



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 5 OF 2020

JAMES SAKALPO.....APPELLANT

-V/S-

NOOR MUSIMIL MALAGAMIS.....1ST RESPONDENT

SCHWINTY JOACHIM WILL HARMUT.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Karimi Njeru (RM) in Voi Civil Suit No. 231 of 2018 made on the 12th day of February 2020 appeal to the High Court of Kenya at Voi).

JUDGMENT

Background

1. The Appellant herein, previously the Plaintiff in Voi Civil Suit No. 231 of 2018 vide a plaint dated 22nd May 2018 sued the Defendant for general damages, special damages and loss of future earning capacity, costs, and interests at court rates for the injuries, loss and damage sustained in a road traffic accident.
2. Vide the judgment delivered on 12th February 2020 by Hon. Karimi Njeru (RM), the same was entered wholly against the Defendants in terms of general damages of Kshs. 800,000, special damages of Kshs. 3,000 plus costs and interests of the suit.
3. The Appellant being dissatisfied with the entire judgment appealed against the whole judgment on the following grounds: -
 - 1) The learned Trial Magistrate erred in law and fact by failing to award the Appellant future medication of Kshs. 500,000.
 - 2) The learned Trial Magistrate erred in law and fact by arriving at a wrong decision that the Appellant's doctor failed to disclose which hospital the Appellant could seek future medication.
 - 3) The learned Trial Magistrate erred in law and fact by failing to award the appellant loss of future medication on reasons that the Appellant did not prove his age by not appreciating documentary evidence filed in court including the Appellant's national identity card and medical report duly filed in court.
 - 4) The learned Trial Magistrate erred in law and fact by disregarding the Appellant's evidence and submissions and thereby not finding that the Appellant deserved to be paid loss of future earning and future medication.
 - 5) The learned Trial Magistrate's judgment was therefore unjust against the weight of evidence and was based on wrong principles of law and occasioned a miscarriage of justice.
4. The appeal was canvassed by way of written submissions.

Appellant's Submissions

5. The Appellant in submitting stated that the grounds of appeal set out above can be synthesized into two leads as follows: -
 - a) Whether the trial magistrate erred in failing to award the Appellant Kshs. 500,000 as future medical and/or treatment expenses.

b) Whether the trial magistrate erred by failing to award the Appellant loss of future earnings.

6. In his submission, the Appellant stated that he wishes to abandon the ground of appeal on future medical expenses and/or treatment leaving the second limb which is loss of future earnings. That the Appellant pleaded for loss of future earning capacity and prayed to be awarded the same which evidence was never challenged by the defendant at all but the trial magistrate erred by failing to award the same.

7. The Appellant cited what the trial magistrate stated on page 76 and 77 of the record of appeal as follows: -

“The Plaintiff submitted that he was a herder employed to herd cattle earning a monthly salary of Kshs. 8,000 per month. That as a result of the injuries sustained, he could no longer work as the work entailed walking for long distances and running after animals in his submission, he stated that he was born in 1989 and therefore relied on a multiplies of 20 years. He prayed for damages of Kshs. 720,000 broken down to ¼ since he had no family = 8,000×12×30 years.”

“I have considered the argument by the Plaintiff. The Plaintiff did not produce any evidence the earnings he quoted as Kshs. 8,000 per month, further the Plaintiff did not produce his identity card as evidence to prove his age in his testimony. The calculations by the Plaintiff would therefore be considered inaccurate for reason of speculation.”

“The Plaintiff ought to have prayed for loss of future earning capacity as opposed to loss of future earnings.”

8. The Appellant submitted that the trial magistrate said that the age of the Appellant was not shown by production of his identity card when the identity card which is found on page 11 of the record of appeal and the medical report by Dr. Hanif MZ on page 41 of the record of appeal were placed before her, as well as the Appellant disclosing his age during his oral testimony in court. Further, the Appellant stated that the trial magistrate disputed the Kshs. 8,000 as the Appellant’s monthly earning as there was no evidence to prove the same.

9. The Appellant cited the cases of *Mumias Sugar Company Ltd v Francis Wanalo* [2007] eKLR on principles guiding the courts in awarding under loss of earning capacity, and *Butler v Butler* where the Court of Appeal enumerated the principles to be considered in respect of loss of earning capacity. The Appellant further submitted that it has been held now and again that proof of income of a person must not be by documentary evidence as was held in the case of *John Ayiga Maruja v Simeon Obayo* [2005] eKLR. The Appellant therefore prayed that the appeal be allowed.

Respondent’s Submissions

10. The Respondents submitted by stating that they wish to oppose the Appellant’s appeal. That it is trite that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings must be disregarded. The Respondent relied on the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd* [2015] eKLR.

11. The Respondent further stated that the Appellant pleaded that he deserved to be awarded loss of future earning as is discernible under ground 4 of the Memorandum of Appeal, the same is found in page 2 of the Record of Appeal. However, the Appellant has submitted on and prayed for loss of future earning capacity under paragraph 12, 27, 28, and 29 in the written submissions filed on 21st October 2021.

