Dated and delivered at Nyeri this 30th day of July, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR