REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL DIVISION

CIVIL APPEAL NO. 136 OF 2016

BETWEEN

KENBLEST KENYA LIMITED.....APPELLANT

AND

MUSYOKA KITEMA.....RESPONDENT

(Being an appeal from the original judgment and decree of Hon. B.N Ireri, Principal Magistrate delivered on 30th September 2016 in Thika Civil Case No. 837 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant, who was dissatisfied with the decision of the trial court aforementioned lodged this appeal on 10th October 2016 seeking *inter alia* that the appeal herein be allowed with costs and that the lower court's judgment in respect of the award on general damages be set aside and that this honourable court be pleased to re-assess and re-evaluate the entire evidence on record and arrive at its own independent conclusion. The appeal is based on grounds THAT:

a) The learned magistrate erred in fact and in law in finding the defendants partially liable given the circumstances under which the accident occurred.

b) The learned magistrate erred in law and in fact by relying on the respondent's submission that relied on a case that was not cited nor annexed in the submission neither was the name of the judge mentioned in the case.

c) The learned magistrate erred in law and fact by awarding damage on loss of earnings and future earning capacity that was not pleaded in the plaint.

d) The learned magistrate erred in law and fact by disregarding the appellant's submissions and judicial authorities both on liability and quantum of damages with the resultant miscarriage of justice to the appellant.

e) The learned magistrate erred in law and in fact in making an award of Kshs. 3,547,960.00 general damages which is inordinately high in view of the injuries sustained by the respondent.

f) The learned magistrate erred in law and in facts by ignoring precedent cited by the applicant.

g) The learned magistrate erred in fact and in law by failing to give a reasoned judgment.

h) The learned magistrate erred in law and facts by holding in favour of the respondent without adequate evidence.

The Pleadings

2. The respondent commenced the suit by way of a plaint in the lower court against the appellant where he sought *inter alia* general and special damages together with costs of the suit, interest on the same and future medical expenses at the sum of Kshs. 1,000/- per session arising out of an accident that occurred on or about the 22nd day of December, 2012 involving the respondent, who was said to have been injured while in the course of lawful employment with the appellant as a Loader. The respondent claimed that as he was going about his authorized duties and as he was removing a sack of flour from the conveyer, his right leg was caught between two sacks of flour and the sack that he was carrying pushed him down as it was heavy and as a consequence, he incurred serious and grievous injuries. The respondent stated that the accident was solely caused by the negligence and or breach of duty of the appellant, particulars of which were set out.

3. The suit was defended by the appellant who filed a statement of defence dated 21st November 2013 denying the contents of the plaint therein. The appellant also averred that if any accident occurred, an allegation that was denied then the blame went to the respondent for being negligent and solely causing the accident.

Judgment of the Trial Court

4. The suit proceeded for a full hearing and at the conclusion of the trial the learned trial magistrate entered judgment for the respondent against the appellant as follows:

Liability in the ratio of 20:80 as against the appellant

General damages Kshs.1,600,000/-

Future Medical expense Kshs. 883,200/-

Loss of earnings and

future earning capacity Kshs.1,920,000/-

Special damages Kshs. 2,400/-

Costs and interest of the suit

Duty of this Court

5. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to***: '…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'*** This was buttressed by the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014] eKLR** where it was held that:

*"**We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil**

Appeal No. 38 of 2002 ***(unreported).”***

The appellant’s submissions

6. The appellant submitted that the trial court awarded the respondent Kshs. 1,920,000/- for loss of earnings and future earning capacity, though the plaintiff did not include such a prayer in their plaint but only appeared in the respondent’s submissions dated 20th July 2016. The appellant stated that in granting this prayer, the magistrate clearly showed that he had already taken a pre-determined position in the matter and was inclined towards favouring the respondent over the appellant regardless of the pleadings and the evidence.

7. It was also submitted by the appellant that the submissions filed by the respondent in the trial court did not have a single authority annexed to them, neither did they cite the cases in their submissions, which the learned magistrate elected to rely on.

