

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 293 OF 2008

JOHN NTHALAU NZOMO.....APELLANT

VERSUS

ALL PACK INDUSTRIES LIMITED.....RESPONDENT

(Being an Appeal from the Decision and Order Of Hon. Miss E Maina (SRM) Given on 28th May, 2008 in CMCC No. 7701 of 2005)

J U D G M E N T

The appellant filed a suit against the respondent following injuries sustained while in the employment of the respondent.

Liability was agreed by consent at 80% against the respondent and 20% on the part of the appellant.

In a brief judgment delivered on 4th October, 2007 the appellant was awarded a net sum of Ksh.201,200/- after taking into consideration the percentages of liability agreed. Thereafter the appellant filed an application asking for a review of the judgment so that the court provides damages for reduced earning capacity. That application was heard and dismissed leading to the present appeal.

In the Memorandum of Appeal dated 3rd May, 2008 the lower court was faulted for failing to appreciate the law relating to review of judgments and orders, thereby applying wrong legal principles and for failing to take into account the medical reports produced by consent. The lower court was also faulted in the appreciation of the nature of the claim for diminished earning capacity.

Both parties have filed submissions relating to the appeal herein.

The plaint filed by the appellant provided at paragraph 6 that the amputation of his fingers would occasion reduced capacity to earn. He therefore claimed damages to be assessed by the court. This was also contained in prayer (a) (ii) of the plaint.

In her ruling the learned trial magistrate said as follows:

“There was no evidence upon which the court could have made an assessment for damages for reduced capacity to earn. To do so the plaintiff should have testified in this case, the advocate preferred to put in written submission and only put in medical reports. There was no evidence tendered the plaintiff has suffered loss of earning capacity. Only medical opinion of his injuries was tendered.”

Whereas, it is true that the medical reports were tendered in evidence by consent without calling the makers, it was incumbent for the appellant to produce evidence to assist the court in making a determination on loss of earning capacity. Nowhere is there evidence of how much his salary was during his engagement with the respondent. Loss of earning capacity is in the form of general damages which however, has to be determined by some form of evidence; in this case the salary or wages earned by the appellant at the time of the accident.

The appellant's earnings per month was also not pleaded otherwise that would have given the court some guidance to assess the said damages. The blanket figure of Ksh.500,000/- suggested by the advocate for the appellant had no support whatsoever from the evidence and pleadings. There was no error on the face of the record that would have justified a review of the judgment by the trial court. The court was therefore correct in declining the review sought by the appellant in the circumstances of this case.

This appeal is therefore dismissed, but each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 28th May, 2019.

A. MBOGHOLI MSAGHA

JUDGE