



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 110 OF 2013

BETWEEN

NATHAN NYAMBU MAGHANGA.....APPELLANT

AND

BENARD M. WANJALA.....1ST RESPONDENT

MARGARET TONUI.....2ND RESPONDENT

(An Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret, (G. W. Ngenye – Macharia, J.) dated 27th November, 2012

in

CIVIL APPEAL NO. 240 OF 2010)

JUDGMENT OF THE COURT

1. On 17th May 2008, the appellant, Nathan Nyambu Maghanga, was travelling as a passenger in motor vehicle registration number KAE010R that was being driven by the 1st respondent along Eldoret-Kitale road. The vehicle, owned by the 2nd respondent, was involved in a road traffic accident as a result of which the appellant sustained severe injuries including a cervical spine injury that resulted in paralysis of both his lower limbs. He filed suit against the respondents in the Magistrates' Court at Eldoret seeking general and special damages. For pain suffering and loss of amenities, that court awarded him general damages of Kshs. 1,400,000.00. The court also awarded him special damages of Kshs. 44,797.00 making a total award of Kshs.1, 444,797.00. That amount was reduced by 10% as the parties recorded a consent order limiting the respondents' liability to 90%.

2. The trial court declined to award the appellant what he had claimed in his plaint as damages for "lost earnings and income". In his judgment, the learned magistrate stated, "*As regards lost earning and loss of future earning, I would agree with the defendant counsel that none are awardable as no basis for the award was laid before me. There is no payslip to show that the [appellant] used to earn at raiPLY.*" (Sic) According to the Magistrate, the appellant should have produced a medical report based on a recent examination "*to confirm his present medical condition and to give an indication of his future prospects.*"

3. The appellant appealed to the High Court against that part of the judgment declining to award him damages for “*lost earnings and income*”. The High Court found that the trial court had misdirected itself when it made a finding that no payslip had been produced as evidence when in fact the appellant had produced, as exhibit 6, his payslip for the month of April 2008 that demonstrated that he earned a gross monthly salary of Kshs. 7,827.00.

4. The High Court also faulted the trial magistrate’s finding that there was no evidence, in the form of a recent medical report, regarding the appellant’s future prospects. The High Court was satisfied, based on its own review of the medical evidence, that the extent of the injuries the appellant sustained were such that the appellant would no longer be able to walk and there were no chances of him resuming gainful employment.

5. In the words of the High Court, the appellant had proved “*inability to engage in gainful employment hitherto enjoyed resulting in loss of earnings.*” However, being of the view that damages for “*lost earnings and loss of future earnings are specific damages*” that “*must be specifically pleaded and specifically proved*” the High Court declined to award the appellant damages under those heads on the basis that the appellant did not so plead them. The Judge said:

*“I do in this regard entirely agree with Counsel for the Respondents that failure to plead the damages must fatally bring down this appeal. I do however disagree with him, as I have indicated earlier on in this Judgment that the Appellant did not prove his inability to ever work again. My view is that had he pleaded for these damages, I would have gladly awarded them subject to taking into account contingencies of life and all relevant factors surrounding the case. I support my findings with decided case in **KISUMU CIVIL APPEAL NO. 91 OF 2003 – MUMIAS SUGAR COMPANY LIMITED –VS- FRANCIS WANALO – Bosire, O’kubasu and Githinji, JJA,**”*

6. Later in the judgment, the Judge concluded that:

“The Complaint dated 21st October, 2008 is in black and white that damages for lost earnings were not pleaded. Neither was there subsequent application to amend the complaint. It is for this reason that this appeal will fail.”

7. It is noteworthy that while the trial court declined to award the appellant damages under those heads on the grounds that there was no evidence to support the claims, the High Court on its part made a finding that there was indeed evidence to support the claims but that the claims were not pleaded.

8. The appellant has in this second appeal faulted the High Court for holding that the appellant did not plead a claim for lost earnings and for dismissing his appeal on that basis.

9. Learned counsel for the appellant, Mr. Francis Omondi, submitted that the decision of the High Court is contrary to law; that the Judge failed to consider that the claim for loss of earnings and income was pleaded; and that having correctly found that the appellant would no longer be able to walk and there were no chances of him resuming gainful employment the Judge should have awarded damages under those heads. In support of his submissions Mr. Omondi referred us to the decision of this Court in **James Mukatui Mavia vs. M. A. Bayusuf & Sons Limited [2013] eKLR.**

10. Opposing the appeal, learned counsel for the respondents, Mr. J. I. Nyarotso, submitted that the learned Judge of the High Court was right in that the appellant’s pleading did not contain a specific pleading in relation to the claim for loss of earnings. Counsel drew our attention to the decision of this Court in Douglas **Kalafa Ombeva vs. David Ngama [2013] eKLR** and a decision of the High Court in **Daniel Kosgei Ngelechei vs. Catholic Trustee Registered Diocese of Eldoret and another [2013] eKLR** for the proposition that a claim for loss of earnings is in the nature of a special damage claim that must be pleaded and proved.

11. We have considered the appeal and the submissions by learned counsel. Under Section 72(1)(a) of the

Civil Procedure Act, an appeal lies to this Court from a decree passed in appeal by the High Court on the grounds, inter alia, that the decision is contrary to law.

12. The appellant contends that the decision of the High Court in this case is contrary to law in that the Judge deprived him of an award for loss of earnings despite the claim having been pleaded and proved. According to the appellant, the learned Judge did not properly discharge her function to properly appraise the appellant's pleading.