8. The appellant further submitted that the damages awarded by the trial court were high compared to the degree of permanent disability that was assessed and awards of previous decisions with far more severe injuries.

9. In conclusion, the appellant prayed that this court set aside the judgment of the trial court and find that the amount paid to the respondent was excessive in the circumstances and further order the respondent to refund the appellant the excess amount.

The respondent’s submissions

10. The respondent submitted that this court lacks jurisdiction to entertain the present appeal on the ground that no Memorandum of Appeal which is a mandatory document was included in the record of appeal filed. The respondent further stated that as per ***Order 42 Rule 13(4) of the Rules***, the record of appeal would not be complete without the decree or order appealed against and added that in as much as the court has discretion to dispense with certain documents that may have been omitted from the record, it could not overlook an order or decree appealed from which is one of the mandatory documents that must form part of the record

11. The respondent further submitted that he produced treatment notes from Central Memorial Hospital and Aga Khan hospital and a medical report by Dr. Ikonya which outlined the injuries that he sustained namely a *Cervic spine fracture c5-c6.* The respondent stated that he could not walk and was still in a wheel chair as his right hand side of the body was totally numb. The respondent added that as the court was able to observe during the hearing, he was totally dependant on others as he could not utilize his right hand side of the body including the hand and legs. The respondent stated that permanent incapacity was assessed at 60%, an assessment that was not contested by the appellant. The respondent further submitted that in view of the injuries and the resultant disability and discomfort, the amount awarded of Kshs. 2,000,000/- was on the lower side as compared to past authorities.

12. The respondent also submitted that the cost of future medical expenses was pleaded in the amended plaint and proved by the medical report of Dr. Ikonya. The respondent stated that since he was 37 years old in the year 2013 and putting life expectancy at 70 years, the sum of Kshs. 883,200/- as awarded was not excessive and that the same was never contested by the appellant in any way at all. That the appellant did not adduce any contrary medical evidence from an independent medical source.

13. On loss of earnings and future earning capacity, the respondent submitted that by his testimony, he had not been able to engage in any employment as he was on a wheel chair and the trial court was right in awarding the sum of Kshs. 1,920,000/- as it did.

14. In conclusion, the respondent submitted that the appeal ought to be dismissed as the record of appeal did not contain the memorandum of appeal, adding that the learned trial magistrate did not misdirect himself and exercised his discretion judicially and in light of that, he invited the court not to interfere with the exercise of the discretion of the learned trial magistrate.

Issues for Determination

15. After going through the record, the written submissions as well as the authorities cited by both parties and from my own considered view of the matter, the main issue for determination is the quantum of damages awarded by the trial court. The respondent has submitted that the record of appeal did not contain the memorandum of appeal and the trial court’s order or decree appealed from and that in the circumstances, the appeal ought to be dismissed. I have gone through the record of appeal and note that the memorandum of appeal is contained at pages 87-89 and; 134-135 of the record of appeal, whereas the judgment of the trial

court is contained at pages 52-62, while the decree of the trial court is contained at page 142. This being the case, I find that there is no reason for the court to delve into this issue of dismissal by the respondent, except to say that the record of Appeal was haphazardly compiled, and without taking great care when looking at the record of appeal, it was difficult to locate these documents. Such work on the part of the counsel is not to be encouraged.

16. In the premises, I find that the following are the issues for determination:

a) Whether the claim for loss of earnings and future earning capacity was pleaded by the respondent and whether the trial court erred in awarding the sum of Kshs. 1,920,000/-.

b) Whether the sum of Kshs. 2,000,000/- awarded by the trial court as general damages to the respondent was inordinately high.

17. The Court of Appeal in ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, cited the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** **at p. 730** where **Kneller J.A**. said:-

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See ILANGO V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles."

The Court further makes reference to the case of ***Gicheru V Morton and Another (2005) 2 KLR 333*** *where* the Court stated:

"In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

See also **Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.**

The Court further references the venerable **Madan, JA** ***(as he then was),*** on the difficulties that confront a judge in assessment of general damages in the context of personal injuries claims as follows in **UGENYA BUS SERVICE V GACHIKI, (1976-1985) EA 575**, at page *579:*

"General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can."

18. Further, the Court of Appeal in the case of ***Gicheru V Morton and Another (above)*** goes on to hold that:

"*In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See JABANE* V OLENJA, (1986) KLR 1.

In MOHAMED JUMA V KENYA GLASS WORKS LTD, CA NO. 1 OF 1986

(unreported) Madan, JA again, aptly observed that "an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award."

….……..……..……..……..…

"It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim. There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons."

19. On the basis of the above authorities, I now move to consider the specific issues.

Whether the claim for loss of earnings and future earning capacity was pleaded by the respondent and whether the trial court erred in awarding the sum of Kshs. 1,920,000/-

20. In ***Cecilia W. Mwangi and Another vs Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR***, the Court of Appeal held that:

"Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability."

21. Similarly, in the case of ***Douglas Kalafa Ombeva v David Ngama [2013] eKLR***, the Court of Appeal held that:

"Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically"

22. The Court of Appeal in ***S J v Francessco Di Nello & another [2015] eKLR*** put the issue in this way:

"Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40 wherein Lord Denning M. R. said as follows:

"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings."

23. From the principles set out in the above authorities, loss of future earnings must be pleaded and proved as they are in the nature of special damages. On the other hand, loss of future earning capacity need not be pleaded as it is in the nature of general damages. Having said that, from the record and more specifically the amended plaint dated 4th December 2013, the respondent did not plead the issue of loss of earnings, but then the trial court went ahead and made an award to the respondent under this head stating that it was a "**claim**". This was an error by the trial court as this was neither alluded to in the pleadings nor stated in evidence. It was also an error for the learned trial magistrate to group the awards of loss of earnings and future earning capacity under one head because as indicated by the authorities cited above, the two are separate and distinct awards. Additionally, the respondent did not prove that as a result of the injuries sustained, he was exposed to either losing his job in the future or that in case he had lost his job, his chances of getting an alternative job in the labour market were slim. Even though, it was not mandatory for the respondent to plead the same, it is my finding that there was no evidence that the respondent was no longer in employment or that the chances of gaining

employment in the future were diminished as a result of the injuries sustained and as such, no award was applicable under the head of loss of future earning capacity. I also find it misleading for the respondent to submit that he operated from a wheelchair when the medical report by Dr. Ikonya (*PExhibit 3A*) clearly stated that the respondent was walking, though with a drag on his right leg. It is also important to note that in his own evidence as PW1, the respondent stated that he was working for the appellant until 2014, close to two years after the said accident, meaning that his employment with the appellant was never affected by the accident. The respondent never stated why he left employment with the appellant and it cannot be assumed that he left the said employment because of the subject accident when there was no proof to that effect.

24. In summary, I find and hold that the learned trial magistrate erred in awarding the sum of Kshs. 1,920,000/- under the head of loss of earnings when the same was neither pleaded by the respondent nor proved at the trial.

Whether the sum of Kshs. 2,000,000/- awarded by the trial court as general damages to the respondent was inordinately high.

25. It was not in dispute that from the subject accident on the material day, the respondent sustained the injury of a *cervical spine fracture c5-c6* and that as a result, he was likely to suffer permanent incapacity of about 60% at least going by the medical report of Dr. Ikonya (*Pexhibit 3A*).

26. Apart from the injuries aforementioned, Dr. Ikonya, in his medical report stated *inter alia* that at the time of examination, the respondent complained that he had right sided weakness, numbness of the hands, stiffness and weakness of the right upper and lower limb, inability to use the right hand and dragging of the right leg. Dr Ikonya observed that the respondent was in fair general condition, was walking with a dragging gait of the right lower limb, had a healed scar on the posterior part of the neck, had rigidity of the right upper limb, had cold extremities of both hands and had a stiff right hip. Dr Ikonya opined that the respondent suffered a lot of pains from the injuries sustained and that the injuries were severe skeletal injuries of the spine which were of grievous harm in nature. Dr. Ikonya added that he was still in the process of recovery.

