



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 438 OF 2014

JOSEPH MUCHIRI MBUGUA.....APPELLANT

VERSUS

GATIMU NDIRANGU AKA AUGUSTINE.....RESPONDENT

(Being an appeal from the judgment of Hon. C. Obulutsa dated 11th July 2014

in Milimani CMCC No. 4527 of 2013)

JUDGMENT

1. This appeal challenges part of the decision of the learned trial magistrate (*Hon. C. Obulutsa, Ag. CM*) dated 11th July 2014. The appellant, then the plaintiff, was aggrieved by the trial court's refusal to award him damages for loss of earnings, or diminished earning capacity and costs of the suit.

2. The appellant had sued the respondent seeking special and general damages for injuries sustained in a road traffic accident whose occurrence was blamed on the respondent's negligence. He pleaded that as a result of the accident, he sustained fractures of the left tibia and fibula which led to amputation of the left leg below the knee and he lost three incisor teeth. Owing to the injuries suffered and resultant disability, in addition to damages for pain and suffering and loss of amenities, the appellant prayed for past and future loss of earnings or diminished earning capacity as well as costs of future medical expenses.

3. In his judgment, the learned trial magistrate awarded the appellant a total of KShs.2,781,975 made up as follows:

- a) General damages - KShs.2,235,000
- b) Cost of prosthesis - KShs.480,000
- c) Dental replacement - KShs.24,000
- d) Special damages - KShs.27,975

4. The learned trial magistrate dismissed the appellant's claim for loss of future earnings or diminished earning capacity arguing that the two medical reports tendered in evidence did not indicate that the injuries sustained by the appellant made him unable to work again and there was no evidence to confirm his claim that he was a *shamba* boy. He also denied the appellant costs of the suit on grounds that he did not serve the respondent with a demand letter prior to institution of the suit.

5. In his memorandum of appeal dated 22nd September 2014 and filed on 1st October 2014, the appellant relied on four grounds of appeal which are as follows:

- a) The learned magistrate erred in failing or declining to make an award for loss of earning or loss of or diminished earning capacity.***
- b) The learned magistrate erred by failing to apply or to adhere to the settled legal principles applicable in awarding of or assessment of damages for loss of or diminished earning capacity.***
- c) The learned magistrate erred by disregarding or misunderstanding the appellant's evidence on loss of or diminished earning***

capacity.

d) The learned magistrate erred by declining to award costs or alternatively by failing to give valid legal reasons for declining to award costs.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. The appellant filed his submissions on 16th July 2019 while those of the respondent were filed on 9th November 2018.

7. This being the first appellate court, its duty as summarized by the Court of Appeal in **Selle & Another V Associated Motor Boat Company & Others, [1968] EA 123:**

"... is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

On the mandate of an appellate court, the court proceeded to state as follows:

"... In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

8. Having carefully considered the grounds of appeal, the evidence on record, the rival submissions filed on behalf of the parties and the judgment of the trial court, I find that since liability and the award of both general damages for pain and suffering and special damages are not contested, the only issue for my determination in this appeal is whether the learned trial magistrate erred in refusing to make any award for loss of earnings or diminished earning capacity and in declining to award the appellant costs of the suit.

9. In his pleadings and in his testimony, the appellant stated that prior to the accident, he was a gardener earning a monthly salary of KShs.5,000; that due to the injuries sustained in the accident, his leg was amputated; that he was thereafter unable to continue working as he was on crutches even at the time he testified in court. These claims by the appellant were not challenged by the respondent either in his statement in defence, under cross-examination or even in his evidence. The same were thus uncontroverted. In my view, since the appellant supported his pleadings on his occupation and salary prior to the accident by his oral testimony during the trial which was not challenged by the defendant, this amounted to sufficient evidence to prove his claims on a balance of probabilities.

10. The learned trial magistrate appears to have held the view that these claims needed to be proved by documentary evidence but this was a misdirection on his part given the facts of this case particularly the fact that the appellant's claim was not disputed. In any event, as was held by the Court of Appeal in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko, [2006] eKLR**, production of documentary evidence was not mandatory as proof of a person's occupation or earnings. The court expressed itself as follows:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

11. In view of the foregoing, it is my finding that the learned trial magistrate erred in his finding that the appellant had not proved that he used to work as a gardener earning KShs.5,000 prior to the accident.

In his plaint, the appellant prayed for loss of earnings from February 2009 to February 2010 and from date of filing suit to date of trial. The record shows that the suit was filed on 27th January 2010 which is covered by the period stated above.

12. Having independently analysed the evidence in this case, I am satisfied that the appellant was entitled to an award representing the income he lost due to his inability to work as a result of the injuries he sustained in the accident. In the premises, I find that he is entitled to damages for lost earnings for a period of about 50 months which covers the period between date of filing suit and date he testified in court on 1st April 2014 when it is obvious he was still not in a position to work since he was still on crutches. I will calculate the amount payable to the appellant under loss of earnings as follows:

KShs.5,000 x 50 months which translates to KShs.250,000.

I consequently grant the appellant the said amount under loss of earnings.

13. Turning now to the prayer for future earnings or diminished earning capacity, there is a wealth of authorities which enunciate the principles that guide courts in the award of damages for loss of future earnings or diminished earning capacity. In **Butler V Butler, [1984] KLR 225**, the Court of Appeal differentiated the damages awarded in the aforesaid two limbs in the following terms:

"A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. ... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of

earning capacity is awarded as part of the general damages. ...”

14. The factors to be considered in assessing damages under either of the limbs depends on the circumstances of each case. As was well stated by *Majanja J* in ***Catherine Gatwiri V Peter Mwenda Karaai, [2018] eKLR***, the court considers the disadvantage the injured party will suffer in future from not working because of the injuries and take into account factors such as age, qualifications of the injured person, his remaining work life, disability among others.

15. In this case, the two medical reports authored by *Dr. P. M. Wambugu* and *Dr. Maina Ruga* confirm that the appellant’s left leg was amputated below the knee and that he had suffered permanent incapacity of between 30%-40%. However, none of the doctors stated that with this incapacity, the appellant could not engage in any gainful employment in future. The appellant did not also make such a claim in his evidence during the trial. In the circumstances, the appellant failed to prove that he was entitled to damages for loss of future earnings.

16. However, given that one of his legs was amputated and he suffered permanent disability assessed at 30%-40%, I am satisfied that his capacity to do manual jobs which he was engaged in to earn a living before the accident was diminished by the injuries he had sustained in the accident. It is not disputed that the appellant was 49 years at the time of the accident.

Considering all relevant factors and doing the best that I can, I award him damages for diminished earning capacity in the sum of KShs.500,000.

17. The appellant had also complained that the trial magistrate erred in law when he declined to award him costs of the suit. The law is that the award of costs is at the discretion of the trial court as provided for by *Section 27* of the *Civil Procedure Act*. The provision further states that costs should follow the event unless the court shall for good reason otherwise order. In this case, the trial court denied the appellant costs on ground that he had not served on the respondent a notice of intention to institute suit against him.

18. As expected, the respondent supported the trial court’s finding on costs relying on the persuasive authority of ***Kajuna Idd Noor V Rapid Kate Services Ltd & 4 Others, [2013] eKLR*** where the court held that where a plaintiff had not served a demand notice on a defendant prior to filing suit, under *paragraph 53* of the *Advocates Act*, the plaintiff was not entitled to costs. *Paragraph 53* of the *Advocates Act* states as follows:

“If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate’s costs shall be allowed except on a special order of the judge or magistrate.”

It is clear from the foregoing that the authority cited by the respondent was not applicable to the appellant’s suit since the respondent did not pay the appellant any money before or during the trial given the nature of his claim.

19. The above provision seems to suggest that in liquidated claims, failure to serve a defendant with a demand letter would disentitle a plaintiff of an award of costs. The rationale for this position was well captured by *Emukule J* in ***Catherine Ngore Obare V Stephen Mulanya Kula & 4 Others, [2014] eKLR*** where he expressed himself as follows:

“The basis of denial of costs for failure to give notice to sue is founded upon the principle that where the claim is for liquidated damages, it is considered that had the defendant been notified of the debt due, he would have paid, and the necessity of suit would have been avoided. The principle also applies where though suit has been filed, the defendant pays the claim well before the hearing of the suit. The general principle of law however is that costs follow the event.”

20. Given that the appellant’s claim was not liquidated, it is my finding that the learned trial magistrate erred in law when he refused to award costs to the appellant who was the successful litigant in a suit which was contested.

Having found the respondent liable, there was no good reason to deny the appellant costs even if he had not served a demand notice on the respondent prior to filing suit.

21. In the end, I find merit in the appeal and it is hereby allowed. The judgment of the trial court on the claim for loss of earnings and finding on costs is hereby set aside and is substituted with an order of this court awarding the appellant lost past earnings in the sum of KShs.250,000; damages for diminished earning capacity in the sum of KShs.500,000 and costs of the suit in the lower court.

22. On costs of the appeal, the order that best commends itself to me is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kaburu for the appellant

No appearance for the respondent

Mr. Salach: Court Assistant