



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWILU & GATEMBU, JJ.A)

CIVIL APPEAL NO. 238 OF 2004

BETWEEN

JAMES MUKATUI MAVIA APPELLANT

AND

M. A. BAYUSUF & SONS LIMITED RESPONDENT

(APPEAL FROM THE JUDGMENT OF THE HIGH COURT OF KENYA AT NAIROBI (MARY ANG'AWA, J) DATED THE 30TH JULY, 2003

IN

NAIROBI H.C.C.S. NO. 735 OF 2001)

JUDGMENT OF THE COURT

1. The appellant, James Mukatui Mavia, sustained multiple injuries as a result of a road traffic accident on 24th December 1999 along Naivasha-Mai Mahiu road involving the respondent's motor vehicle and a vehicle driven by the appellant. In 2001, the appellant filed Nairobi H.C.C.C NO. 735 of 2001 in the High Court against the respondent seeking damages for pain, suffering and loss of amenities; loss of earnings of Kshs.8, 179.00 per month; loss of earning capacity and future medical treatment expenses.
2. At the commencement of the trial in the High Court, it was agreed between the parties that the respondent should shoulder 70% liability for the occurrence while the appellant would bear 30% of the liability. The trial court entered judgment in those terms and thereafter proceeded to take evidence for purposes of assessment of damages.
3. In the Judgment the subject of this appeal dated 30th July 2003, the High Court awarded the appellant Kshs. 105,000.00 (Kshs. 150,000.00 less 30% contribution) as general damages for pain suffering and loss of amenities. Rejecting the appellant's claim for loss of earnings, the court held that the appellant "was unable to tender any proof of evidence from his employer that he indeed earned" Kshs. 8,179.00 per month and further that "it seems that he chose not to try out his hand in a new or alternative career from that of a driver" and that the appellant "purposely choose (sic) not to engage in any lawful

employment in order to earn a living. He has not been left incapacitated as not to do any work.”

4. In his memorandum of appeal, the appellant contends that the judgment of the High Court is against the weight of the evidence, legal principle and submissions made before the trial judge; that the learned judge misdirected herself in the approach she took in assessing damages; that the award made for general damages is manifestly low; that the judge erred in holding that the injuries sustained by the appellant are not incapacitating so as to render him unfit to work; that the learned judge erred in rejecting the appellant's claims for loss of earnings and for loss of earning capacity based on the judge's own subjective assertions and speculation; that contrary to the judge's finding evidence in support of the appellant's earnings was in fact tendered at the trial; that the judge erred in taking the view that the claim for future medical treatment expenses was not pleaded and that the judgment amounted to a miscarriage of justice.

Submissions by counsel

5. Before us, learned senior counsel Mr. Nzamba Kitonga for the appellant submitted that the trial judge was casual in her treatment of the injuries sustained by the appellant; that the two medical reports that were produced by consent before the trial judge were in agreement as to nature of injuries; that the learned judge failed to consider the case of **Peter Wilfred Kavilu HCCC 705 of 1996** cited before her in which an award of Kshs 450,000.00 was made for less severe injuries than those sustained by the appellant in this present case and that the award suggested by the appellant in the sum of Kshs.800, 000.00 was justified having regard to the injuries he sustained; that the judge failed to take into account that on the part of the respondent it was proposed that an amount of Kshs.250,000.00 a figure allegedly put out by the respondent without any justifiable basis would be adequate compensation for general damages for pain suffering and loss of amenities yet the learned trial Judge, without any authority, came up with a fanciful lower figure of Kshs.150,000.00 'out of the blue' without any attempt being made by the judge to analyze the authorities cited; that the judge dismissively commented that the injuries sustained by the appellant were not serious and that the award she made is manifestly low and does not accord with the principles used by the courts in assessment of damages.

6. Counsel for the appellant submitted that the amount of Kshs.800, 000.00 sought by the appellant would have been the appropriate award for general damages for pain suffering and loss of amenities and that having regard to the passage of time and inflation, an award in the region of Kshs. 1,200,000.00 for pain suffering and loss of amenities should be made by this Court in favour of the appellant.

7. With regard to the rejection of the appellant's claim for loss of earning capacity, counsel submitted that contrary to the learned judge's statement that the appellant chose not to work, the injuries he sustained, based on the uncontested medical reports, were debilitating; that the appellant gave evidence that he was employed as a driver and stated that his salary had been Kshs. 8,179.00 per month; that appellant's evidence in that regard was not rebutted; that on the strength of the case of **Kimatu Mbuvi vs. Augustine Kioko** oral evidence in a matter of this nature is evidence a court can follow and rely upon and it was therefore a misdirection on the part of the learned judge to dismiss the appellant's evidence on basis that it was not documentary.

