REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 157 OF 2008

NEW LEATHER MANUFACTURING

FACTORY LIMITED…………………………………..APPELLANT

VERSUS

JOHN MBUVI MBITI………………………………..RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate Hon. Kiarie W. Kiarie delivered on 11th March, 2008 in CMCC No.9403 of 2006 at Milimani Commercial Courts, Nairobi)

J U D G M E N T

1. This appeal arises from a suit which was filed at the Magistrate's Court at Nairobi, by John Mbuvi Mbiti (hereinafter referred to as the respondent). He had sued his employer New Leather Manufacturing Factory Ltd (hereinafter referred to as the appellant). The suit was in respect of general damages for personal injuries suffered by the respondent in an industrial accident whilst working for the appellant. The respondent maintained that the accident was caused by breach of contract and or statutory duty on the part of the appellant.

2. A consent judgment was recorded on liability in favour of the respondent as against the appellant in the ratio of 70:30. It was further agreed that the medical report which was prepared by Dr. Were be admitted in evidence without calling the parties. Thereafter the parties' counsel made oral submissions. The trial magistrate having considered the submissions and the medical report awarded Kshs.250,000/= as general damages for pain and suffering, and Kshs.480,000/= for loss of earnings for four years. The appellant is aggrieved by that assessment and has lodged this appeal raising three grounds as follows:

> (i) The learned magistrate erred in law and fact in awarding general damages that was manifestly high and excessive. The amount awarded was an erroneous estimate of the loss suffered by the respondent.
>
> (ii) The learned magistrate erred in law and fact in awarding damages on account of loss of earnings when no evidence was led to support the same.
>
> (iii) The learned magistrate erred in fact and law in awarding loss of earnings for a period of 4 years when the same was not pleaded.

3. Following an agreement by the parties' counsel, written submissions have been duly filed. For the appellant it was submitted that the injuries sustained by the respondent were fairly minor. The report of Dr. Were who examined the respondent about 5 months after the accident revealed that the respondent was treated and discharged. There was no evidence of any further treatment. It was contended that the trial magistrate wrongly relied on ***Mombasa Civil Case No.442 of 1991 Mwaike Kwaka Chindoro vs Dhanjal Brothers Ltd***, in which the plaintiff suffered severe multiple injuries for which she was admitted in hospital for 20 days. The residual effects of the respondent's injuries in ***Mwaike Kwaka Chindoro's*** case (supra), included loss of movement in the left thumb and small finger, resulting in a weak grip in the left arm. It was maintained that the injuries were not comparable with the respondent's injuries. The court was urged to reduce the awarded damages from Kshs.250,000/= to Kshs.50,000/=.

4. The following cases were relied upon in support of the appellant's submissions:

- ***Socfinaf Company Ltd vs Joshua Ngugi Mwaura Civil Appeal No. 742 of 2003.***
- ***Vavu Munyoki vs Mohamed A. Kadaula Nairobi HCCC 408 of 1992.***
- ***Peter Ndungu Kinyanjui vs E.A Seafood Ltd & Peter Nganga Kamande Civil Case No.2905 of 1996.***

5. With regard to the award in respect of loss of earning capacity it was submitted that the claim for loss of earning was neither pleaded nor was evidence led to support it. It was contended that there was no consent entered with regard to damages for loss of future earnings and earning capacity. Therefore the respondent had to prove that claim. It was submitted that the respondent needed to adduce evidence in order to assist the court in the assessment of damages for loss of future earnings.

6. It was argued that the respondent pleaded for '*loss of future earnings*' and not '*lost earnings'*. It was submitted that the trial magistrate's finding that the respondent remained for 2 years without employment and required 2 years to recover fully after treatment, was not supported by the respondent's evidence or the doctor's evidence. It was further submitted that the case of ***Jackson Musyoka Ndunda vs Lochab Transport Ltd, Machakos HCCC No.172 of 2001***, which was relied upon by the respondent's counsel was distinguishable. The court was further referred to ***Woodtex Kenya Ltd vs Moses Otiangala Solomon Civil Appeal 825 of 2001***, in which general damages of Kshs.290,000/= was awarded for injuries which were more serious than those of the respondent, and no further award was made for loss of earning capacity or loss of future earnings. The court was urged to reduce the general damages awarded by the trial magistrate from Kshs.250,000/= to Kshs.50,000/= and set aside the award given for loss of earning.

7. For the respondent it was argued that the award made by the trial magistrate was not excessive. It was contended that the appellant was merely trivializing the injuries sustained by the respondent, on the mistaken belief that the injuries were not serious because there was no fracture. It was submitted that the gravity of the injury can clearly be discerned from the nature of the injury and the resultant disability to the body of the person and how the injury has affected the life of the injured person. It was noted that according to the doctor's report, the respondent's hand did not have grip 5 months after the accident and the injury could not therefore be trivialized as minor. The case of ***HC Civil Appeal No.9 of 2004 Nakuru Spin Knit Ltd vs Johnston Otara,*** was cited.

