



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL CASE NO. 121 OF 2015

NANDI TEA ESTATES.....APPELLANT

VERSUS

NOAH IBERIA LIJODI.....RESPONDENT

(An appeal from decree and judgment by G.Adhiambo (SRM) in Kapsabet PMCC No. 106 of 2013 delivered on 9th October 2015)

1. **NOAH IBERIA LIJODI (the respondent)** had filed a claim for general and special damages, against **NANDI TEA ESTATE LTD** (Appellant) arising from injuries sustained in the course of his employment while performing duties for the appellant as a casual labourer.

2. On 20th June 2009; while engaged in his duties, he suffered injuries which he attributed to the appellant's negligence in failing to provide a safe working environment, and not providing him with protective gear.

3. Apparently the Respondent was traveling in a trailer which overturned, and as a result he suffered blunt trauma to the left shoulder, chest (especially around the rib cage) dislocation of the left sterno clavicular joints. Following the accident, he was retired on medical grounds.

4. The parties recorded a consent on liability at the ratio of 20% against the Respondent and 80% against the appellant.

5. The trial magistrate subsequently awarded general damages of Ksh.170,000/- Ksh.2,407,249/20 cts for loss of earning, Ksh.1500/- as special damages. This was then subjected to the agreed percentage ratio on liability to give a net figure of Ksh.2,062,999/36cts.

6. The appellant is aggrieved by this award and challenged the same on grounds that the trial magistrate failed to consider the updated report of 17th June 2014 which indicated he had recovered from his injuries, and even the movement of the joint was within normal limits. That in any event the medical report clearly indicated the respondent had suffered soft tissue injuries for which the general damages awarded were inordinately high. These being soft tissue injuries, the loss of earning capacity did not arise at all as he did not suffer any permanent disability.

7. It was also pointed out that the Respondent's inability to continue on employment was due to arthritis and had no nexus to the injuries he suffered as a result of the accident on 20th June 2009. There was no evidence to suggest that the Respondent did not have arthritis as a pre-existing condition, so appellant should only have been compensated for the injuries suffered as a result of the accident.

8. That in any event, even if he was entitled to damages for loss of earning capacity the number of years adopted by the trial magistrate was erroneous as there was no evidence that the Respondent could have lived upto 60 years considering the nature of work he was doing which carried a high risk of contracting pneumonia. The court is urged to use 11 years in working out the loss of earning capacity to give a working of

$6471 \times 10 \times 12 \times 11 = 854,185/2\text{cts}$

Less 20% contribution

9. This court is urged to be guided by the decision in **JAMES THIONGO GITHIRI V NDUATI NJUGUNA NGUGI (2012)** Eklr which held that the loss of earning capacity was limited to the percentage of disability suffered by the plaintiff. The trial magistrate is faulted for using wrong principles, and taking into account irrelevant factors in assessing the evidence and making a finding on damages.

10. In opposing the appeal, the respondent's counsel submits that the general damages awarded for the injuries was appropriate. All the injuries suffered were soft tissue injuries with a dislocation of the left sterno – clavicular joint – this was the content of the report by **Dr. Aluda** dated 28.05.2013. The prognosis indicated that the injuries were continuing to heal but for the pains in the left shoulder and chest which would subside with the use of analgesic.

11. The medical report did not refer to any permanent disability or even a temporary disability. The decisions cited by the Respondent's counsel involved far more extensive and severe injuries which included a fracture (*see for instance the cited case of Jane W. Obwogi V Lawrence John Aburi*) and I think the sum of Ksh.170,000/- award as general damages was appropriate.

I decline to interfere.

12. The major issue is whether the Respondent should have been awarded general damages for loss of further earning capacity. The report/assessment by the Medical Board clearly linked his osteoarthritis condition to the shoulder injuries he suffered in year 2009 and which reduced his work output. It was thus recommended that he ought to be retired on medical grounds.

Consequently although he had not suffered any permanent disability, the residual effect of the dislocation to the clavicular joint affected him as to reduce optimum performance. At the time, going by the information in the Workman's Compensation form the respondent was 29 years old and was then earning a salary of 6,471/-.

The Medical Board observed that the nature of the respondent's illness. (suffered from dislocation of the left shoulder sustained in June 2009, he had developed chronic chest pain and left shoulder pain and these significantly interfered with his daily activities as a tea plucker. He was thus recommended for early retirement.

If the appellant was not satisfied with the outcome of the Medical Board's report, the remedy lay, not in making submissions from the bar about a professional report, but getting the subject to be subjected to another medical examination. This was done vide the medical report, medical report by **Dr. Z. Gaya** dated 17th June 2014 echoed the findings of **DR. ALUDA** with regard to the nature of injuries suffered and the prognosis was that;

“He appears to have normal full range of movement's on the injured left shouter and chest.

He may however develop early post traumatic osteoarthritis of the left shoulder as he already has crepitus on movement.

He retired on medical grounds but he still appears able bodied and could still be productive. In terms of Accident Compensation, Since, there is no permanent disability at the moment.”

13. What I understand from this report visa vis the findings of the Medical Board is that the injuries had resulted in the Respondent's output – not that he was unemployable – but in terms of worker as a tea plucker, his ability was greatly reduced.

14. Indeed the Board had recommended that he would require further evaluation by a medical board – that was on 18.10.2011.

15. Certainly **Dr. Gaya** is not a medical board bound, but his findings were very significant more so because they confirmed what **Dr. Aluda** stated i.e “**No permanent inability.**”

It was not clear what criteria was used to find that the respondent was totally unable to perform his work. Whatever the case, the issue of permanent disability was not established by any evidence presented before the court.

16. To that extent it was erroneous for the trial magistrate to use the formulae she applied in awarding lost years. I think the respondent's earning capacity was just reduced due to the injury and an award in the millions was inordinately excessive and unreasonable. In my view a global figure of ks.300,000/- (Three hundred thousands only) would suffice from the reduced optimal performance, this set aside the sum awarded for loss of earning capacity and substitute it with a sum of Ksh.300,000/-

Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15th DAY OF MARCH 2019

H. A. OMONDI

JUDGE