8. Counsel for the appellant went on to say that considering the evidence in the Medical reports indicating that the appellant was not able to work, the award of Kshs. 981,480.00 sought by the appellant based on a multiplier of 10 years considering he would have retired at age 55 and was aged 45 at the time of the accident was reasonable.

9. With regard to the appellant's claim for future medical costs, learned counsel submitted that the

learned trial judge was either casual in her approach or simply lazy when she stated that the claim was not pleaded when fact it was pleaded; that there was concurrence by the doctors as indicated in both medical reports that the figure of Kshs.100,000.000proposed for future medical expenses is reasonable and the learned judge should have awarded that figure.

10. In conclusion, counsel submitted that the learned judge misdirected herself and made an award that is manifestly low and that this Court should therefore interfere with it.

11. Opposing the appeal, Mr. Ambrose Weda learned counsel for the respondent submitted that a distinction should be made between loss of earnings and loss of earning capacity; that for an award to be made under the head of loss of capacity to earn the appellant must have been rendered incapable of generating any earnings, that is to say, the appellant must have lost the capacity, as a human being, to earn; that for an award to be made under that head, the appellant must have been rendered incapable of generating any earnings and that the learned judge was right in refusing to treat the appellant as a cabbage, or as somebody who could not work. Counsel submitted that the appellant conceded under cross examination that he had about 10 acres of land on which he reared cows and grew crops and could therefore continue earning in a capacity other than that of a driver for which he was allegedly incapacitated.

12. Counsel for the respondent went on to say that a claim for loss of earning capacity was not pleaded in the appellant's plaint as the prayer in the plaint is for loss of earnings; that the appellant would have said he was out of work for a period of time or was out of work for a period on the basis of which he would have sought an award before the High court which the appellant did not do.

13. Counsel for the respondent further submitted that based on the medical reports, the injuries the appellant sustained were not debilitating and the appellant could go back to driving; that although the appellant was restricted as a result of accident, he should not be treated the same way as a paraplegic; that the appellant did not seek loss of earnings and that what he asked the court to do was to treat him as a vegetable and award damages based on a multiplier of 10 years which the trial judge correctly rejected; that the plea by the appellant that he was earning Kshs. 8,175.00 per month was not supported by any evidence and that he needed to prove the employment and the trial judge was left to speculate or assume which the trial court could not do; that the evidence of the appellant was that he was working with many employers which suggests he was a casual employee and therefore evidence should have been placed before the judge to support the figure of Kshs. 8,175.00.

14. Regarding the award of general damages for pain suffering and loss of amenities counsel for the respondent submitted that the award of Kshs. 150,000.00 made by the trial court was on the lower end within an acceptable bracket and further that considering that the award was made in the year 2003 it was reasonable; that the decision cited before the lower court in which an award of Kshs.450, 000.00 was given is not comparable as it involved more severe injuries and a permanent disability of 20% and the claimant in that case under-went two operations and was left with a scar of one foot and half which is not the case with the appellant in this case; that the appellant did not suffer permanent disability of the same magnitude even though his leg was shortened. In the circumstances counsel submitted that the award given by the trial court is not so manifestly low so as to be an error and the trial judge cannot be faulted for the manner in which she exercised her discretion.

15. Counsel further submitted that to award the amount of Kshs. 1,200,000.00 suggested by the appellant would be tantamount to assessing damages thereby usurping the mandate of the trial court.

16. With regard to the claim for cost of future medical expenses counsel submitted that although the two

doctors provided the figure of Kshs.100, 000.00 in the medical reports, the appellant did not pray for it and the trial judge was within the law in declining to make an award for that amount as it was neither specifically pleaded nor proved.

17. In his brief reply Mr. Kitonga for the appellant submitted that the appellant's claims under all the heads were pleaded; that a claim for future medical expenses is a claim for general damages which need not be in the prayers; that in any event the appellant did in the course of his evidence specifically seek the award.

18. Counsel for the appellant concluded by urging us to review the evidence and draw our own conclusions.

Our determination

19. We have identified three issues for determination in this appeal. The first is whether this Court should interfere with the award of general damages for pain suffering and loss of amenities by the trial judge. The second issue is whether the appellant is entitled to damages for loss of earnings and for loss of earning capacity" Thirdly, whether the appellant is entitled to damages under the heading of future medical costs"

20. First the question is whether this Court should interfere with the award of general damages for pain suffering and loss of amenities. The award of damages is a matter of discretion by the trial court and this Court should be slow to interfere with awards of damages by the lower court 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. (see case of **Butt V Khan [1981] KLR 349.**

