REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 240 of 2010

NATHAN NYAMBU MAGHANGA ..... APPELLANT

VERSUS

BENARD M. WANJALA …..... 1ST RESPONDENT

MARGRET TONUI …..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C. G. Mbogo (Chief Magistrate) delivered on 17th November, 2010 in Chief Magistrate's Court Civil Case No. 620 of 2008)

JUDGMENT

This appeal arises from a Judgment and decree in Eldoret Chief Magistrate's Court Civil Case No. 620 of 2008 delivered on 17th November 2010. The Plaint shows that the Plaintiff sued the Defendant jointly and severally for:-

(a) General damages

(b) Special damages

(c) Costs of the suit

(d) Interest on (a) and (b) at court rates

(e) Any other relief the Honourable Court deemed fit and just to grant

In the said suit, the Plaintiff (Appellant) was injured in road traffic accident on 17th May, 2008 while he was travelling in motor vehicle registration number KAE 010R along Eldoret-Kitale Road. The first Defendant (now 1st Respondent) was its authorized driver while the 2nd Defendant (now 2nd Respondent) as the registered owner at the material time of the accident. The accident was attributed to the utter negligence of 1st Defendant.

The Plaintiff called two witnesses including himself . Before his case and that of the defence was closed, parties consented to produce as exhibits several documents in support of their cases. On the part of the Plaintiff a letter dated 10th July, 2008 from the Moi Teaching & Referral Hospital and proceedings of the Medical Board were produced while on the part of the defence a second medical report dated 30th April, 2010 by a Dr. Jakait Charles Sangalo was produced in this respect. Suffice it to say, the defence called no oral evidence.

The learned Magistrate having considered the evidence presented before him and the authorities cited gave judgement for the plaintiff and against the Defendants jointly and severally as follows:-

(a) General damages - Kshs. 1,444,797/=

(b) Special damages - Kshs. 14,479.70

T O T A L - **Kshs. 1,300,317.30**

(c) Costs and interests

At the close of the hearing Counsel for the Plaintiff submitted that the Plaintiff was entitled to general damages for lost earnings (income). He justified the same on grounds that after the accident, the Plaintiff who worked with Raiplywood (K) Limited was retired on medical grounds. That he earned a gross salary of Kshs. 7,827/= which after statutory deducations of Ksh. 160/= (NHIF), Ksh. 200/= (NSSF), Ksh. 50/= (COTU) and Ksh. 174 (UNION) the net pay was Ksh. 7,243/=. That he was aged 39 years and would have worked until he was 55 years thus for another sixteen (16) years. That therefore using a multiplier of 16 years the lost income would be as follows:-

Ksh. 7,243 x 12 (months) x 16 = Ksh. 1,390,656/=

The Counsel submitted that a payslip of the month of April, 2008 had demonstrated the gross pay as Ksh. 7,827/= and that court should consider money deducted as advance pay and to a self-help group as part of his net pay.

In its Judgment the court found no basis for awarding damages for lost earnings. In his own words, the Magistrate said:-

"I would agree with the defence Counsel that none are awardable as no basis for the award was laid before me. There is no payslip to show that the Plaintiff used to earn at Raiply. Further the proceedings of the Medical Board (Exhibit No. 9) that the Plaintiff sought to rely on are unsigned. It will also be noted that in the report dated 10th July, 2008 (P. Exhibit No. 7) the Plaintiff is said to be recovering positively albeit slowly."

The learned Magistrate went on to find that a recent medical report would have been produced to show his future prospects. He relied on the case of **SAMSON OKUMU BUNDE VS. TOM KAUDO – KISUMU HCCC. NO. 47 OF 2005** in this regard.

It is the refusal of the subordinate court to award general damages for lost earnings (income) that gave rise to this appeal. In a Memorandum of Appeal dated 9th December 2010 and filed on the same date the Appellant faults the learned Magistrate on three grounds. I duplicate them as under:-

1. The Learned Chief Magistrate erred in law and fact in dismissing the appellant's claim for lost earnings and income against the weight of evidence before him.

2. The Learned Chief Magistrate erred in law and fact in exercise of his judicial discretion as to amount to abuse and improper exercise of a discretion.

3. The Learned Chief Magistrate erred in law and fact in failing to consider all the evidence and decide all the issues before him.

