



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO.10 OF 2017

LAXMANBHAI CONST. LTD.....APPELLANT/DEFENDANT

V E R S U S

JOSEPH GITONGA WARUTUMO.....RESPONDENT/PLAINTIFF

J U D G M E N T

The plaintiff/respondent **Joseph Gitonga Warutumo** filed a suit against the defendant/appellant, **LAXMANBHAI CONSTRUCTION LTD** for general and special damages for injuries he sustained in a road traffic accident which occurred on 24/11/2006 along Nyahururu Rumuruti Road near Maili Saba Trading Centre. The respondent was alleged that the appellant's motor vehicle KZK 219 driven by the appellant's agent drove it so negligently that he caused the vehicle to collide with the respondent as a result of which he sustained serious injuries. The allegations of negligence were enumerated in the plaint. The appellant filed a statement of defence denying the said allegations.

The matter proceeded to hearing by the court taking respondent's evidence but the appellant's agent did not testify. The court delivered its judgment on 9/12/2015 and made the following award:

- 1. General damages for pain and suffering Kshs.1,000,000/=**
- 2. Damages for loss of earning capacity Kshs.1,029,000/=**
- 3. Special damages Kshs.77,430/=;**
- 4. Costs of the suit and interest.**

The appellant was aggrieved by the magistrate's decision which provoked the instant appeal dated 11/2/2016. The grounds of appeal are as follows:

- 1. That the trial magistrate erred in law and fact in making an award of damages for loss of earnings of Kshs.1,029,000/= upon making findings not supported by pleadings and the weight of the evidence adduced in support thereof and eventually arriving at an amount there was excessive in the circumstances;**
- 2. That the learned magistrate erred in law and fact and wholly misapprehended the legal principles governing the assessment of damages for loss of earnings thus arriving at an excessive award to the respondent on damages for loss of earnings.**

The appellant prays that the appeal against judgment delivered by the trial court on 18/12/2015 be allowed in its entirety; that the judgment and decree be varied and or set aside and the appellant be awarded costs of this appeal.

As per the amended plaint dated 31/8/2010, the respondent sought the following prayers:

- 1. General damages;**
- 2. Special damages of Kshs.1,026,000/= for loss of earnings for 24/11/2006 upto 24/6/2010 at Kshs.21,000/= per month;**
- 3. Medical expenses of Kshs.77,850/=.**

The appellant does not challenge the award on general damages of Kshs.1,000,000/= and special damages of Kshs.77,430/=. The only challenge is to the award loss of earning capacity of Kshs.1,029,000/=.

The appellant filed submissions on 17/1/2018 while the respondent filed their reply on 16/2/2018.

Ms. Muriithi, counsel for the appellant submitted that though the respondent's claim was for loss of earnings, the court made an award of loss of earning capacity; that loss of earnings is a special damage claim that needs to be specifically pleaded and strictly proved whereas loss of earning capacity falls under general damages which has to be assessed by the court. Counsel further submitted that the payment vouchers produced by the respondent in evidence did not have statutory deductions and it is not clear which company issued the said vouchers; that they questioned the authenticity of the vouchers and that the vouchers had no probative value.

In reply, Ms. Njoki Muriithi, counsel for the respondent opposed the appeal and urged that the award was proper having been pleaded and proved by way of vouchers; that the documents had been served on the appellant's counsel before and they were never disputed; that they should have insisted that the maker of the vouchers be called as a witness.

This being a first appeal, it behoves this court to review all the evidence adduced especially as relates to the claim of loss of earnings.

As pointed out in the submissions, the amended plaint is clear. The respondent's claim was for loss of earnings specified as Kshs.21,000/= per month from 24/6/2010 to 24/11/2006 to 24/6/2010.

Contrary to the prayer in the plaint, the award made by the court is for loss of earning capacity. The question is whether the two terms 'loss of earning capacity' and 'loss of earnings' mean the same thing. The court in the case of Cecilia Mwangi & Another v Ruth W. Mwangi stated as follows:

“Loss of earnings’ is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of ‘loss of earning capacity’ can be classified as general damages but those have also to be proved on a balance of probability. See the case of Kenya Bus Services Ltd v Mayande (1991) 2 KAR 232 at page 235 where this court referred to the cases of Ali v Nyambu T/A Sisera Store Court of Appeal No.5 of 1990 (Unreported) and Shabani v City Council of Nairobi (1985) 1 KAR 684 and the statement of Lord Goddard (J) in the case of Bonham Carter v Park Ltd (1948) 647 T.L.R. 177 was approved.”

The above passage differentiates between what 'loss of earnings' is; that it is a special damage that needs to be specifically pleaded and strictly proved while 'loss of earning capacity' is a general damage claim that needs to be proved on a balance of probability.

The law is settled on when an appellate court can interfere with a Lower Court's award of damages. (The issue of liability is not challenged save for special damages.) This issue was restated in Kemfro Africa Ltd T/A Meru Express Services Githago Karu v A.M.N. Lubia and Aron (1982 – 88) 1 KAR 777 where the court stated:

“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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

In this case, the magistrate erred by making an award for loss of earning capacity when none had been pleaded nor is there evidence that it was proved.

In his testimony, the respondent said that he was injured on 24/11/2006; that he was at the time working as a driver and earned Kshs.700/= per day which translated to Kshs.21,000/= per month; that he used to sign payment vouchers upon receipt of the salary and produced payment vouchers for April, 2006 till November, 2006; that he was unable to drive after the accident. In cross examination, PW1 admitted that the vouchers had no letter head and that he neither paid PAYE, NSSF nor NHIF; that he resumed work in 2014. According to the appellant, there was no proof that the respondent earned Kshs.21,000/= per month. Firstly, the driving license produced by the respondent was issued in 2007. There is no evidence that it was a renewal. The accident herein occurred in November, 2006. The question that begs is whether the respondent worked as a driver without a driving license at the time of the accident.

In further attempt to prove loss of earnings, the respondent produced a letter from the employer and payment vouchers. The employment letter is a document that bears the Government Coat of Arms and is the property of the Kenya Revenue Authority. The respondent said that he was employed by his father as a driver and there was no nexus to the said document from Kenya Revenue Authority. As respects the vouchers produced as proof of the earnings, one of them was dated 1/4/2006, the basic pay is indicated as Kshs.700/=, there was a deduction of Kshs.140/= as NHIF then the net pay was entered as Kshs.21,000/=. These entries do not make sense because the appellant earned only Kshs.700/=, then the net could not have been 21,000/=.

In the other vouchers, there were no statutory deductions entered i.e. NSSF, PAYE or NHIF. These documents cannot be authentic because they do not even show the source as they have no letter head. The respondent said he was employed by the father. He could have called the father as a witness to confirm that indeed he had employed the respondent and further explain why the statutory deductions were not included in the vouchers. As submitted by the appellant's counsel, the purported payment vouchers do not meet the threshold requirements for payment statements pursuant to Section 20 of the Employment Act, 2007. From a careful consideration of these documents, I come to the conclusion that the documents are not authentic and are not proof of what the respondent earned if at all he earned.

I therefore set aside the award of Kshs.1,029,000/= on loss of earnings as having not been proved.

The appellant suggested that the court adopts and awards the respondent the minimum wage that was prevailing then, that is, Kshs.3,000/= per month. The respondent said nothing to this suggestion. I believe that even if the respondent did not have a regular job, he did some

casual jobs where he earned a living and I agree with the appellant that he can be awarded a minimum wage that was prevailing at the time. In my view, I would estimate the minimum wages prevailing at the time to have been about Kshs.5,000/= per month. The total period of time when the appellant did not work was 43 months. The loss of earnings therefore translates to Kshs.5,000/= x 43 months which totals to Kshs.215,000/=.

The respondent will therefore have judgment for the sum of Kshs.215,000/= as loss of earnings.

The appellant will have costs of the appeal.

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 10th day of July, 2018.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

N/A - for Appellant

Mr. Muriithi holding brief for Wahitu – for Respondent

Soi - Court Assistant