8. It was further argued that the trial magistrate appreciated that the injuries in ***Mwaike Kwaka Chindoro***'s case (supra), were more severe as the award of Kshs.260,000/= having been made in the year 1993 would have been Kshs.400,000/= as of today. It was maintained that the award of Kshs.250,000/= was not inordinately high nor was it based on wrong principles as to arrive at an erroneous estimate. The court was urged to note that the report of Dr. Were confirmed the extent of the respondent's injuries and the resultant non-functionality of the respondent's arm.

9. As regards the damages for loss of earning capacity, it was maintained that the respondent's chances of work in the future, in the labour market were lessened by his injury. It was pointed out that the

respondent pleaded in paragraph 7 of the plaint that as a result of his injuries, he lost his employment with the appellant and means of livelihood and therefore claimed damages for future earning capacity. It was pointed out that the appellant did not deny paragraph 7 of the respondent's plaint and therefore there was no need for the respondent to call evidence in that regard. It was further argued that the appellant having entered into a consent on liability, Section 67(2) of the Civil Procedure Act, precluded him from challenging that consent in regard to the claim for loss of future earnings. The court was further referred to ***Butler vs Butler [1984] KLR 225***.

10. I have carefully reconsidered and evaluated the record of the lower court and the submissions made before me. The consent recorded by the parties before the trial magistrate was in the following terms.

> ***"1. By consent judgment on liability in favour of the plaintiff against the defendant be entered at the ratio of 70:30.***
>
> ***2. Judgment on special damages for Kshs.2,000/= in favour of the plaintiff against the defendant.***
>
> ***3. The medical report by Dr. Were of 10th August 2006 be admitted by consent without calling the maker and marked as Exhibit 1.***
>
> ***4. The matter be mentioned on 27th February, 2008 for submissions on quantum."***

11. That consent is clear that the issue of liability was resolved by the parties. The consent does not distinguish between liability in respect of general damages for pain and suffering, or liability in respect of loss of future earning capacity. Therefore, there was no issue before the trial magistrate regarding the determination of liability. The only issue before the trial magistrate was assessment of damages in respect of which submissions on quantum was made. Nevertheless, from the plaint which was filed by the respondent in the lower court, it is evident that the respondent did not distinguish in his prayers for judgment the claim for general damages in respect of pain and suffering, and general damages for loss of future earning capacity. As was held in ***Butler vs Butler*** (supra), 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.

12. In this case, the respondent's claim for loss of earning capacity ought to have been included as an item within general damages. This was particularly necessary since there was no evidence concerning factors such as the qualifications of the claimant, his remaining length of working life, and his previous service if any. The trial magistrate's findings that the respondent had been out of a job for about 2 years and was likely to be without a job for another 2 years, was not based on any evidence. The only credible evidence before the trial magistrate was the fact indicated in the medical report that the respondent had a temporary incapacity of 7% which was likely to be resolved by physiotherapy. Apart from that, the only other relevant fact was the pleading that the respondent had lost his employment due to his injuries. I find therefore, that the trial magistrate erred in awarding general damages under the specific heading of loss of earning capacity.

13. As regards the award which was made for pain and suffering, as was stated in ***Butler vs Butler*** (supra):

"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision."

14. With the above caution in mind, I have considered the judgment of the trial magistrate, and do note that the trial magistrate completely misdirected himself by being guided by ***Mwaike Kwaka Chindoro***'s case (supra). Firstly, the trial magistrate had only a digest copy. Secondly, although the respondent had

exaggerated his injuries listing them in the plaint as, deep cut wound to the base of the right hand small finger, fracture of the metacarpal bones of the small finger, and fracture injury to the base of the right thumb with complete loss of sensation and movement, the report of Dr. Were simply put the respondent's injuries as blunt trauma injury to the right little finger and blunt trauma injury to the right thumb.

15. In being guided by the case of ***Mwaike Kwaka Chindoro*** (supra), the trial magistrate was apparently swayed by the injuries listed by the respondent in the plaint, which were similar to the injuries suffered in the ***Mwaike Kwaka Chindoro***'s case (supra), which included fracture of the thumb and crush injury to the right arm. The injury in the ***Mwaike Kwaka Chindoro***'s case (supra), resulted in permanent disability which could not be corrected. Thus, there was absolutely no comparison between those injuries and the injuries suffered by the respondent. Moreover, the case of ***Spin Knit Ltd vs Johnston Otara*** (supra), which was also cited to the trial magistrate in which an award of Kshs.300.000/= was made also concerned injuries which were not comparable to the respondent in this case as they had permanent incapacity of 10-20% unlike the respondent's injuries which had only temporary incapacity of 7%.

16. In the light of the above, I come to the conclusion that the assessment done by the trial magistrate was excessive as it was based on wrong comparisons. Accordingly, I allow this appeal, set aside the award made by the trial magistrate and substitute thereof a global award of Kshs.150,000/=, as general damages taking into account the element of pain and suffering, loss of amenities, temporary incapacity and loss of earning. This award shall be subject to the agreed ratio of liability. The appellant having substantially succeeded in this appeal, I award half the costs of the appeal to the appellant.

Dated and delivered this 9th day of June, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mutuga for the appellant

Muindi for the respondent

Eric - Court clerk