



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 248 of 2011

WILLIAM WAGURA

MAIGUA.....PLAINTIFF

-VERSUS-

ELBUR FLORA

LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff, William Wagura Maigua, instituted this suit against the defendant seeking general and special damages for injuries that he allegedly suffered owing to the negligence and/or breach of contract of employment on the part of the defendant.

The plaintiff alleges that on 23rd April, 2009 while in the course of his employment with the defendant he fell from a greenhouse truss that he was constructing and sustained serious injuries. He contends that the fall and the consequential injuries was due to the defendant's failure to provide him with a safe and proper system of work thus exposing him to a risk of damage or injury which it (the defendant) knew or ought to have known of.

The defendant though served with summons to enter appearance failed to enter appearance or file a defence within the stipulated. On 21st October, 2011, interlocutory judgment was entered in favour of the plaintiff and the matter was fixed for formal proof.

In his testimony, the Plaintiff (P.W.1) stated that he was employed by the defendant as a carpenter from 2005 to 2009 when the accident herein occurred. On 23rd April, 2009 while in the course of his employment with the defendant, he fell down when the truss of a greenhouse he was constructing collapsed on him. After this he lost consciousness and only came to at Molo Hospital where he was rushed for first aid. He was later on treated at the Provincial General Hospital, Nakuru before he was transferred to Kenyatta National Hospital and later to the Spinal Injuries Unit where he was confined for 14 months. He produced the Discharge Summary from Kenyatta National Hospital as exhibit 1. He further stated that owing to the injuries he sustained, he has not been able to resume work and indeed cannot undertake any job.

P.W.2, Dr. Joseph Onyango Oraya, examined the plaintiff on 11th July, 2011 and noted that he was suffering from paralysis of the limbs as a result of spinal injuries. According to him the plaintiff is unable to use his limbs and has to depend on other people for mobility. He prepared a report for which he was paid Kshs. 10,000/=. For court attendance, he was paid Kshs. 32,000/=. In proof of these charges he produced receipts (plaintiff exhibit 4 and 5 respectively).

In his submissions the plaintiff has urged this court to find the defendant 100% liable for the accident. He argues that since the defendant did not file a defence and/or call any witness to controvert the allegations of negligence and/or breach of contract leveled against it should be deemed as admitted.

Relying on the medical report of Dr. Onyango ,(P.W.2) and the authority of John Mwongera V. Stanley Maingi Mwongera Ngeera, Meru HCCC No. 32 of 2004, the plaintiff has made the following claim for damages:-

General damages for pain and suffering.....	Kshs.4,000,000/=
Loss of Consortium.....	Kshs.1,000,000/=
Loss of earnings.....	Kshs.1,300,000/=
Home care expenses (maid).....	Kshs.500,000/=
Wheel chair.....	Kshs.300,000/=
Total.....	<u>Kshs.7,100,000/=</u>

He has also claimed special damages amounting to Kshs. 42,000/=, in respect of money expended in procuring the medical report and attendance of Dr. Oraya (P.W.2) to testify.

In this case, as no appearance or defence was filed the issue of liability was settled in favour of the plaintiff through entry of interlocutory judgment on 21st October, 2011 and the plaintiff was not under any obligation to call evidence to prove it. (See the decision in Susan Nyachi V. Kijabe Limited Nairobi , High Court Civil Appeal No. 950 of 2003 and that of the Court of Appeal in Mbaka Nguru & Anor V. James George Rakwar Court of Appeal Civil Appeal No. 133 of 1998).

Starting with the claims for future earnings and future medical expenses, the Court of Appeal in Mbaka Nguru (supra) held that a claim for loss of future earnings is a claim for special damages which ought to be specifically pleaded and proved and likewise, the claim for future medical expenses must be pleaded and proved as a special damages claim.

In emphasizing the need for plaintiffs to properly plead their damages the court observed:-

“Plaintiffs who do not plead for their damages properly and who do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to the damages claimed under this head we are constrained to disallow the whole of that award and we set it aside wholly”

Whereas the plaintiff has submitted for Kshs.1,300,000/ in respect of loss of earnings, Kshs.1,000,000/= for loss of consortium, Kshs.500,000/= for home care expenses and Kshs.300,000/= for a wheel chair, these claims were not pleaded. Having failed to specifically plead them, the plaintiff cannot introduce those claims through evidence or submissions. For this reason I make no award in respect of the above heads.

In deciding the damages to award to the plaintiff this court must ensure that the award is within limits set out by decided cases based on comparable injuries and also within limits the Kenyan economy can afford (Kigaragari V. Aya(1982-1988)1 KAR 768).

In this case, the plaintiff suffered paralysis in all the limbs (quadriplegia), loss of control of urine and stool, loss of ability to perform any sexual function, proneness to frequent chest infection and injury to the spinal cord. The injuries rendered him 100% dependent. He was indeed on a wheelchair when he came before the court. For these injuries he claims Kshs. 4,000,000/=. In support of his claim he relies on

John Mwongera V. Stanley Maingi Mwongera Ngeera Meru HCCC No. 32 of 2004 in which the plaintiff was awarded Kshs.2,000,000/= for similar injuries (fractured dislocation of the cervical vertebrae 4 and 5 resulting in paralysis).

On 23rd December, 1998 the Court of Appeal in Civil Appeal No. 133 of 1998 (supra) reduced the High court award of Kshs.2, 500,000/= to Kshs.1,500,000/= for similar injuries (paraplegia resulting from fracture of the T12 thoracic vertebra with spinal cord damage). Like in the instant case the injuries rendered the plaintiff in that case 100% dependent. On 30th August 2001 Joyce Aluoch, J (as she then was) in Nairobi HCCC No.2735 of 1998 awarded Kshs. 3,000,000/= for injuries that resulted in paraplegia/weakness of the body and rendered the plaintiff 100% dependent. On 24th June, 2011 R.P.V Wendoh, J. in **Nancy Oseko V. The B.O.G Masai Girls High School Nairobi**, HCCC No. 171B of 2009 awarded Kshs.2,500, 000/= to the plaintiff who was rendered paraplegic and 100% dependent.

From the authorities above, it is clear that the courts have been awarding between Kshs.1, 500,000/= and 3,000,000/= as damages for pain and suffering for the injuries similar to those suffered by the Plaintiff herein. As damages must be within limits set by decided cases, in this case I make an award of Kshs.3, 000,000/=.

As regards special damages, although the plaintiff submitted for Kshs.42,000/= I note that he only pleaded for Kshs.10, 650/= out of which Kshs.10,000/= was strictly proved by production of a receipt (plaintiff exhibit 4) the same is awarded to him. The Kshs.32,000/= paid to the doctor form part of the costs of the suit. They cannot be claimed as special damages as special damages have to be pleaded and strictly proved.

The upshot of the foregoing is that I enter judgment for the plaintiff against the defendant for Kshs.3, 000,000/= in general damages, Kshs.10,000/= in special damages plus costs and interest.

Dated, Signed and Delivered at Nakuru this 5th day of October, 2012.

**W. OUKO
JUDGE**