12. The Respondent submits that compensation for loss of future earning is awarded for the real assessable loss proved by evidence. This is the position of the Court of Appeal in *SJ v Francesco Di Nello & Another* [2015] eKLR. That the Appellant pleaded Kshs. 8,000 as his monthly earnings to form the basis for the award of loss of future earnings as seen under paragraph 6 of the Plaintiff, the same is found in page 5 of the Record of Appeal. The Appellant never produced any evidence to prove the quoted amount of Kshs. 8,000 as was required of him. Therefore, the learned trial magistrate correctly held that the Appellant was not entitled to get compensation for loss of future earnings on account of failure to produce any evidence to prove his monthly earnings.

13. The Respondent cited the case of *William J Butler v Maura Kathleen Butler* [1984] eKLR where the Court of Appeal stated: -

“The factors to be taken into account in considering damages under the head of loss earning capacity will vary with the circumstances of the case and they include such factors as age and qualifications of the claimant and his remaining length of working life, his disabilities and previous service if any.”

14. The Respondent submits that the Appellant did not produce his identity card to prove his age in his testimony. That the Appellant produced documents listed in his list of documents dated 22nd May 2021, the same is found on page 9 of the Record of Appeal. That the Appellant stated that, “I produce my documents as they appear in the list of documents dated 22.5.2018.” This is evident at the last paragraph of page 85 to first paragraph of page 86 of the Record of Appeal. Notably, the identity card was never listed in the said produced documents, thus the same was never produced as evidence. That it is trite that documents only become evidence when they are produced by a witness and marked by the court accordingly. That this position was held in the case of *Delta Haulage Services Ltd v Complast Industries Limited & Another* [2015] eKLR.

15. The Respondent further submits that the Appellant never proved his disability as seen under paragraph 2, page 77 of the Record of Appeal where the trial magistrate held as follows: -

“In any event, there was no evidence to prove that if the treatment had been well done, the plaintiff would have suffered any permanent disability. The medical report is silent on the issue. I hereby decline to award any damages under this head.”

16. The Respondent submitted that the Appellant has not at all demonstrated that the learned trial magistrate was wrong at all in her findings and urged the court to dismiss the Appellant's appeal for lack of merit and award the Respondents costs of the Appeal.

Analysis and Determination

17. This is a first appeal and in the circumstances this Court has a duty to analyze and re-evaluate the evidence adduced in the superior court and to reconsider it to find out if it warranted the decision reached. As was stated in *Selle & Another v. Associated Motor Boat Co. Ltd.* [1968] 123 at p 126:-

“...the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.”

18. After considering the grounds of appeal, records of the trial court and submissions, the issue for determination is whether the Appellant was entitled to the award of loss of earnings capacity.

19. In the Appellant's Plaintiff dated 22nd May 2018, he prayed for general damages, special damages of Kshs. 3000 and loss of earning capacity as well as costs of the suit.

20. In declining to make an award for loss of earning capacity, the trial magistrate relied on the holding in *SJ v Francesco Di Nello & Another* [2015] eKLR where it was held: -

“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.”

21. Although the Appellant gave evidence that would have been fit for a claim of loss of future earnings, his prayer in the Plaintiff is for loss of earning capacity which according to the holding in the authority above is compensated by an award of general damages once proved. The Defendant/Respondents did not controvert the claim of earning capacity and it was erroneous for the trial magistrate to seek proof of the Appellant's earning rather than quantifying general damages for loss of earning capacity. It appears that the trial magistrate did not distinguish between the two heads of claims and the principles upon which such awards are made.

22. I have also perused submissions in the lower court and found out that the Appellant had submitted on loss of future earning rather than loss of earning capacity as per the Plaintiff and that may have contributed to the mix-up shown in the judgment.

23. In consideration that the accident occurred on 8th June 2016 and as at 30th October 2019 when the Appellant was testifying the trial magistrate observed the swelling on the right foot where the Plaintiff explained that the leg had shortened for lack of proper medication and was yet to heal. It would have been proper for the trial magistrate to assess damages for loss of earning capacity.

24. Award of general damages being a discretion of the court and to avoid taking the parties herein back to the trial court, this court is of the opinion that Kshs. 200,000 would be sufficient to compensate for that loss.

25. The appeal herein succeeds to the extent for the award of general damages for the pain, suffering and loss of amenities of Kshs. 800,000/- the Appellant is also awarded general damages for loss of earning capacity in the sum of Kshs. 200,000.

26. Each party will bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 17TH DAY OF FEBRUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

OGWEL- COURT ASSISTANT

MR. OTWERE FOR THE APPELLANT – NO APPEARANCE

MR. OMWENGA FOR THE RESPONDENTS – NO APPEARANCE

COURT: REGISTRY TO CONVEY NOTICE OF JUDGMENT TO ADVOCATES FOR PARTIES HEREIN

HON. LADY JUSTICE A. ONG'INJO

JUDGE