21. The principle was reiterated in the case of **Butler V Butler [1984] KLR 225** where this Court held:

"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

22. The trial court awarded to the appellant Kshs. 150,000.00 general damages under the heading of pain and suffering and loss of amenities, (less 30% liability to arrive at Kshs. 105,000.00). Based on the medical reports produced by consent before the trial court, the appellant sustained multiple injuries involving a fracture neck of the right femur; comminuted fracture in the middle-third of the right femur; and lacerated wound over the knuckle of the right thumb. He was admitted to Kenyatta National Hospital on 24/12/1999 and discharged on 7/3/2000 but continued to receive outpatient treatment until the fractures united. His second medical examination revealed that he walked with a slight limp due to shortening of his right leg by ½ cm which the doctor classified as a 'permanent impairment' and a slight restriction of extension of his right thumb. Grip in his right hand was normal, however, and the screws and plate from his right femur could be removed since his fractures had united.

23. The appellant had urged the trial court to award him Kshs.800, 000.00 on the strength of the case of **Peter Wilfred Mutambuki Kavilu vs. Joseph Njihia Wahito and 5 others High Court Civil Suit No. 705 of 1996** where an award for Kshs.450, 000.00 was made by the High Court for damages for pain suffering and loss of amenities. The plaintiff in that case sustained a fracture of the right femur and under

went two operations, the fracture did not heal properly and permanent disability was assessed at 20%. Counsel for the appellant submitted that the injuries sustained by the appellant in the present case were more severe and an award of Kshs. 800,000.00 was therefore merited.

24. Having regard to these injuries and their sequela, considering also that the respondent had proposed an award under this head in the amount of Kshs.250, 000.00 and having regard to the past awards in cases with similar injuries to which the learned trial judge was referred, we think that the award of Kshs. 150,000.00 she made is so low so as to amount to an erroneous estimate. In our view, had the judge taken into account the nature of injuries as disclosed in the uncontested medical reports, past awards for comparable injuries to which the court was referred, we think the court would have at least awarded the sum of Kshs.450, 000.00 for pain suffering and loss of amenities. We accordingly set aside the award for Kshs. 150,000.00 and substitute the same with an award for Kshs.450, 000.00 for pain suffering and loss of amenities. That award is subject to the agreed apportionment on liability.

25. We turn now to the claims for loss of earnings of Kshs.8, 179.00 per month and the claim for loss of earning capacity.

26. In addressing this issue, we are aware that the learned trial judge made findings of fact which we should be slow to interfere, as we did not have an opportunity to hear and observe the witnesses. It is our duty however to review and re-evaluate the evidence and draw our own conclusions.

27. The appellant testified that prior to the accident he used to work as a driver and that he had ceased to do so as a result of the injuries sustained in the accident and was staying at home since his leg hurt when he drove. He further testified that he was 45 years old at the time of the accident and that he was earning Kshs. 8,175.00 per month as a driver.

28. Under cross examination the appellant stated that he obtained his driving licence in 1978 and had been driving from that time; that he was working with many companies and that "*motor transport was the last*"; that he had land at home and that "*I dig about 10 acres with cows*" and gets harvest which is not constant; that his work is that of a driver which he did from his youth and that his leg hurts if he walks for a long time and could not do other work such as a watchman or a pastor.

29. There is no doubt that the appellant was until the date of the accident on 24th December 1999 working as a driver. He was indeed in the course of his work as a driver, driving a lorry, when the accident occurred. The appellant's evidence that he was thrust out of work by reason of the injuries he sustained in the accident and that he was no longer able to drive as he experienced pain when driving was not challenged in cross examination. The cross examination aimed to demonstrate that the appellant could possibly pursue other livelihoods that might not have involved driving. In his plaint, the appellant pleaded "*loss of earnings of Kshs. 8,179.00 per month*" and also stated in his testimony that "*I am paid the sum of Kshs. 8,175.00 per month.*" Though counsel for the respondent in his closing submissions before the trial court submitted that "*the plaintiff has failed to prove he earned a salary*" by production of either a payslip or any other form of documentary evidence that statement was also not challenged in cross-examination. We therefore find that the appellant proved his salary of Kshs. 8,179.00 per month.

30. Based on our review of the evidence, we are satisfied that the appellant was thrown out of his employment as a driver and lost earnings as a result of the accident. By the time the trial was conducted in the lower court and judgment delivered in July 2003 he had been out of work for three and half years, a total of 42 months. He was in our view therefore entitled to an award for lost earnings for that period at the rate of Kshs. 8,175.00 per month being the actual loss sustained over that period. The trial judge in

our view misapprehended the evidence and erred when she declined to make an award in those terms given the evidence. We accordingly award the appellant Kshs. 343,350.00 (Kshs. 8,175 x 42) as lost earnings for the period between the date of accident and the date of trial.