13. It is common ground, and it is an established principle that a claim for loss of earnings is in the nature of a claim for special damages that must be pleaded and proved. As already mentioned, and as appears from the extracts of the judgment reproduced above, the High Court found that the claim for "lost earnings" was proved but declined to make an award on the basis that the claim was not pleaded. In arriving at that conclusion, the Judge did not make reference to or regard paragraph 8 of the appellant's plaint where the appellant pleaded as follows:

"The plaintiff states that prior to the accident herein, he was employed by Rai Plywoods (K) Limited as a winder earning an income of Kshs.7, 243/- per month which income he has now lost after being retired on medical grounds owing to the injuries sustained in the accident. The plaintiff is aged 39 years and was due to retire at the statutory age of 55 years. The plaintiff therefore claims cumulative lost earnings and income from the defendants jointly and severally."

14. The respondents' grievance with that pleading is not entirely clear. In their submissions before the trial court the respondents acknowledged that "*the plaintiff pleaded loss of earnings and income*" and contended that in the absence of medical evidence regarding the degree of permanent disability, it should be assumed that the appellant would recover from his injuries and resume work. The respondents then concluded their submissions before the trial court as follows:

"However, this is only in proof of loss of earning capacity. However, loss of future capacity were (sic) not pleaded. None can be awarded. Lost earnings relate to the period of temporary incapacity between injury and resumption of work. Given that loss of earning capacity was not specifically pleaded and proved we pray you dismiss the Plaintiffs claim on this limp."

15. We appreciate that the words "loss of earnings" or "loss of future earnings" or "loss of earning capacity" or "loss of future earning capacity" are not deployed or used in the appellant's pleading. That does not, however, negate the substance of the plea. It is plain from the averments in paragraph 8 of the plaint that the appellant was stating that he lost his employment and attendant income from Rai Plywoods (K) Limited on account of the severe injuries he sustained from the road traffic accident. He was incapacitated to the extent that he was retired on medical grounds.

16. It is also plain from the pleading that he was saying that, but for the injuries, he would have continued to work to the retirement age of 55 years. As he put it in his submissions before the trial court, he "*lost the income he would have earned for a period of 16 years*"

17. In our view, the plea in paragraph 8 of the plaint coupled with the evidence tendered by the appellant provided sufficient basis for the court to assess and award damages for loss of earnings and loss of future earnings. Furthermore, the trial court did not reject the claims on the basis that they were not pleaded. Based on the memorandum of appeal before the High Court, the complaint before that court was not that the claims were not pleaded. The complaint was that the trial court failed to consider all the evidence and that it dismissed "*the appellant's claim for lost earnings and income against the weight of the evidence.*"

18. In the circumstances we hold that the lower courts erred in failing to assess and award damages for loss of earnings and loss of future earnings. We shall now do so.

19. Evidence tendered before the trial court included a letter dated 12th July 2008 from the appellant's

former employer Rai Plywoods (Kenya) Limited informing him that he had “*been retired from... employment on medical ground*” with effect from 12th July 2008 and that his final dues including days worked would be paid up to 12th July 2008. By the time judgment was delivered by the trial court on 17th November 2010, he had been out of work for 28 months.

20. The appellant earned a gross pay of Kshs. 7,827.00 per month based on his payslip for the month of April 2008 that was produced as exhibit 6. The total statutory deductions were Kshs. 584.00 leaving a balance of Kshs.7, 243.00 per month as pleaded in paragraph 8 of the plaint. He was entitled, in our view, to an award for lost earnings for the period of 28 months amounting to Kshs. 202,804.00.

21. As regards loss of future earnings, in **Mumias Sugar Company Limited vs. Francis Wanalo [2007] eKLR** this Court associated itself with the words of Lord Denning in **Fairley vs. John Thompson Ltd [1973] 2Lloyd’s Report at page 40**, where he stated, “**compensation for loss of future earnings is awarded for real assessable loss proved by evidence.**”

22. There are many imponderable factors that would have prevented the appellant from working until the retirement age of 55. As the Court stated in **James Mukatui Mavia vs. M. A. Bayusuf & Sons Limited** (supra)

“ The method evolved by the courts for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future is by taking the figure of the claimant’s present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, [the multiplier] is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. Adjustments may be made to the resulting amount on account of other contingencies of life. (see McGregor on damages, 18th edition paragraph 35 – 065).”

23. Based on the appellant’s net monthly salary of Kshs. 7, 243.00 and assuming he would have worked to the age of 55 years and taking into account that he was 39 years old and having regard to the contingencies of life and accelerated payment, we award him damages equivalent to the salary he would have earned in eight years. We accordingly award him Kshs. 695,328.00 made up of 7,243.00 multiplied by 12 multiplied by 8.

24. The total award amounting to Kshs. 898,132.00 will be reduced by 10% in terms of the consent of the parties on liability, with the result that the net award is Kshs. 808,318.80 for loss of earnings and for loss of future earnings.

25. We accordingly allow the appeal. We set aside the judgment of the High Court to the extent that it dismissed the appellant’s claim for loss of earnings and for loss of future earnings and substitute therewith an order awarding the appellant Kshs. 808,318.80. Interest on that amount will accrue at court rates from the date of judgment of the trial court, i.e. 17th November 2010, until payment in full.

26. The appellant shall have the costs of this appeal and of the High Court.

Orders accordingly.

Dated and delivered at Eldoret this 14th day of June, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR