



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 94 OF 2016

JOSEPH MOREKA NYAMACHE.....APPELLANT

- V E R S U S -

TELCOM KENYA LIMITED.....RESPONDENT

(Being an appeal from the judgement and decree of

Hon. L. M. Wachira (Mrs) SPM delivered on

8th February 2016 in Nairobi

CMCC No. 3602 of 2014)

JUDGEMENT

1) Joseph Mareka Nyamache the appellant herein filed a compensatory suit against Telkom Kenya Ltd, the respondent herein arising out of an industrial accident. By way of plaint dated 29/01/2014 it is alleged that on 26/05/2009 while at the respondent company in the course of employment the appellant was involved in an accident. Before the matter proceeded to full trial, the parties recorded a consent order on 2nd July 2015 in the following terms:

a. Judgement on liability be entered in the ratio of 85:15 in favour of the appellant.

b. The respondent to pay the appellant

i. Ksh.1,600,000/= as general damages

ii. Ksh.150,000/= as costs for future medical expenses and Ksh.8,525/= as special damages

c. The appellant's claim for loss of earning capacity be determined by the court.

2) The issue of the appellant's loss of earning capacity proceeded to full hearing, where Hon. Mrs. L. W. Wachira, the learned Senior Principal Magistrate, disallowed the claim. Aggrieved, the appellant preferred this appeal and put forward the following grounds of appeal in its memorandum.

1. The learned magistrate misdirected herself on the law on loss of earning capacity.

2. The learned magistrate erred in law in disregarding expert evidence produced in court by Dr. Wokabi.

3. The learned magistrate erred in law by ignoring binding precedent on the law on loss of earning capacity.

4. The learned magistrate erred in law in failing to consider and take into account the authorities placed before her touching on pertinent and substantial points of law and fact so as to arrive at a just and fair decision.

3) When the appeal came up for hearing, learned counsels appearing in this matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the appellant's written submissions.

4) Though the appellant put forward a total of 4 grounds of appeal, one main issue commends itself for determination that is to say whether or not the trial magistrate erred in failing to make an award on loss of future earnings.

5) The appellant submits that the trial court misconstrued, misapprehended and misapplied the law on loss of earning capacity and therefore disregarded the binding precedents setting out the principles governing claims for loss of earning capacity.

6) The appellant cited the case of **Butler –v- Butler (1984) KLR 225** which held inter alia that:

“..... a person's loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well as paid before the accident are lessened by his injury.”

7) Accordingly, the appellant submits that even though an injured person may continue his or her employment, as the appellant did after recovery, the injured person is still entitled to be compensated for the loss of earning capacity if it is attributed to the injuries suffered as a result of the accident.

8) The appellant avers that he became less marketable as an employee after the injury and could not take advantage of all the job opportunities which may have been open to him had he not have been injured. Lastly that if the appellant was not injured, he could have earned more income in a competitive labour market.

9) The quantum payable as proposed by the appellant is as follows:

The appellant was a qualified technician earning a net salary of ksh.39,424.20 and was forced to leave employment due to the injuries at the age of 49 years and would have worked upto the retirement age of 60 years therefore giving a multiplier of 11 years and calculated as follows:

$$39,424 \times 20 \times 12 \times 11 = \text{ksh.}5,203,994.40$$

10) PW1 the appellant herein testified on how the injuries he sustained had curtailed his capacity to work. Dr. Wokabi (PW2) corroborated the nature of injuries suffered by the appellant. There is no dispute that the appellant sustained deep electric burns covering 40% of his body; hypertrophic scars from burns; general body weakness and pain on his left foot. The appellant's disability was assessed at 20%. DW1 told court that the appellant recovered and even resumed duty but quit employment in 2011 when the respondent company was being restructured. DW1 stated that he would report to work and just sit and not to go to the field. After leaving the respondent company, PW1 stated that he went into banana farming as a source of earning a living, an activity he had started back in time.

11) After re-evaluating the evidence tendered before the trial court I find that the appellant did not prove on a balance of probabilities that he lost future earnings. It is evident that despite the injuries he suffered

he could still engage in some activities to earn him a livelihood. The appellant was awarded ksh.1,600,000/= in general damages and nothing under the head of lost earnings by the trial court.

12) In the case of **Butler vs- Butler (1984)**supra, the issue of awarding damages for loss of earning capacity was substantively considered and it was held inter alia that;

“whilst loss of earning capacity should be included as an item of general damages it is not improper to award it under its own heading. a victim of personal injury who lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as loss of earning capacity.....”

13) I am convinced that the trial magistrate disallowed the appellant’s claim for loss of earning capacity.

14) In the end and on the basis of the above reasons, this appeal is found to be without merit. It is hereby dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 29th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent