



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 152 of 2004

SIMON MBURU WANJIKU.....APPELLANT

VERSUS

CHARLES WAMUGU WAMITI.....RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was initiated in the CM's Court at Milimani by Simon Mburu Wanjiku (hereinafter referred to as the appellant), against Charles Wamugu Wamiti (hereinafter referred to as the respondent). The appellant sought general and special damages arising from personal injuries in an accident involving the respondent's motor vehicle Registration No.KZT 054, allegedly owned by the respondent. The appellant contended that the accident was caused by the negligence of the respondent.
2. In his defence the respondent denied ownership of motor vehicle KZT 054 (hereinafter referred to as the subject vehicle). The respondent also denied the occurrence of the accident and the allegation of negligence attributed to him. Further, the respondent contended without prejudice that if there was an accident then it was caused by the negligence of the appellant and or owner/driver of motor vehicle KAK 389X.
3. On 1st October, 2003 a consent judgment was recorded in favour of the appellant on liability at 90% and it was agreed that evidence be taken for assessment of damages. On the date fixed for the assessment of damages hearing proceeded *ex-parte* as there was no attendance by the respondent. Three witnesses testified on behalf of the appellant: Dr. Moses Kinuthia who examined the appellant after the accident produced a medical report which he prepared after the examination. The appellant who produced a P3, a police abstract report of the accident and receipts for medical expenses and transport expenses which he incurred as a result of the accident. The appellant testified that prior to the accident he was employed as a driver by one Jacob who was paying him 500/= daily. He produced his driving licence. Jacob Njoroge Wainaina was another witness. He confirmed that at the material time the appellant was working for him as a driver.
4. In her judgment the trial magistrate found that the appellant suffered *inter alia*, severe multiple comminuted fracture of the right tibia/fibula necessitating amputation above the knee. He noted that the appellant was still on crutches and that the doctor had assessed his total permanent incapacity at 50%. She awarded general damages at Kshs.800,000/= (less 10% contribution), 130,000/= for artificial limb and removal of plates and Kshs.69,000/= as proven special damages. The trial magistrate rejected the claim for loss of future earnings contending that that there was no proof of employment.
5. Being aggrieved by that judgment the appellant has lodged this appeal raising 8 grounds as follows: -
 - (i) The learned magistrate erred in law and in fact in awarding the plaintiff a sum of Kshs.69,000/= on special damages instead of Kshs.77,133/= as per the plaint which was amended on 25.11.2003 despite the fact that the same had been specifically proved.
 - (ii) The learned magistrate erred in law and in fact in failing to make any award for future medical expenses inspite of the medical and oral evidence before her.
 - (iii) The learned magistrate erred in fact and in law in failing to make an award for loss of earning capacity despite the overwhelming oral, medical and documentary evidence before her.

(iv) The learned magistrate erred in fact and in law in failing to consider the principles in the authorities before her and particularly Nairobi High Court Case No.968/88 and Nakuru High Court Case No.508 of 1999 in assessing the plaintiff's claim for loss of future earning capacity.

(v) The learned magistrate's findings on special damages and loss of future earnings capacity were against the weight of evidence.

(vi) The learned magistrate erred in fact and in law in holding that the appellant had not proved his case on loss of future earning capacity against the defendant.

vii) The learned magistrate's dismissal of the plaintiff's claim on diminished/future earning capacity had no legal basis.

(viii) The learned magistrate erred in law and in fact in finding that since the plaintiff did not produce an employment card during the hearing he was not entitled to an award for loss of future employment.

6. In support of the appeal, Mrs. Wangombe who appeared for the appellant submitted that the trial magistrate awarded special damages of Kshs.69,000/= whilst receipts were produced in support of the claim of Kshs.77,133/= for special damages as amended. Mr. Wandago who appeared for the respondent on the other hand maintained that the amount of Kshs.69,000/= awarded was the amount which was proved as special damages.

7. I have examined the receipts which were produced before the lower court and I see no reason why the trial magistrate awarded less than Kshs.77,133/= as receipts were produced in support of the same. Secondly, judgment having been entered on liability, that judgment also encompassed the special damages claim as it was a liquidated claim and was therefore not subject to any assessment.