This Court's duty as a first appellate court is to re-evaluate evidence adduced in the subordinate court both on points of facts and law and come up with its findings and conclusions. Thus the appeal is in the nature of a re-trial – **SELLER -VS- ASSOCIATED MOTOR BOAT CO. LTD (1968) EA, 123** and **NYERI CIVIL APPEAL NO. 147 OF 2002 – KLR – STANELY MAORE -VS- GEOFFREY MWENDA**.

I will consider grounds 1 and 3 together as they focus on the failure of the learned magistrate to consider the evidence laid before him as sufficient to grant damages for lost earnings; and so determine whether he arrived at an erroneous finding based on the evidence laid before him. On ground 2 I will determine whether he improperly exercised his discretion in not finding that damages for lost earnings were awardable to the Appellant.

In the case of **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KAR, 278** the Court of Appeal held:-

"A Court of Appeal will normally not interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles."

The Appellants' Counsel submitted that the Plaintiff had tendered a pay slip for month of April, 2008 which showed his gross pay as Ksh. 7,827/=. From the Record of Appeal copies of exhibits are contained on pages 80 – 93. At page 90 is a letter dated 12th July, 2008 from RaiPlywoods (Kenya) Ltd addressed to the Appellant informing him of his retirement on medical grounds. Paragraph 2 of the letter stipulates his entitlement dues upon such retirement. Proceedings show that this letter was produced by consent of the parties P. Exhibit 8.

A copy of a payslip for the month of April 2008 is contained on page 88 of the proceedings and was produced by the Appellant as P. Exhibit 6. The Counsel acting for the Respondents during the hearing did not object to the production of the said pay slip. The only question arising about it during cross-examination was whether the Appellant would demonstrate that he was a permanent employee of Raiply company to which he answered in the negative. But he reaffirmed his pay as Ksh. 5,764/= as shown on the pay slip. I do accordingly uphold the submission by the Appellant's Counsel that the authenticity of the pay slip cannot be questionable. It is accordingly a misdirection on the part of the trial Magistrate that no pay slip was produced to demonstrate that the Appellant was in gainful employment.

It was also the contention of the trial Magistrate that the proceedings of the Medical Board were not signed and so court cannot rely on them. These proceedings were again produced by the consent of parties as P. Exh. No. 9. They are contained on page 91 of the copy of Records. It is in black and white that they were signed by Doctors Omar Aly, David Koech and Jane Kamuren. Their signatures are clearly shown besides their names. Below the names of the doctors who signed them is an approval by the Director of the Hospital (Moi Teaching and Referral Hospital) who has also appended his signature and the date of approval. The only signature lacking is one at the very bottom that should be for the Director of Medical Services. This does not in any way invalidate those proceedings as all requisite persons from the examining hospital had approved the retirement of the Appellant on medical grounds. In any event the Respondents did not object to the production of those proceedings. Their authenticity was also not challenged which to me can be the only ground upon which at this juncture, court cannot rely on them.

In the same vein, I hold that the trial Magistrate misdirected himself in judging that the Medical Board Proceedings were not signed and so he could not rely on them. My take is that he did not evaluate this piece of evidence critically. If he had he would have arrived at a different conclusion.

The trial Magistrate also found that the Appellant was recovering well and could possibly resume duties. He was particularly impressed by a medical report dated 10th July, 2008 from Moi Teaching and Referral Hospital signed by a Dr. F. Koech, a neurosurgeon. The report contained in the form of a letter is addressed to the then employer of the Appellant, Raiply Ltd. He had relied on paragraph two of the letter which indicated that the Appellant "**is recovering positively albeit slowly**".

He failed to consider the last bit of the same sentence which indicated that he (Appellant) was not fit to resume work. The letter was produced in Court as P. Exhibit 7. P. Exhibit 9, being the Medical Board Proceedings had recommended that the Appellant be retired on medical ground. Another comprehensive medical report dated 30th April, 2010 by Dr. Jakait, Charles Sangalo produced by the defence clearly showed that the Appellant had suffered 55% permanent disability and had lost complete use of his lower

limbs.

It is worthy to note that the Appellant testified on 26/3/2010. The report of Doctor Jakait was prepared in April of the same year and produced in court on 3rd September, 2010. Nothing would have been easier for the doctor than to say that the Appellant stood high chances of recovery and resume gainful employment. Instead he observed the inability of the Appellant to ever walk again. Therefore the learned Magistrate arrived at a finding that the Appellant would recover well based on no evidence and poor evaluation of the evidence tendered before him.

The learned Magistrate had also noted that the appellant had not relied on a recent medical report to mitigate the award for lost earnings. I say far from this. The medical report by the defence doctor (Dr. Jakait) was prepared only one month after the Appellant had testified and only six months before its production. What other evidence did the Court require, yet this most recent report was clear that the Appellant stood no chance of ever walking again? He even failed to appreciate that this report was produced by the defence which for all intent and purposes supported the Appellant's case.

I now consider whether the Respondents' submission that the Appellant is not entitled to future earnings holds. The Counsel relied on the case of **SAMSON OKUMU VANDE -VS- TOM KAUDO – KISUMU HCCC. NO. 47 OF 2005** to demonstrate that:-

- the degree of permanent disability was not established
- loss of working capacity was not established
- the time required for healing to occur was not proved.

I have already noted and need not repeat myself, that all the medical reports of which I consider that of Dr. Jakait as a most recent one prove the Respondents wrong.

In the Okumu case the Honourable Judge was of the view that in awarding damages for lost earnings the court must look at a conclusive guide to determine whether the injury suffered are of permanent nature. I have already found in the affirmative in this respect and I am not persuaded to make a different finding. I add there is no distinction between the term "**loss of earning**" and "**loss of future earning**". In both, prove of inability to engage in gainful earning hitherto enjoyed resulting in loss of earnings must be demonstrated at the time of hearing. This is what the Appellant has demonstrated.

So then can the Court, award such damages if they have not been pleaded? Did the learned Magistrate improperly apply his discretion in arriving at the finding he did? It is settled law that such damages as for lost earnings and loss of future earnings are specific damages. That is why in an attempt to prove them the Appellant produced the pay slip and all medical reports to demonstrate what he had suffered in this regard. Again the law is trite that specific damages must be specifically pleaded and specifically proved. As rightly submitted by Counsel for the Respondents parties are bound by their pleadings. The Appellant, through his Counsel had ample time to amend his pleadings even as late as at the time of the hearing. He did not take advantage of the noble time he had since the filing of the suit. Appellant could not be bailed out by the documents produced at the time of the hearing nor by the submissions made. At this hour an appeal too cannot also bail him out. I do in this regard entirely agree with Counsel for the Respondents that failure to plead the damages must fatally bring down this appeal. I do however disagree with him, as I have indicated earlier on in this Judgment, that the Appellant did not prove his inability to ever work again. My view is that had he pleaded for these damages, I would have gladly awarded them subject to taking into account contingencies of life and all relevant factors surrounding the case. I support my findings with decided case in **KISUMU CIVIL APPEAL NO. 91 OF 2003 – MUMIAS SUGAR COMPANY LIMITED -VS- FRANCIS WANALO – Bosire, O'kubasu and Githinji, JJA.**

In distinguishing what is required in proving damages for loss of earning, the Judges cited the case of **FAIRLEY -VS- JOHN THOMPSON LTD (1973) 2 LLOYDS REP. 40** at Page 41 in the following words:-

"It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for future earnings are awarded for real assessable loss proved by evidence. Compensation for dimi nution in earning capacity is awarded as part of general damages."

It is in this Judgment **– MUMIAS SUGAR COMPANY LIMITED -VS- FRANCIS WANALO** that the learned Judges went into great length to distinguish the difference between award for loss of earning capacity and lost earnings. In the former case they said:-

"Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token, one modest or substantial depending on circumstances of each case. There is no formula for assessing loss of earning capacity."

In the instant case, the damages the Appellant is seeking is for lost earnings. As pointed out in the case of **FAIRLEY -VS- JOHN THOMPSON LTD** which the Judges in **MUMIAS SUGAR CO. LTD -VS- FRANCIS WANALO** agreed with such damages must be pleaded and specifically proved. The Appellant has failed in this test.

I must point out that it is misleading on the part of the Counsel for the Appellant to indicate in the submissions dated on 2nd October, 2012 and filed on 4th October, 2012 that in the plaint before the subordinate court the Appellant had pleaded for damages for lost earnings. The Plaint dated 21st October, 2008 is in black and white that damages for lost earnings were not pleaded. Neither was there a subsequent application to amend the plaint. It is for this reason that this appeal will fail.

I do accordingly dismiss the appeal with costs to the Respondents.

DATED and **DELIVERED** at **ELDORET** this 27th day of November, 2012.

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

Nyairo holding brief for Omondi for the Appellant

M/s. Karuga for the Respondents