



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO.58 OF 2010
(An appeal from the Judgment of Hon. Wilbroda Juma,
Chief Magistrate, Nakuru on 3rd March, 2010)
FARMERS WORLD LIMITED.....APPELLANT
VERSUS
STONIC NYAMWAYA OKEMWA.....RESPONDENT

JUDGMENT

FARMERS WORLD (the appellant) have filed this appeal against STONIC NYAMWAYA OKEMWA (the Respondent) on grounds that the trial magistrate misdirected herself as to the extent of the Respondent's injuries and erred in her assessment of damages awarded to the Respondent. The damages awarded are contested as being far more excessive in the circumstances and manifestly incomparable to the current judicial awards for analogues injuries.

Secondly, that the trial magistrate erred in awarding a global sum in lieu of making separate awards on each distinct head as submitted by the Defendant.

The Respondent was an employee of the defendant, and was injured in the course of his work. Liability does not seem to be contested in this matter as parties had entered a consent where Respondent bore 30% and Appellant bore 70% liability.

The injuries pleaded were:-

1. Spinal injuries
2. Numbness of both lower limbs
3. Tenderness of the back
4. Soft tissue injuries to the neck
5. Loss of power of upper limbs
6. Abdominal pains

There were two medical reports produced, the one by Dr. Obed Omuyoma which assessed the degree of Respondent's injury as grievous harm with a permanent disability of 30%. The prognosis was that the Respondent had parasymphathetic nerve paralysis leading to sexual dysfunction. The report by Dr. Malik assessed a permanent disability at 25% and that it was difficult to predict whether the Respondent would ever gain complete power in the right arm and leg.

A further report by Dr. Malik observed that the Respondent had never complained of sexual dysfunction and he was of the view that there was no convincing clinical examination pointing to the possibility of impotence or any other accompanying evidence of parasympathetic nerve paralysis. The Respondent's counsel suggest general damages for pain and suffering and loss of amenities at Kshs.1,700,000/=, and for loss of future earning capacity at 1,296,000/= less the 30% contribution to give a total figure of Kshs.2,097,000/=. The Appellant's counsel suggested general damages Kshs.300,000/= for pain and suffering, Kshs.40,000/= for loss of consortium (following the claims of sexual dysfunction Kshs.300,000/= for diminution of his chances of employment). The Appellant's counsel also offered an alternative to this with regard to loss of future earning capacity at Kshs.150/= being his earning wage and using a multiplier of 10 years, as the Respondent was 37 years, and that in lieu of the separate awards under different heads, the Respondent be awarded a global award of Kshs.500,000/=.

Having considered the evidence and the submissions made, the trial magistrate observed that even from the medical evidence, there was no prediction as to when the Respondent would recover sufficiently as to be able to engage in reproductive employment. The trial magistrate noted:

“There is clearly nothing wrong with the mental capabilities of the plaintiff but he says he does not have the academic qualifications which can enable him to engage in any other appropriate employment.”

She also took into account the non-concurrence by the two doctors regarding the Respondent's purported sexual dysfunction and resolved it by pointing out, that such a claim was not pleaded and the Respondent was bound by his pleadings. She was of the view that the evidence clearly disclosed that Respondent lacked earning capacity and was still undergoing pain and suffering, which could improve with time. The trial magistrate thus awarded the Respondent the global sum of Kshs.1,400,000/= and apportioned the agreed ratio on liability to give Respondent a sum of Kshs.980,000/=.

This award is contested, and Miss Gichuki who argued the appeal on behalf of the appellant, submitted that the trial court took into account an irrelevant matter which it ought to have left out, then left out what was relevant. It was also her argument that the court did not consider the percentage of disability assessed by the doctor who re-examined the Respondent. According to counsel, the trial magistrate did not consider that Respondent has a grade 4 injury which was almost normal, and if that had been taken into account, then a lower figure would have been awarded, especially in light of the decided cases which had been cited by the appellant's counsel.

It was the appellant's contention that the trial court took issue with regard to the Respondent's earning capacity yet there was no conclusive proof as to his earnings. Further, that in any event loss of future earnings must be quantified and calculated on multiplicand/multiplier basis, and the Respondent did not even indicate to the court that he was totally unable to engage in any employment, so he ought to have been paid for diminished earning capacity.

Appellant's counsel still maintains that the global sum which the Respondent should have been awarded is Kshs.500,000/=. It is however not clear whether this factors in the 30% contribution, or whether this would be subjected to further apportionment.

In opposing the appeal, Mr. Mongeri submits that they were reflected in the discharge summary and the two medical reports. Further that Dr. Malik (whose report appellant's counsel prefer to give more weight) clearly stated that the injuries were not minor, and even 10 years of physiotherapy would not put back the Respondent to his former state. These were factors the trial magistrate took into account in awarding the sum of Kshs.1,400,000/= before apportioning it. He urged this court not to interfere with the trial court's decision, saying it had taken into account all relevant factors.

Miss Gichuki insists that a relevant fact was left out – and it becomes necessary to determine what were the relevant factors in this matter. According to her the relevant factor was the final report by Dr. Malik, and the irrelevant factor was in-conclusion of future earning capacity.

From the pleadings by the appellant, loss of future earning capacity was not pleaded, yet it was a factor which was of such significance that both doctors in their reports alluded to it. This is because the injuries suffered by the Respondent impacted on his daily activities and it would be pretentious to ignore this. I think this is why in assessing the damages; the trial magistrate opted to give a global sum taking into account all the factors as presented to court, rather than deal with each sub-head. I can identify the reason why the trial magistrate did not give a specific detail of loss of future earnings, because from the evidence presented to court what was available was not sufficient to make a specific determination. I say this because although the Respondent told the court that he was earning Kshs.150/= per day, there was nothing to confirm that, and even though he claimed that he worked seven days a week, there was again nothing to support that.

Given this scenario, I would not fault the trial magistrate for the approach she adopted of giving a global figure instead of breaking down the same into separate sub heads. In any case, even the Appellant's counsel had comfortably suggested to the trial court, to adopt the "**global**" approach.

I have read through the trial court's judgment, indeed she took into account relevant factors which were the nature of injuries, the residual effects of the injuries, especially on his ability to work, and the medical reports by the doctors especially point of departure with regard to the issue on effect to his sexual abilities. The trial magistrate resolved the matter in favour of the Respondent saying the same was not pleaded. It would have been pretentious for the trial magistrate to act as though the injuries did not affect the Respondent's activities.

The second issue is whether the sum awarded was excessive. I have taken into consideration the various decisions cited – which dealt with separate heads of awards. The defence had suggested Kshs.300,000/= for pain and suffering Kshs.40,000/= for loss of consortium Kshs.300,000/= for diminished earning ability which would have given a total figure of 640,000/=.

I notice that the past decisions which the Appellant's counsel cited date back to between 4 years – 10 years ago. Regard must be given to the current economic trends, the value of the Kenyan shilling and the rate of inflation, but I think the trial magistrate ought to have taken into consideration the views of Dr. Malik especially the alleged sexual dysfunction – with all this in mind the sum of Kshs.1.4 million was rather excessive and I find it prudent to interfere with that award by setting it aside and substituting it with a global sum of Kshs.1,000,000/= which is then apportioned at the 30:70% agreed ratio to give a net figure of Kshs.700,000/= as general damages. The costs of this appeal is awarded to the appellant.

Delivered and dated this 21st day of September, 2012 at Nakuru.

H.A. OMONDI

JUDGE