



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 148 OF 2016

WELLS FARGO LTD.....1ST APPELLANT/RESPONDENT

DOMINIC MUDAIDA.....2ND APPELLANT/RESPONDENT

VERSUS

MAXINE BOSIBORI GEKE.....RESPONDENT/APPLICANT

RULING

1. The application dated 27th July 2020 seeks orders that the honourable court be pleased to review its judgment of 29th day of May, 2020 and decree thereof and proceed to make a decision on the Respondent/Applicant's Cross-Appeal dated 18th day of July, 2019,

2. The application is premised on the grounds stated therein and in the affidavit in support. The gist of the application is that there is an error on the face of the record as the judgment delivered herein on 29th May, 2020 omitted to make a decision on the Cross-Appeal dated 18th July, 2019.

3. The application is opposed. It is stated in the replying affidavit that the Applicant did not pray for loss of earning capacity in the plaint. That the entire Appeal and the Cross-Appeal were determined and that there is no error apparent on the face of the court record. That failure to determine a Cross-Appeal is a point of law and cannot be a ground for review.

4. Under Order 45 rule 1 (1) of the Civil Procedure Act provides:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

5. As stated by the Court of Appeal in the case of **Mwihoko Housing Co. Ltd v Equity Building Society [2007]2KLR:**

“It is trite law, and we reiterate, that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.

The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City council v Thabiti Enterprises Ltd [1995-98] 2 EA 251 (CAK).”

6. I have perused the Record of Appeal and the judgment herein dated 29th May, 2020. I have considered the Memorandum of Cross-Appeal dated 18th July, 2019. The same raises the following grounds:

1. The learned trial magistrate erred in law and fact in not awarding damages for loss of future earning and/or loss of earning capacity pleaded and proved by the Respondent.

2. The learned trial magistrate erred in law and fact in her assessment of general damages for pain and suffering.

7. The judgment dated 29th May, 2020 inadvertently omitted to reflect the court's determination on the Cross-Appeal. The court re-evaluated the evidence on record and addressed itself on the issue of general damages and the issue of loss of future earning capacity based on the Appeal and did not include the Cross-Appeal. This court will therefore proceed to evaluate the issues raised in the Cross-Appeal.

8. On the question of general damages for pain and suffering, the trial magistrate assessed the same at Ksh.450,000/=. Taking the Appellants injuries into account, I find the same within the range of comparable awards.

9. This court is guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**: where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

In the case at hand, it is not necessary for this court to interfere with the award of general damages made by the trial magistrate.

10. On the loss of earning capacity, the Court of Appeal in **S J v Francesco Di Nello & another [2015] eKLR** gave the exposition of the law as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in **Fairley v John Thomson Ltd [1973] 2 Lloyd's Law Reports 40** at pg 14 wherein Lord Denning M. R. said as follows:

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

11. As stated in the case of **Mumias Sugar Company Ltd v Francis Wanalo [2007] eKLR**:

The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. ”

12. In the case at hand, loss of earning capacity was pleaded in paragraph No. 7 of the plaint. The Applicant testified (PW2 Maxine Bosibori) and stated in her evidence that the injury affected the performance of her work both in the office and at home. She further testified that her salary was reduced from Ksh.60,000/= to Ksh.13,000/=. However, no documents were produced in support of the said reduction of her salary.

13. Dr. Theophilus Wangata (PW1) examined the Applicant on 24th September, 2014 while the Applicant was still undergoing treatment according to his oral evidence in court and his medical report which was produced as an exhibit. Dr. Wangata (PW1) who described himself as a medical practitioner testified that he also relied on the medical report by Dr. Johnson Murila, an Orthopedic Surgeon. Dr. Wangata reflected at page 2 of his report that the Applicant's complaints were that she was **“...not yet able to use the left hand”**. Dr. Wangata then recommended subsequent treatment that would also include physiotherapy. That's why an award was made of Ksh.150,000/= for future medical treatment.

14. There was no evidence to reflect the results of any further treatment. The report by Dr. Johnson Murila dated 9th September, 2014 reflects that the Applicant was recovering well. After re-evaluating the evidence in respect of the injuries, this court's findings is that the case on loss of future earnings was not proved.

15. With the foregoing, I find no merits in the Cross-Appeal and dismiss the same. Each party to meet own costs of this application and of the Appeal and Cross-Appeal.

Dated, signed and delivered at Nairobi this 15th day of Oct., 2020

B. THURANIRA JADEN

JUDGE