



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL 20 OF 2017

FANUEL KARANJA WANASWA APPELLANT

VERSUS

BUTALI SUGAR MILLS LIMITED RESPONDENT

(From the Judgment of T.K. Kwambai , RM, in Butali SRM's Court Civil Case No. 36 of 2016 delivered on 2/2/2017)

J U D G M E N T

1. The appellant had sued the respondent in the lower court seeking damages after the appellant was injured while working for the respondent as a casual labourer. Parties recorded consent on liability in the ratio of 90:10 in favour of the appellant. The trial court assessed the claim for damages and awarded Kshs. 1,500,000/- in general damages, Kshs.450,000/= for loss of income and Kshs. 40,504/= in special damages . The appellant was aggrieved by the award and filed this appeal on the grounds that:

- (i) The learned trial magistrate erred in law and in fact by using 5 years as a multiplier which was inordinately low.
- (ii) The learned trial magistrate erred in law and in fact by not awarding any amount for domestic worker thus occasioning miscarriage of justice.

The appellant thereby prayed that the court re -evaluates the evidence afresh and make a fresh finding as to the multiplier and as to costs of a domestic worker.

The appeal was opposed by the respondent through the submissions of their advocates, **L.G. Menezes & Co. Advocates**.

The case for the appellant:-

3. The appellant was examined by two doctors . Dr. Andai and Dr. Oketch . According to the report by Dr. Andai , the appellant had sustained the following injuries:

- Fracture of the pelvis
- Raptured urinary bladder
- Mangled lower part of the right leg.

The report indicates that the appellant had been admitted for one month at Kakamega County Hospital where the raptured bladder was repaired through an operation (laparotomy) and the right leg amputated at the distal 1/3 level. The doctor assessed permanent physical disablement at 40%.

4. The report by Dr. Oketch noted the following injuries:-

- Blunt injury to the abdomen with resultant injury to the urinary bladder
- Cut wound on the left groin
- Injury to the hip girdle bone.
- Crush injury to the right foot

The report indicates that the ruptured bladder was repaired while the crushed right foot was amputated just above the ankle joint. The doctor observed that the injuries had healed at the time of examination but had left the appellant crippled due to the permanent loss of the right foot as a result of which he now uses two armpit crutches for support and movement. The doctor estimated the resultant permanent incapacity at 40%.

5. The claim by the appellant was for:-

- (a) general damages for pain, suffering and loss of amenities, loss of income and future nursing/domestic work expense.
- (b) special damages
- (c) costs of the suit.

6. The appeal herein is therefore on the amount awarded by the trial magistrate on the loss of income and the failure by the magistrate to make any award on the claim for future nursing/domestic worker expenses.

The claim for Loss of income:

The appellant called one witness, PW2 in support of his case. Both the appellant and his witness adduced evidence that they were working as tractor loaders. That they used to earn Kshs. 300/= per trip of loading sugarcane onto the respondent company tractors. That they could make 4 trips in a day thereby earning Kshs. 1200/= per day.

7. The trial magistrate however did not believe this evidence on the ground that there were no documents to prove that the two were earning Kshs. 1200/= per day. The magistrate there upon employed the minimum government wage guidelines (The Regulation of wages (General) (Amendment) order 2015, to estimate the amount the appellant could have been earning in a month. The magistrate used a guide of Kshs. 7500/= per month though the regulations for 2015 provided for Kshs. 6,752.50 per month for the category of the appellant. The appellant was aged 46 years at the time of the accident. The magistrate opined that the appellant could have worked as a casual labourer for 5 years. He thereby used a multiplicand of Kshs.7500/= and a multiplier of 5 years. The loss of income worked out as follows:-

$$7500 \times 12 \times 5 = 450,000/=.$$

Claim for Nursing /Domestic Worker Expenses.

8. The magistrate reviewed the evidence and concluded that the appellant had not led evidence to prove the claim and as a result dismissed it.

Submissions:-

9. The advocates for the appellant submitted that the award in general damages was inordinately low considering that the appellant had suffered 40% permanent disability. That the multiplier used by the magistrate of 5 years was erroneous considering that the appellant was a casual labourer who could have worked to even beyond the age of 60 years. That the authorities relied on by the advocates for the respondent were fairly old and taking into consideration lapse of time and inflation the award should be enhanced. That the magistrate made an error in failing to make an award for a domestic worker and failed to consider that the appellant will no longer support himself for the rest of his life and thereby requires a helper. The advocates asked the court to make an award for this part of the claim.

10. The advocates for the respondent submitted on two issues first, on the amount of quantum of general damages awarded to the appellant and secondly on the failure to make an award on the services of a domestic worker. On the first issue the court notes that there was no appeal against the award of general damages of Kshs.1,500,000 neither was there a counter-appeal on the same. The appeal was on the multiplier adopted to arrive at the award for loss of income. The advocates did not make any submissions on that issue.

11. On the second issue the advocates submitted that the appellant did not adduce evidence in support of the claim as required by section 107 of the Evidence Act Cap 80 Laws of Kenya. That the appellant did not show that he had any nurse or domestic worker that cared for him and whose payment ought to have been accommodated in the judgment. Therefore that the second ground of appeal was not proved.

ANALYSIS AND DETERMINATION

Duty of Appellant Court

12. This is a first appeal. It is the duty of a first appellate court to reconsider and to re-evaluate the evidence and draw its own conclusions bearing in mind that it did not see or hear the witnesses testify -See *Selle Vs Associated Motor Boat Company (1968)E.A, 126*. On damages, the court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low- see *Butt Vs Khan(1981) KLR 349* and *Kemfro Africa Limited t/a Meru Express Services Vs Lubia & Another (1982-88)1KAR 777*. I will then proceed to consider the two grounds of appeal.

13. The claim for loss of income.

The appellant's claim as contained in the plaint was for loss of income. The trial magistrate in his judgment indicated the claim as loss of income/ earning capacity. The claim for loss of income can be construed to mean loss of future earnings. However there is a difference

between a claim for loss of income/ future earnings and loss of earning capacity. The difference was well stated in the case of **Butler Vs Butler (1984) KLR 226** where the Court of Appeal held 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 paid as before the accident, are lessened by his injury.

Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages.

Damages under the heads of loss of earning capacity and loss of future earnings, which in England were formerly included as an unspecified part of the award of damages for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them.

Loss of earning capacity can be a claim on its own, as where the claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and /or at the date of the trial.

Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included, it is not improper to award it under its own heading.

14. The claim for the appellant was for loss of future earnings which should not have been confused with a claim for loss of earning capacity. In **Henry Moriasi Osiero Vs Quid J. Mohammed & Merali Mfadhul(2001)eKLR**, it was held that loss of earnings is a special damage claim that must not only be pleaded but must be strictly proved. The question then is whether the appellant had proved the claim for loss of income/future earnings.

15. The appellant and his witness testified that they could earn upto Kshs. 12000/= per day in loading sugarcane into tractors. The appellant's witness PW2 stated that they were usually being paid by farmers to load the sugarcane into the respondent's tractors. The trial court found no evidence to prove that the loaders were earning Kshs. 12000/= per day. Indeed there was no record produced to show that the appellant could have been earning upto Kshs. 12000/= per day. It is to be noted that the appellant was a loader and a casual labourer. He would only therefore work when work was available. There was no evidence that he was working on a daily basis. There was no evidence that he would work throughout the month and throughout the year. There was thereby no evidence that the appellant was earning Kshs. 1200/- per day.

16. In **John Kibicho Thirima Vs Emmanuel Parsmei Mkoitiko (2017) eKLR**, where the plaintiff was claiming loss of future earnings among others prayers, **Aburili J** held that:

' Loss of future earnings cannot be an estimate. It must be an actual quantifiable and provable figure and not gotten out of speculation or even left to the court to speculate .'

The learned judge in that case found that there was no evidence produced to prove the claim for loss of future earnings and dismissed it.

17. The trial court in this case found no evidence as to how much the appellant was earning . For the trial court to have turned to applying the government minimum wage to calculate the appellant's earnings, the court was resulting to speculation to estimate the appellant's salary. This was a misdirection on the part of the magistrate. The magistrate proceeded on wrong principles to make the award .The appellant was strictly required to prove the claim for loss of future earnings which he did not do. The trial magistrate confused a claim for loss of future earnings with a claim for loss of earning capacity as a result of which he fell into error. This court should therefore interfere with the award of 450,000/=. It is my humble view that the award of Kshs.450,000/= for loss of income was made in error. The award is thereby set aside.

There was no claim for loss of earning capacity pleaded. The court cannot make an award for a claim not pleaded.

(2) The Claim for Nursing/ Domestic worker Expenses:

18. Whoever desires for judgment to be entered in his favour has to adduce evidence in support of the claim – section 107 of the Evidence Act Laws of Kenya. The appellant never adduced evidence that he requires services of a domestic worker as a result of the injuries that he sustained. The reports for the two doctors who examined him did not make such a recommendation. This aspect of the claim was therefore not proved. The learned trial magistrate was right to dismiss it.

19. In the foregoing, the award for Kshs. 450,000/= for loss of income is set aside. The appeal on the claim for future nursing/domestic worker expenses is dismissed.

For avoidance of doubt the award on general damages of Kshs. 1,500,000/= remains as awarded by the lower court as there was no appeal or counter -appeal on the same.

Orders accordingly.

The appellant to bear the costs of this appeal.

Delivered, Dated and signed at Kakamega this 20th day of June,2018

J. NJAGI

JUDGE

In the presence of

Twaye holding brief for Mukisu... ..for Appellant

Matete holding brief Menezes.....for Respondent

Court Assistant.....George/Ruto.

Parties:

Appellant.....Absent.

Respondent.....Absent.