



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 103 OF 2015

ELOSY WANJA NGAI.....APPELLANT/RESPONDENT

VERSUS

REDLANDS ROSES.....RESPONDENT/APPLICANT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Thika by S.N Mbungi, Ag Chief Magistrate delivered on 24th February, 2015)

JUDGMENT

Following the Judgment of the lower Court two appeals were filed by the parties herein. This appeal, that is No. 103 of 2015, was filed by the original plaintiff in the lower court against the defendant. From the Record of Appeal dated 4th September, 2015 the said appeal was received by the High Court on 11th September, 2015.

The other appeal was Civil Appeal No. 346 of 2015 and going by the Record of Appeal dated 15th March, 2016 the same was received by the registry on 23rd March, 2016. It would appear Civil Appeal No. 346 of 2015, though filed later than Civil Appeal No. 103 of 2015, went through the process faster, and was listed for hearing before Segon J and judgment thereof delivered on 6th April, 2018.

These appeals arising from the same cause of action and between the same parties, ought to have been consolidated. This was not done hence Civil Appeal No. 346 of 2015 was heard and determined while Civil Appeal No. 103 of 2015 has never been heard. Parties elected to file written submissions which I now have on record.

It has been submitted on behalf of the respondent that the court is *functus officio*, because the matter has been determined in Civil Appeal No. 346 of 2015. On the other hand, the appellant submitted that the matter is not *res judicata* as the issue of loss of earning capacity has not been decided at all.

Going by the submissions of the parties herein, I have to consider the pleadings, the evidence and the grounds of appeal as set out in the respective Memorandums of Appeals in the two appeals. In the plaint dated 28th January and filed on 11th February, 2010 the plaintiff claimed general damages, loss of earning capacity, costs and interest as a result of injuries sustained while in the employment of the respondent herein.

After a full hearing the lower court made an award of Kshs. 400,000/= general damages, Kshs. 2000/= special damages plus costs and interests. It is that judgment that led to the two appeals.

In Civil Appeal No. 346 of 2015 the respondent herein complained that the lower court was wrong for failing to find that the respondent was liable for her own injuries, and at least should have apportioned liability as the company could not be entirely to blame for those injuries. The award of general damages was also faulted for being too high.

In Civil Appeal No. 103 of 2015 which is the subject of this judgment, the lower court was faulted for awarding general damages which award was inordinately low, for failing to make an award for loss of earning capacity and also damages for breach of contract of employment.

In the judgment of Segon J, in Civil Appeal No. 346 of 2015 the learned Judge summarised the grounds of appeal into two main grounds.

1. Whether or not the trial magistrate erred in law and fact on apportionment of liability and
2. Whether or not the trial magistrate erred in law and fact in awarding general damages.

In the end the learned Judge found that, the finding on liability was correct and the award on damages was reasonable and should not be disturbed. The appeal was therefore dismissed.

In the judgment, the court observed in passing that the respondent also sought damages for loss of earning capacity which the trial court dismissed on grounds that the knee replacement surgery did not render the respondent incapacitated, so as not to be in gainful employment. There was no specific finding by the appellate court on loss of earning capacity, other than the reference to the judgment of the lower court.

Section 7 of the Civil Procedure Act provides as follows,

“Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I have already observed that the judgment of Seron J did not conclusively address issue of loss of future earning capacity. It is instructive that the lower court in this appeal is being faulted for not awarding damages under the said heading. With respect therefore, the court is not *functus officio* neither can it be it said the issue is *res judicata* in view of the provisions of Section 7 of the Act cited above. That being the case, this court is perfectly in order to revisit the issue with a view to arriving at an independent finding.

The appellant pleaded in the plaint and in particular paragraph 11 thereof, that due to the injury sustained she had been substantially incapacitated and therefore her future earning capacity had been compromised. In its judgment, the lower court in addressing the plaintiff's claim for loss of earning capacity referred to the medical report by Dr. Ikonya and observed that, not all activities require someone to stand and that there were income generating activities which the appellant could do without standing. He added that he watched the appellant testify and that she did not appear to be in great pain because she stood for one hour when giving evidence in chief, during cross examination and re-examination.

The trial court concluded as follows,

“Therefore I am not convinced that the plaintiff has permanently lost her capacity to earn. I do dismiss this claim but I note that it was slightly reduced.”

Two medical reports were produced during the trial. One was by Doctor Ikonya dated 8th June, 2012 prepared at the instance of the appellant, while the other was by Doctor Wambugu prepared at the instance of the respondent on 29th July 2010.

The degree of permanent incapacity was assessed at 35% by doctor Ikonya, while doctor Wambugu assessed the same at 40%. It is clear from the medical reports that the lower court misdirected itself in dismissing the appellant's claim for loss of earning capacity even after observing the same had been reduced.

The appellant gave evidence in support of her claim for loss of earning capacity. She was terminated as a result of low performance following the injury sustained. She produced the termination letter as exhibit 2. Under cross examination, she reemphasised the reason for her termination and that she did not have the knee problem before she joined the company. It was her evidence that she was earning Kshs. 5,000/= although the pay slips produced showed her gross salary was about Kshs. 8000/=. At the time she was testifying in May 2014, she was 34 years old. She could not stand for long and therefore claimed damages for loss of earning capacity.

In my judgment, the appellant was entitled to that award. Going by the doctor's reports I have taken the average of 40% as loss of future earning capacity. I have also taken the figure of Kshs. 5,000/= being her monthly earnings. At the age of 34 when she gave evidence, it is more probable than not that she would have worked up to the age of 60. However I consider a multiplier of 20 years to be appropriate in the circumstances of this case, more so taking into account that the award of general damages for pain and suffering was upheld by Seron J in the judgment of 6th April, 2018.

At full earning capacity she would have earned Kshs. 5,000 x 12 x 20 = 1,200,000/= over that period of time, but the respondent shall be liable to pay the appellant Kshs. 480,000/= being 40% permanent incapacity attributed to negligence on its part.

Having made the award for loss of earning capacity, the appellant does not qualify for an award of damages for breach of contract of employment claimed in the Memorandum of Appeal.

In end the appeal hereby succeeds. The appellant shall have judgement in her favour in the sum of Kshs. 480,000/= general damages for loss of earning capacity. However, the appellant having received costs under Appeal No. 346 of 2015 is not entitled to any costs under this appeal. Therefore each party shall bear their own costs.

Dated, signed and delivered at Nairobi this 18th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE