**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 131 of 2003**

**ZAKAYO CHAMWAMA BUSAKHA …….....…… APPELLANT**

**VERSUS**

**SPICE WORLD LIMITED …….....…… RESPONDENT**

**(An Appeal from the Judgment of Hon. T. W. C. Wamae, SRM in**

**Nairobi Milimani Commercial Civil Suit No. 1076 of 1999**

**delivered on 13th February, 2003)**

**JUDGMENT**

By a Plaint dated 8th February, 1999, and filed in the Lower Court on 10th February, 1999, the Appellant (Plaintiff in the lower court) claimed special and general damages from the Respondent arising out of injuries sustained at his place of work.

The nature of the injuries sustained, as pleaded in the Plaint, were injury to chest wall, and tear of the medical collateral ligament of the right ankle.

The lower court found the Respondent to be 100% liable for the Appellant's injuries and awarded him Kshs.180,000/= general damages. In doing so, the lower court rejected the claims for "future medical costs" and "loss of earning capacity", which is why this matter is before this Court on appeal.

Those are the two issues in this appeal. There was a third issue relating to "exemplary damages" that the Appellant's Counsel, Mr Nelson Harun, attempted to raise at the hearing. Mr Mbugua, Counsel for the Respondent correctly objected to the same, as it was being raised for the first time at the hearing. I agree with Mr Mbugua and disallow the same as it is not part of the Memorandum of Appeal.

With regard to future medical expenses, there was clear evidence in the lower court that "the tear of the deltoid ligament will require surgical correction in order to stabilize the right ankle joint." As per the medical report of Dr Amaganya dated 22nd January, 1999 (PEx 1), and his evidence before the lower court, the cost of surgery was Kshs.40,000/= in 1998, and approximately Kshs.80,000/= as at the date of the hearing on 4th December, 2002.

The claim for future medical expenses was expressly pleaded in the Plaint (see paragraph 11) although the exact amount was not stated in the prayers. Prayer (e) of the Plaint states:

"*Damages to cover future medical expenses in the form of surgery.*"

I believe the lower court's rejection of this claim arose out of some confusion as to whether this was a "special" damage claim or a "general" damage claim. Unfortunately, the lower court's judgment is scanty and completely unreasoned. There is only one line dedicated to this important claim, as follows:

"*Special damages were not specifically pleaded and (b) and (e) of the Plaint are dismissed.*"

Prayer (e) related to the claim for future medical expenses. It was rejected because the court considered it to be a claim in "special damages" which needed to be specifically pleaded and proved, but was not.

Clearly, the lower court was wrong. In *Sosphinaf Company Ltd & Another vs Daniel Ng'ang'a Kanyi Civil Appeal No. 315 of 2001*, the Court of Appeal, in a Judgment delivered 5th April, 2006 held that the claim for future medical treatment was part of general damages which did not have to be specifically pleaded. In *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs Augustine Munyao Kioko Civil Appeal No. 203 of 2001*, the Court of Appeal expressed similar sentiments, although it declined to award the claim because there was no evidence to justify the same.

In the case before me, the claim for future medical expenses was pleaded, there was evidence that it was needed, the amount of the claim was also stated by an expert before the Court, and, therefore, there was no justification to reject the claim. As I said before, the claim is a "general damage" claim, and the specific amount need not have been pleaded. It simply was an item that ought to have been taken into account in calculating the general damages. Accordingly, I award the Applicant Kshs.80,000/= additional general damages on account of future medical expenses.

With regard to the claim for "loss of earning capacity", this too was pleaded in the Plaint [see paragraph 9 and prayer (d)]. The lower court rejected this claim without giving it sufficient consideration, nor proper reasons. This is what it said:

"The doctor's report shows that plaintiff was capable of handling light duties when he examined him 6 months after the accident. There is no evidence that plaintiff is a driver and that he has lost his capacity to earn a living."

There was indeed evidence, as the learned Magistrate herself stated, that the Appellant could only handle "light" duties. Prior to the accident, he was a labourer handling 100kg bags of sugar. After the accident, he could handle only light duties. Clearly, therefore, his capacity to earn, at least in the immediate future after the accident, had diminished. However, I disagree with Mr Harun's submission in the lower court, that the Appellant's capacity to earn had diminished "for life", and that a multiplier of 30 years ought to be applied in calculating loss of earning capacity. Dr Amaganga's evidence before the lower court indicated that this condition was "temporary". This is what he said:

"*I did not indicate for how long Plaintiff was to be on light duties but it was until the ligament was attended to.*"

Accordingly, the claim for Kshs.720,000/= for this head of damage that Mr Harun submitted before the lower court, was not justified. I would award Kshs.100,000/= for loss of earning capacity. Therefore, the total additional general damages I award to the Appellant are Kshs.180,000/=.

This appeal is allowed, and the Judgment and decree of the lower court is hereby set aside, and in its place the Appellant is awarded Kshs.360,000/= in general damages, with interest and costs both in the lower court, and on appeal.

Dated and delivered at Nairobi this 18th day of September, 2008,

**ALNASHIR VISRAM**

**JUDGE**