



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 59 OF 2016

DICKSON SIMON NYAMBORI.....APPELLANT

-VERSUS-

JUSTUS OMONDI OBURA.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. C. M. Kamau, Resident Magistrate in Rongo Senior Resident Magistrate's Civil Case No. 254 of 2016 delivered on 02/08/2016)

JUDGMENT

1. There is only one issue for determination in this appeal. It is whether the trial court wrongly assessed the general damages for loss of future earnings.
2. The Appellant's contention is that the trial court erred in adopting the Respondent's monthly income of Kshs. 24,000/= without any proof of such earnings. According to the record, the Respondent testified that he was a carpenter earning Kshs. 1,200/= per day. That would translate to Kshs. 36,000/= monthly. No proof of such earnings was however adduced at the hearing. The trial court settled for two-thirds of the monthly income and computed the general damages for loss of future earnings at Kshs. 2,304, 000/= having assessed the multiplicand at 8 years.
3. The Appellant contended that since the Respondent did not prove his income at Kshs. 1,200/= daily then the court ought to have been guided by the **Regulation of Wages (Amendment)(General) Order, 2012** which instead placed the basic minimum wage for carpenters at Kshs. 10,687/90 monthly. The award on loss of future earnings would then be Kshs. 1,026,038/40.
4. The Respondent did not file his written submissions as ordered on 26/07/2017 when he was duly represented by Mr. Odongo Counsel.
5. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).
6. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.
7. I have previously dealt with this issue and held that whenever a court is charged with the duty of assessing general damages for loss of future earnings and the claimant fails to prove the income relied on, the court should be guided by the requisite wages approved by the Ministry of Labour and duly gazetted. I still hold that position. In this case there was no proof of income. The trial court therefore, and with utmost respect, fell into error in accepting the figure of Kshs. 1,200/= as the Respondent's daily wages without proof.
8. The court was to be rightly guided by the **Regulation of Wages (Amendment)(General) Order, 2012**. The award of Kshs. 2,304, 000/= was hence arrived at without any basis in law and it must be set-aside, which I hereby do. The right income to have been adopted by the court, in the circumstances of this case, was the basic minimum for such an artisan under the said **Regulation of Wages (Amendment) (General) Order, 2012** which placed the monthly income at Kshs. 10,687/90. Going by the multiplicand of 8 years, the loss of future earnings would be Kshs. 1,026,038/40, which figure I hereby award instead.
9. The upshot is that the appeal is successful and since there is no dispute on any of the other awards made by the trial court and upon taking the liability into account, the net award to the Respondent would be Kshs. 2,906,030/72.
10. The Respondent shall bear the costs of the appeal whereas the Appellant shall bear the costs of the suit before the trial court as ordered therein.

11. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of March 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Mbeka Counsel instructed by the firm of Messrs. L. G. Menezes & Company Advocates for the Appellant.

.....Counsel instructed by the firm of Messrs. Khan & Associates Advocates for the Respondent.

Miss Nyauke – Court Assistant.