27. In **Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR** the Court of Appeal observed thus:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

28. In ***Board of Trustees Anglican Church of Kenya Diocese of Marsabit v Chukulisa Roba Halakhe [2019] eKLR*** the respondent suffered a c5 spine fracture and permanent incapacity was estimated at 30%. Her earning capacity had not been affected and she had made improved recovery and was fully working. There were other injuries to the right fore arm, right knee and foot and left shoulder. The court set aside the award of Kshs. 3,000,000/- and replaced it with **Kshs. 2,000,000/-**

29. In ***David Muriungi Daniel & another v Martine Githongo Ndereva alias Martin Githingo Ndereva,*** the Court of Appeal declined to set aside an award of general damages of **Ksh.1,400,000/=** as had been awarded by the trial court where the plaintiff had suffered multiple injuries including Subluxation of the cervical spine at C3 to C5.

30. In ***Joseph Maganga Kasha v Kenya Power and Lighting Company Ltd [2012] eKLR*** where the plaintiff who was 22 years old suffered 100% disability, was paralyzed from the waist downwards, the court awarded **Ksh.3,000,000/=** as general damages in the year 2012.

31. In ***George Otieno V Attorney General & Another [2006] e KLR,*** the plaintiff sustained a gunshot wound through his neck. The bullet went through his ears and affected C4-C5; C3 bone of the spinal code and was found with quadriplegia injuries due to gun shots to his neck and all his limbs were weak. He suffered incapacitating fracture and could only walk on crutches and learn lifting small things like tea cup. He had permanent incapacity at 45 degrees. The court awarded him Kshs. 900,000/- general damages for pain, suffering and loss of amenities on 14th February 2006. It must be remembered that 2006 is truly a long time ago.

32. In the instant case, and considering the injuries suffered by the respondent, his general condition as per Dr. Ikonya's report together with the authorities cited above, it is my considered view that the award of Kshs. 2,000,000/- by the trial court was sound and judicious in the circumstances and was neither inordinately too high nor too low to warrant this court's interference. I accordingly uphold the same under this head.

Conclusion and Disposition

33. In conclusion, I find and hold that the trial court applied the correct principles and took into account relevant factors in awarding the sum of Kshs. 2,000,000/- as general damages. The said sum was reasonable, sound and judicious in the circumstances and was commensurate to the injuries sustained by the respondent and comparable awards made in the past.

34. However, I find that the trial court's award of Kshs. 1,920,000/- under the head of '**loss of earnings and future earning capacity'** was erroneous as the two awards are separate and distinct and that the head of '**loss of earnings'** was never pleaded by the respondent. Furthermore, I have established from the record that there was no evidence that the respondent had lost his employment or that his chances of gaining employment in the future were diminished as a result of the injuries sustained from the accident. Therefore, the award under this head of **'loss of future earning capacity'** was made without any evidence to support it and I accordingly disallow the same.

35. In the foregoing, this appeal partly succeeds and the trial court's decision on quantum and substitute it with the following awards:

General damages	***Kshs. 2,000,000/-***
Special damages	***Kshs. 2,400/-***
Future Medical Expenses	***Kshs. 883,200/-***
Sub Total	***Kshs.2,885,600/-***
Less 20% contribution	***Kshs. 577,120/-***
Total	***Kshs.2,308,480/-***

Costs of the suit and interest on general damages at court rates from the judgment date until payment in full. Interest on special damages shall be from date of filing suit.

36. In addition to the above, I order and direct that any excess amounts paid to the respondent as a result of the lower court judgment should be refunded to the appellant within ninety (90) days of this judgment or such other shorter or longer period as the parties may agree.

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

38. Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kiambu on this **11th** day of **June, 2020**

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CHRISTINE W.MEOLI

JUDGE