



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 288 OF 2010

KAVILI MBITI.....APPELLANT

VERSUS

ACADEMIC SERVICES LTD.....RESPONDENT

(Appeal from the Judgment of the Chief Magistrate Court of Kenya at Nairobi

(The Honourable S.N. Riechi (CM) dated 2nd July, 2010) in Nairobi,

Milimani Commercial Court Civil Suit No. 5964 of 2005)

JUDGMENT

The appellant was injured in a road traffic accident which involved a motor vehicle owned by the respondent. After a full hearing, the appellant was awarded Kshs. 800,000/= for pain, suffering and loss of amenities. He was dissatisfied with the said judgment relating to future medical expenses and loss of earning capacity which were not awarded by the trial court. There is a prayer therefore in the appeal, that the trial court be ordered to reconsider and award damages under the heads of future medical expenses, loss of earning capacity and special damages.

It is my duty to evaluate the evidence adduced by the parties in the trial court and make independent conclusions.

In the lower court judgment, the trial court stated as follows,

“Taking this into account, I award the plaintiff Kshs. 800,000/= for pain, suffering and loss of amenities. I do not find that a basis has been laid for nor evidence adduced to support the claim of future medical treatment or loss of earning capacity in which heads I decline to award any damages.”

Both parties have filed submissions to address the appeal herein.

In the amended plaint filed on 23rd July, 2008 the plaintiff at paragraph 3A and 3B pleaded that he was dismissed from employment by the defendant on medical grounds. Further, he was deprived of the capacity to earn for the remainder of his working life until retirement at the age of 55 years. He therefore claimed loss of years to be quantified at the trial. Additionally, he claimed special damages particulars of which were set out at paragraph 5 of the amended plaint.

Special damages must be specifically pleaded and strictly proved. Other than the payment for the police abstract and the examination and medical reports, the plaintiff fell short of strictly proving the travel charges to the hospital. He produced a number of receipts which however did not connect to the hospital visits and in any case, some of them were dated so closely to the other to raise some concern. What I can discern from the evidence is that he produced receipts for payment to the doctors, Peter Mungai Ngugi and Kiama Wangai amounting to Kshs. 8,000/=. He also paid Kshs. 200 for the police abstract making a total of Kshs. 8,200/=. This should have been awarded by the trial court.

The doctors ought to have recommended and assessed the costs for future medical treatment. The two reports produced are silent in that regard and since such a claim falls under special damages, the court was right to find that no award could be made under that head. On the loss of earning capacity, I have already cited paragraphs 3A and 3B of the amended plaint. This claim falls under general damages subject to proof which is on a balance of probability.

The plaintiff gave evidence that at the time of the accident, he was being paid Kshs. 5,798/= per month. He produced the payslip for May, 2005 as exhibit 5. He went on to say that he received a letter retiring him on medical grounds which he produced as exhibit 8. Since his retirement he has not been able to get any gainful employment as a matatu tout or casual worker. There is no evidence if he has tried any such engagements.

It is clear that he lost the capacity to earn but the degree of incapacity has not been assessed by the doctors who examined him. The court is therefore left in the dark in the assessment of the degree of loss of future earning capacity.

That notwithstanding, having given evidence in relation to his age which was 32 years and his salary then, the trial court had sufficient evidence to assess and award damages under the head of loss of earning capacity. The failure to do so was therefore an omission on the part of the trial court. The plaintiff still suffered some pain at the time of giving evidence before the lower court.

The degree of incapacity having not been assessed by the doctors, the award under the loss of earning capacity may only be addressed by looking at the evidence he gave to the court. Chances are that he would have worked for another 20 years or so doing the same job, but any job has its own degree of risks just like what he went through in this accident. In that regard, I take the figure of 10 years as a multiplier in the calculation for loss of earning capacity in which case damages awardable amount to Kshs. 5,798 x 12 x 10 = 695,760/= which I hereby award.

In the end therefore this appeal succeeds by awarding Kshs. 8200/= special damages plus Kshs. 695,760/= damages for loss of earning capacity. The appellants shall have interest thereon from the date of this judgment. Each party shall bear their own costs of this appeal.

Dated, signed and delivered at Nairobi this 14th Day of March, 2019.

A.MBOGHOLI MSAGHA

JUDGE