8. With regard to the award for future medical expenses, Mrs. Wangombe submitted that no award was made for future medical expenses but when it was pointed out to her that there was an award of Kshs.130,000/= in the judgment, she maintained that the trial magistrate did not give any reason for adopting a lower figure for the future medical expenses or the artificial limb. I have considered the expert opinion which was before the trial magistrate. Dr. Kinuthia estimated the cost of the artificial limb at between 50,000/= to 150,000/=: and the costs of future operation of plates and screws at 80,000/= to 100,000/=: The trial magistrate adopted the sum of Kshs.50,000/= and 80,000/= which were within the estimate given by the doctor. There is therefore no justification for interfering with the trial magistrate's discretion in that regard.

9. The main bone of contention appears to be the failure by the trial magistrate to award any damages in respect of loss of future earning capacity. In paragraph 10 of the plaint, it was pleaded as follows:

“The plaintiff was aged 30 years at the time of the accident and in good health. He was a driver earning a salary of Ksh.5,000/= per month. He has been physically incapacitated by the accident and claims loss of earning capacity.”

The trial magistrates findings in regard to this claim was as follows: -

“Loss of future earnings not proved – he says he was a driver employed by one Jacob, no evidence of employment, a driver's licence is not proof of employment, it merely means he is licensed to driver – not proved no award.”

10. It is evident from the above that the trial magistrate misdirected herself. Loss of future earnings arises where the plaintiff has suffered injuries affecting the plaintiff's ability to engage in gainful employment. In this case there was clear evidence from Dr. Kinuthia that the appellant had suffered total permanent incapacity of 50% as it would be difficult for him to drive having lost one of his legs. The trial magistrate also appears to have completely ignored the evidence of Jacob Njoroge Wainaina who testified that he had employed the appellant as a driver. The trial magistrate appears to have laid undue emphasis on the need for a document to confirm the alleged employment. The trial magistrate ought to have taken judicial notice of the informal sector employment and the fact that most matatu drivers are employed as casuals (or daily contracts) and therefore a document would not be available. Moreover the driving licence Produced by the appellant was consistent with the appellant's evidence as corroborated by the evidence of Jacob Njoroge Wainaina that the appellant was employed as a driver.

11. Further, even assuming that the appellant was unable to prove that he was employed as a driver, the fact that he had suffered injuries which were likely to affect his gainful employment was sufficient and the trial magistrate could even have assessed the loss of future earnings based on the minimum wage. I find that in rejecting the appellant's claim for damages for loss of future earnings the trial magistrate applied wrong principles, and there is therefore justification for interfering with the judgment.

12. I note that there was contradiction between what the appellant pleaded as his salary in paragraph 10 which was Kshs.5,000/= and what was alleged to be his salary according to the oral evidence which was Kshs.15,000/=. I note also that an unsuccessful attempt was made to amend paragraph 10 of the plaint to change the figure to be in line with the oral evidence. Be that as it may, the trial magistrate who saw and assessed the demeanour of the witness did not appear to have been impressed. She appeared to have formed the impression that there was an attempt to take advantage of the respondent's absence by inflating the figure. I have no reason to question the impression of the trial magistrate. Indeed, one wonders why the lower figure of 5,000/= was initially given. The sum of Kshs.5,000/= per month being consistent with the minimum wage applicable at the time of the accident, it would be fair and just to adopt that amount as the appellant's income in assessing the appellant's loss of future earnings. Further, it being evident that the appellant was about 30 years of age at the time of the accident, a multiplicand of 20 years would be appropriate. The appellant's permanent loss having been assessed by the doctor at 50%, the appellant's loss of income would work out as follows: -

$$20 \times 12 \times 5,000 \times \frac{1}{2} = 600,000/=$$

Less 10% contribution 60,000/=

540,000/=

13. The upshot of the above is that I allow the appeal to the extent of setting aside the judgment in respect of special damages and substituting thereof judgment for a sum of Kshs.77,133/=. I confirm the general damages of Kshs.720,000/= in respect of future medical costs and award a further sum of Kshs.540,000/= in respect of loss of future earnings. The appellant shall have costs of this appeal.

Those shall be the orders of this court.

Dated and delivered this 29th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Wangombe for the appellant

Chabala H/B for Wandago for the respondent