



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
(MWERA, WARSAME, GATEMBU, JJ.A)
CIVIL APPEAL NO 24 OF 2005

BETWEEN

DOUGLAS KALAFKA OMBEVA.....APPELLANT

VERSUS

DAVID NGAMA.....RESPONDENT

(being an appeal from the judgment and decree of the High court of Kenya at Nairobi (the Hon. Lady justice M. Ang'awa) dated 3rd May 2001

in

High Court Civil Case No. 754 of 1998)

JUDGMENT OF THE COURT

This appeal arises out of a road traffic accident which occurred on 6th December 1995 where the appellant, Douglas Kalafa Ombeva, was injured. He filed **Civil Case Number 754 of 1998** in the High Court of Kenya. The circumstances surrounding the accident were that the appellant was riding on a motorcycle, when the respondent's driver/agent caused a collision. Through the plaint dated 31st March 1998, the appellant sought:

- a. Special damages
- b. General damages
- c. Costs of the suit
- d. Interest on (a) (b) and (c) above.

In paragraph 7 of the plaint, the appellant claimed that before the accident, he was working as a messenger earning a salary of Kshs. 3913.00 but as a result of the injury he suffered, he had been rendered jobless. During trial however, he claimed that he was earning Kshs. 3,670.00 a month. He testified that he had since lost his job, and was at the time living on his father's farm in Western. The respondent opposed any award for damages for loss of earning capacity as there was no proof of a salary.

A consent was entered into by the parties on 2nd May 2001, in which special damages were agreed at Kshs. 64,412.00, subject to liability. Liability was also agreed upon at 25% against the appellant and 75%

against the respondent. The only issue that remained for determination was the award of general damages due to the appellant.

Upon determination, the trial judge found that the appellant suffered serious injuries and had his arm amputated above the elbow. The appellant was awarded general damages for pain, suffering and loss of amenities at Kshs 300,000.00, subject to apportionment. On the issue of loss of earnings, the trial court agreed with the respondent that this claim had not been proved, and stated that ‘to prove this head of damage, one requires to have a letter from the employer confirming employment and the rate of employment’. This claim was therefore dismissed.

The appellant being aggrieved, filed the present appeal, setting out two grounds:

- a. ***That the learned judge erred in awarding no damages for loss of earning for lack of proof when there was evidence that the Plaintiff was earning Kshs. 3,670.00;***
- b. ***The learned judge erred and was wrong in disregarding the submissions and authorities referred to by counsel for the appellant regarding the award of general damages and in the circumstances misdirected herself to the law and awarded damages properly awardable to the appellant for the injuries he sustained.***

The appellant therefore prays for orders that:

- a. ***The appellant be awarded damages for loss of earning and loss of capacity;***
- b. ***The award of general damages to the appellant be increased to such sum as would be reasonable and adequate compensation to the appellant for the injuries he sustained and;***
- c. ***Costs of the appeal.***

The appeal was argued before us on 21st May 2013. On the first ground, the appellant argued that he had testified that he was a messenger earning a salary of Kshs. 3,670.00, paid by Bons Company although he had no receipt. He argued that employers do not always give payslips, and the sum of Kshs. 3,670.00 was a reasonable figure, yet the trial court gave no award at all.

On the second ground, counsel for the appellant argued that the damages awarded were too low. At trial, the appellant had suggested a figure of Kshs. 800,000.00, while the respondent had suggested a figure of Kshs. 300,000.00. The court awarded the sum of Kshs 300,000.00 which when subjected to apportionment, came to Kshs. 250,000.00. The trial court gave no reasons for this award, and failed to take into account that there was total loss of the right arm.

The first issue that arises for our determination is whether the appellant was entitled to damages under the head of ‘loss of earning.’

In the case of *Karani vs. Nchedu (1995-1998)1 EA 87*, this court stated that:

“The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Ksh.50,000/= per month. She produced no documentary evidence to support this claim but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.”

In *Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR (Civil Appeal 91 of 2003)* this court sitting in Kisumu cited the case of *Fairley v John Thompson Ltd [1973] 2 Lloyd’s Rep. 40* where Lord Denning explained the difference between loss of earning capacity and loss of earnings:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution

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

Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically. In the present case, the appellant provided no evidence that he was indeed employed at Bons Company and that he was earning the 3,670.00. In this case, the sum pleaded was Kshs. 3,913.60, but like in the ***Karanu*** case, there was no evidence to support this claim. Even though the appellant claims that the sum was reasonable, and the court ought to allow it, we find no basis to do so. We are satisfied that the trial judge applied the correct principles on this head and this ground of appeal therefore fails.

The second issue that the appellant raises is that the amount awarded as general damages is too low, and has asked us to interfere with it.

The principles upon which an appellate court will interfere with an award of damages in the High Court are well settled – the court will only interfere where the trial judge considered matters that ought not to have been considered, misapprehended aspects of the case, or made an award that was too low or too high that must have been improper. See ***Tracom Limited & Another V Hassan Mohamed Adan [2009] eKLR (Civil Appeal 192 of 2006)*** where this court stated that:

“In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award .”

The appellant had urged the trial court on loss of earning capacity. He stated that as a result of the amputation of his right arm, he was no longer able to work. He prayed for the sum of between Kshs 400,000.00 and 500,000.00. He also prayed for an award of Kshs 800,000.00 for pain and suffering.

In support of his case, a Dr. Museve testified that the appellant sustained a head injury which left him confused for three days, and had a fracture of the right femur which resulted in the arm being amputated on 19th December 1995. He assessed the disability of the appellant at 70%. In the end, the trial court awarded a sum of Kshs. 300,000.00 for pain, suffering and loss of amenities.

While loss of earnings fall under the head of special damages, which must be specifically pleaded and proved, loss of earning capacity on the other hand, falls under the head of general damages and would need to be proved on a balance of probabilities. See ***Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR*** where this court stated that:

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 these have also to be proved on a balance of probability.

In ***Butler v Butler [1984] KLR***, Nyarangi JA also distinguished the two and went on to state that “***it was immaterial at the time that the respondent had not been in salaried or similar employment.***”

In ***Mumias Sugar Company Limited V Francis Wanalo [2007] eKLR*** this court stated that

“The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a

token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability. (emphasis ours)

The trial judge rejected the respondent's authority, which suggested a sum of Kshs 250,000.00 as being inapplicable to the present circumstances, and instead allowed a sum of Kshs. 300,000.00.

In our considered view, the trial judge failed to fully evaluate the circumstances surrounding this case in making her determination. In this case, the appellant was a young man of 24. He was in a confused state for a period of three days. He was right handed, and would have to learn how to use his left hand. Moreover, it was the appellant's testimony that he had since lost his employment, and had been unable to secure paid work. In our view, the sum of Kshs 300,000.00 for pain, suffering and loss of amenities allowed by the judge was inordinately low. The trial court does not appear to have taken into account the element of loss of earning capacity.

We would therefore allow the appeal, set aside the order of the trial court, and enhance the sum of general damages to Kshs. 500,000.00, subject to liability as agreed in the superior court. The appellant shall also have the costs of this appeal.

Dated and delivered at Nairobi this 14th day of June, 2013.

J. W. MWERA

.....

JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

/mwk.