31. Turning to the claim for loss of earning capacity, there appears to have been a mix up in the learned trial judge's mind as to the nature of the claim the appellant was putting forward. Lord Denning in **Fairley v. John Thompson Ltd. [1973] 2 Lloyd's Report 40**, stated that:

"It is important to realize the difference between an award for loss of future earnings 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 of earning capacity is awarded as part of general damages."

32. In **Moeliker v Reyrolle & Co Ltd (1977) 1 WLR 132** Browne LJ at page 140 par B said in reference to loss of earning capacity:

"This head of damages generally only arise where a plaintiff is at the time of trial in employment but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damage from an actual loss of future earnings which can already be proved at the time of trial."

33. In the **Butler V Butler (supra)** Case, the High Court awarded damages for pain and suffering and for loss of earning capacity under separate heads to a lady who had suffered severe injuries as a result of a road traffic accident. Due to her injuries, the plaintiff would never be able to find a suitable job. Though the appellate court faulted the use of the multiplier/multiplicand method of calculating damages for loss of earning capacity, it concurred with the High Court that the plaintiff was entitled to damages under his head. Nyarangi JA stated that:

"Having however been injured to the extent of not being able to find a suitable job, the Respondent had lost her capacity to earn."

34. In **Butler V Butler (supra) KLR 225** the justification given, for awarding the plaintiff damages under the head of loss of earning capacity while employed, is to compensate the plaintiff for the risk that the disability has exposed him to of either losing his job in the future or in case he has lost his job, his diminution of chances of getting an alternative job in the labour market; while the justification for the award where the plaintiff is not employed as at the date of trial is to compensate the plaintiff for the risk that he will not get employment or find suitable employment in the future. (See also **Mumias Sugar Co. Ltd V Francis Wanalo (2007) eKLR Civil Appeal 91 of 2003**.)

35. There was in our view, sufficient evidence before the trial court consisting of the testimony of the appellant and the medical reports to demonstrate that the appellant was injured to the extent of not being able to continue with his job as a driver and also being at risk of not getting suitable employment in the future. The finding by the trial court that *"...the appellant purposely chose not to engage in any lawful employment..."* is not in our view therefore supported by evidence. The learned judge's further observation that the appellant *"has not been left incapacitated as not to do any other work"* would in our view be a factor to be taken into account in adjusting the award payable and not as a basis for the outright rejection of the claim. The appellant's evidence was that he could not assist in tilling the land as he has no "strength to work" and neither could he work as a watchman or the work of a pastor or any other work but that of a driver.

36. The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant's present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. **(see McGrogor on paragraph, 18th edition paragraph 35-065).**

37. Based on the appellant's monthly salary of Kshs. 8,175.00 and assuming the appellant would have worked to the age of 55 years and taking into account that he was aged 45 years at the time of the accident, the appellant sought an award of Kshs. 981,480/=, based on a multiplier of 10 years.

38. We have already awarded the appellant damages for lost earnings up to the date of judgment by which time he would have been aged 49 years. He would then have had about six years to retirement at the age of 55. Having regard to the contingencies of life and accelerated payment, we would apply a multiplier of 3 years and accordingly award the appellant Kshs 294,300.00 under this head.

39. On the question of future medical expenses of Kshs. 100,000/=, we think the trial judge was clearly in error in taking the view that the same were not pleaded. The appellant in his plaint pleaded and claimed damages for future medical expenses. The purpose of such pleading is to prevent taking the defendant by surprise and enabling him to answer to the claims brought by the plaintiff.

40. Both medical reports by Dr. Felix Musili and Dr. Joab Bodo provided for future medical expenses in the amount of Kshs. 100,000.00. The appellant is entitled to this amount and we therefore uphold the appellant's complaint and award him Kshs. 100,000.00 for future medical expenses. This too is subject to the agreed apportionment.

41. In the result, we allow the appellant's appeal, set aside the judgment of the trial court dated 30th July 2003 and substitute the same with judgment in favour of the appellant against the respondent for kshs. 831,355.00 as follows:

General damages for pain suffering and loss of amenities Kshs. 450,000.00

Damages for lost earnings Kshs. 343,350.00

Damages for loss of future earnings Kshs. 294,300.00

Future medical expenses Kshs. 100,000.00

Total Kshs. 1,187,650.00

Less 30% contribution Kshs. 356,295.00

Total award Kshs. 831,355.00

42. Interest on the said amount will accrue at court rates from the date of this judgment until payment in full.

43. The appellant will have the costs in the High Court and the costs of the appeal.

Dated and delivered at Nairobi this 20th day of December, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

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