Case Number:	Civil Appeal 152 of 2001
Date Delivered:	05 Dec 2002
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Abdulrasul Ahmed Lakha, Effie Owuor, Moijo Matayia Ole Keiwua
Citation:	Bildad Mwangi Gichuki v TM-AM Construction Group (Africa) [2002] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	1617 of 1998
Case Outcome:	Appeal Allowed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: LAKHA, OWUOR & KEIWUA, JJ.A)

CIVIL APPEAL NO. 152 OF 2001

BETWEEN

BILDAD MWANGI GICHUKI.....APPELLANT

AND

TM-AM CONSTRUCTION GROUP (AFRICA) .....RESPONDENT

(Appeal from the Judgment and decree of th e High Court of
Kenya at Nairobi (Lady Justice Ang'awa) dated 7th February,
2000
in
H.C.C.C NO. 1617 OF 1998)
****

JUDGMENT OF THE COURT

The appellant, Bildad Mwangi Gichuki, was an employee of the respondent, TM-AM Construction Group (Africa). On 8th August, 1996 when he was engaged in repairing a lorry belonging to the respondent, a chain holding the trailer of the lorry snapped from the crane hook and fell on him. He sustained several severe injuries and lost consciousness for sometime. He was admitted at Tabaka Mission Hospital, somewhere near Homa Bay and thereafter brought to Nairobi West Hospital for further treatment.

On 22nd July, 1998 the appellant filed H.C.C.C No. 1617 of 1998 in the superior court alleging the respondent was negligent. The respondent filed its defence on the 13th day of November, 1998 denying the allegation of any negligence.By this time, the appellant had since been dismissed from employment by the respondent as at the end of December, 1996.

The matter came for hearing in the superior court, (Ang'awa J.) on 2nd February, 2000 when a consent was entered, in as far as liability was concerned, in the following terms:-

"Judgment for the plaintiff against the defendant on liability of 80%".

The learned Judge proceeded to deal with the issue of Quantum of damages and thereby awarded the appellant a total sum of Ksh.599,500/= with interest at court's rate from the date of the judgment until payment in full.General damages awarded were as follows:-

a. Ksh.250,000/= for pain and suffering

b. Past lost earning Ksh.123,000/=

c. Ksh.70,000/= for future medical care and

d. Diminished earning capacity Ksh.156,500/=.

On 16th July, 2001 the appellant lodged this appeal to this Court complaining against basically the awards made in respect of items (a) and (d) as set out above. The complaints were based on the grounds that the two awards were too low, they were founded on wrong principle of law and should therefore be enhanced accordingly.

We noted that there was no cross-appeal in the matter and counsel for the respondent's contention was that the awards given by the learned trial judge were proper and should be left undisturbed, in that the injuries sustained were not so severe as to warrant higher awards, nor were they of such nature as to preclude the appellant from engaging in any other work for the rest of his working life.

The principles upon which this Court will interfere with a trial Judge's assessment of damages are now well settled. Those principles are that the trial judge must have applied a wrong principle, for instance, taking into account an irrelevant factor or failing to take into account a relevant factor or misapplying or not understanding the correct law or not correctly appreciating the evidence adduced, or short of these, the damages awarded by the court are so inordinately high or low that some error of principle must be evident.

This principle has since been followed frequently by this Court. See for example, Kemfro Africa Ltd. t/a Meru Express Service, Gathogo Kanini vs AM Lubia & Oliver Lubia (1982-88) I KAR 727.

Also Kenya Bus Service and Peter Kithaka v. Fredrick Mayade (1988- 1992) 2 KAR 232 where this Court restated the principle in the following terms:

"The principles on which an appellate court will interfere with a trial judge's assessment of damages are now well settled in Kenya. Kneller J.A, as he then was, put it thus in ROBERT MSIOKI KITAVI V. COASTAL BOTTLERS LTD [1982-1988]

1 KAR 891 'The Court of Appeal in Kenya, then, should,

as its fore-runners did, only disturb an award of damages

when the trial judge has taken into account a factor he ought

not to have taken into account or failed to take into account

something he ought to have taken into account or the award

is so high or so low that it amounts to an erroneous estimate.

SINGH V. SINGH AND HANDA (1955) 22 EACA 125, 129; BUTT V.

KHAN (1977) 1 KAR 1.'

As for the general damages awarded by the learned trial Judge for pain and suffering, Mr. Kaburu for the appellant sought to persuade us that the judge applied wrong principle in her assessment of the

same in view of the severity of the injuries suffered by the appellant and her non-consideration of the numerous comparable cases put before her. Mr. Kaburu's contention was that if the cases cited before the judge were properly considered, the award for pain and suffering should have been in the region of Ksh.400,000/= to Ksh.500,000/= and not the Ksh.250,000/= she awarded. We agree with Mr. Kaburu that various authorities were cited to the Judge by each side and we assume the parties were doing so because they thought the injuries involved in those claims were similar to those involved in the one under consideration. In none of these cases was there an award of more than Ksh.500,000/=.In fact, the awards ranged between Ksh.200,000/= and Ksh.500,000/=. For injuries similar to the ones suffered by the appellant, namely a fractured pelvis, three fractured ribs and segmental fracture of the left femur bone. On our own consideration of the general trend as indicated in the authorities put before the learned trial Judge, we are satisfied that the injuries suffered by the appellant were severe enough to warrant a higher award and that the award made by the learned trial Judge was so inordinately low that we must interfere with it. Accordingly, we set aside the award of Ksh.250,000/= and substitute it with one of Ksh.400,000/=.

The other complaint before us is that:

"The learned Judge erred in assessing loss of future

earnings or diminished earning capacity for only two years".

Facts which were not disputed before the learned trial Judge were that at the time of the accident, the appellant was aged 43 years, employed by the respondent as a mechanic and earning a basic salary of Ksh.6,500/= plus overtime which of course varied from month to month. In as far as the injuries the appellant had suffered were concerned, the doctor's opinion was that:

"Mwangi suffered permanent incapacitating injuries for which would I award him 50%".

Based on these facts, the learned trial Judge found:

"On the diminished earning capacity, Bildad is now 43 years of

age. Apart from his limb, he appears fit and able to work elsewhere

in future. I would award him this head of damages for two years at 6,500/= = Ksh.150,000/=".

We are in agreement with Mr. Kaburu that the learned trial Judge had no basis upon which she could come to the conclusion that she did in making this award. The evidence before her was clear in that the appellant was incapacitated to a very large degree. He testified that he had not been able to work, hence his being sacked from his job by the respondent. For the period between December, 1996 to the date of the trial, he had not been able to get any other employment. He still was in pain and dependant on painkillers. Above all, he was only 43 years old.

There was also evidence before the learned trial Judge that the appellant was in salaried employment before the accident. This therefore entitled him to a claim for loss of future earnings. However, having been injured to the extent of not continuing in employment or being able to find a suitable job, the appellant had lost his capacity to earn for the rest of his working life due to the negligence of the defendant. He was therefore entitled to compensation for the "lost years".Those years as agreed by both counsel could not be the two years used as a multiplier by the learned trial Judge, and resulted in the figure of Ksh.156,500/= that she awarded.

In our view, and taking the particular circumstances of this case into consideration, we would apply a multiplier of seven years to bring the age which the appellant would have stopped to work at age 50. Therefore we set aside the award of Ksh,156,500/= given as diminished earning capacity and substitute it with a figure of Ksh.6,500/= X 12 X 7 = 532,000/=.

There having been no disagreement with the rest of the awards on past loss of earning Ksh.123,500/= and future medical care of Ksh.70,000/=, we will leave them undisturbed. Accordingly, the appeal is allowed. The final orders in this appeal shall therefore be as follows:-

a. The award of Ksh.250,000/= given as general damages for pain and suffering and loss of amenities is set aside and substituted therefor with an award of Ksh.400,000/=.

b. The award of a sum of Ksh.123,500/= for past loss of earning will remain undisturbed.

c. The award of future medical care for the sum of Ksh.70,000/= will also remain undisturbed.

d. The award of Ksh,156,500/= for diminished earning capacity is set aside and substituted therefor with an award of Ksh.532,000/=.

e. Taking into consideration the agreed 20% liability of the appellant, the total amount due to the appellant is Ksh.900,400/= with interest thereon at court's rates with effect from the date of the judgment of the superior court.

f. The appellant shall have the costs of the appeal and in the court below paid by the respondent.

Dated and delivered at Nairobi this 5th day of December, 2002.

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M. Ole KEIWUA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR