



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 91 OF 2003

MUMIAS SUGAR COMPANY LIMITED APPELLANT

AND

FRANCIS WANALO RESPONDENT

**(Appeal from a judgment and decree of the High Court of Kenya Kisumu
(Lady Justice Gacheche) dated 26th day of September, 2002 In H.C.C.C.
NO. 243 OF 2001)**

JUDGMENT OF THE COURT

The appellant is aggrieved by the judgment and decree of the superior court (Gacheche J) by which the superior court found the appellant liable for negligence and awarded the respondent special and general damages for injuries sustained in an industrial accident. The appeal is against both liability and damages.

The respondent was on a four – year apprenticeship for general fitting and mechanical engineering and was attached to the appellant’s factory. On the material date, 4th July, 1998, the respondent and other employees of the appellant were instructed to remove a locker from the first floor of the factory building to another building about 50 metres away. The locker had to be lowered to the ground floor, put in a fork lift and ferried to the other building. The respondent and his colleague John Ododa decided to use an overhead crane to lower the locker.

Since the walkways on the upper floor had been dismantled and the switch handle cable of the crane was short, the crane could not be operated from the ground. The respondent decided to climb on to the crane by using a fixed ladder and operate the crane from there. His colleague John Ododa remained on the ground. He was required to give the respondent instructions on how to control and direct the crane and how to hook the locker onto the crane.

The respondent operated the crane, hooked the locker onto the crane and lowered the locker to the required position. The respondent then positioned the crane near the ladder in order to alight using the ladder. After this, the respondent dropped the switch handle of the crane to Adriano Otanga, an acting supervisor Adriano Otanga in turn operated the crane before ensuring that the respondent had alighted thereby causing part of the crane to push respondent’s right thigh on the beam of the structure of the building and another part of the crane to crush two fingers of the respondent’s right hand.

The respondent averred in the plaint that the accident was caused by the negligent operation of the crane by the appellant’s servant to wit, switching on the crane using the switch button without waiting for

the respondent to alight, switching on the crane while knowing or having reason to know that the respondent was in unsafe position and acting without due regard to the respondent's safety. The appellant merely denied negligence in its defence and put forward two alternative defences – the defence of contributory negligence and *volenti fit non injuria*. The trial Judge evaluated the evidence and made a finding that the appellant was wholly liable for negligence and that the respondent was not guilty of contributory negligence. The appellant complains that the learned Judge erred in so finding.

This being a first appeal is in the nature of re-trial (see *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123, *Mariara v Kenya Bus Services (MBS) Ltd* [1987] KLR 440). However, it is a well settled principle that the court should be slow to interfere with the findings of fact made by a trial court (see e.g. *Peters v Sunday Post Ltd* [1958] EA 474; *Hahn v Singh* [1985] KLR 716).

The evidence of the respondent regarding the occurrence of the accident and the circumstances under which the accident occurred were not controverted. Indeed, the defendant did not call any witness at all. The respondent in addition produced an internal investigation report of the accident by the appellant's Security Officer dated 24th July, 1998 and the accompanying statements of the witnesses including the statement of Adriano Otanga.

The investigator reported in part:

“From the facts on record it is clear that Adriano Otanga was negligent in the performance of his duties in that he operated the crane switch with full knowledge that his colleague Francis Wanalo was still at an unsafe position, on top of the crane, thereby causing injury to his right hand and thigh”.

The investigation report was produced as exhibit without any objection by the appellant's counsel. The report exonerates the respondent from any degree of contributory negligence and blames Adriano Otanga, the appellant's servant for the accident. Adriano Otanga admitted in his statement that he operated the crane and caused the accident..

On our re-appraisal of the evidence, we are satisfied that the superior court reached the correct decision on liability.

The appellant who was about 26 years at the time of the accident sustained a traumatic amputation of the small finger of the right hand, crush injury to the fourth finger of the right hand and soft tissue contusion with bruises on the right thigh. He was admitted in hospital for 4 days and the base of the amputated small finger stitched. He thereafter attended out-patient treatment. He was subsequently admitted in hospital for one month. He took six months before he could resume duties. According to Dr. Juma, who examined the respondent at the request of respondent's advocate the deformity of the two fingers and osteo-arthritis of the joint has resulted to permanent incapacity of 15%. However, according to Dr. Raburu who examined the respondent at the request of the appellant, the respondent sustained a permanent disability of about 10%.

The appellant was paying the respondent Shs.8,300/= per month during the four years of apprenticeship and upon expiry of the apprenticeship the respondent left the company on 20th December, 1998. The superior court awarded the respondent Shs.200,000/= as general damages for pain suffering and loss of amenities, Shs.1,500/= as special damages and Shs.2,016,000/= for loss of earning capacity.

In computing the latter award for loss of earning capacity, the learned Judge applied a multiplicand of Shs.7,000/= per month and a multiplier of 24. The appellant in grounds 6 and 8 of the appeal attacks the award for loss of earning capacity thus:

“6. The learned trial Judge misdirected herself in awarding damages under 2 separate heads one ostensibly for pain and suffering and loss of amenities; and the other for loss of earning capacity when the plaint showed otherwise.

7.

8. That the award of damages for loss of earning capacity was so high as to represent an entirely erroneous estimate”.

The principles upon which an appellate court can interfere with the assessment of damages by a trial court has been enunciated in many cases, (see *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470; *Kemfro v. A. M. Lubia & Olive Lubia* [1982-88] 1 KAR 727).

The respondent sought four reliefs in the plaint, namely:

- a. General damages for pain, suffering, loss of amenities and for loss of earning capacity.**
- b. Special damages.**
- c. Costs of the suit.**
- d. Interest on (a), (b) and (c) at court rates from the date of filing suit until payment in full”.**

As Lord Denning MR said in *Fairley v John Thompson Ltd* [1973] 2 Lloyd’s Rep. 40 at page 41:

“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”.

The characteristics of an award for loss of earning capacity and the principles on which it is assessed were considered more comprehensively in *Moeliker v Reyrolle & Co. Ltd.* [1977] 1 WLR 132. In that case Browne L.J. said at page 140, paragraph B:

“This head of damages generally only arises where a plaintiff is at the time of trial in employment, but there is a risk that he may lose this employment at sometime in future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial”.

The claim for loss of future earnings as Browne L.J. said later at page 140 paragraph G, is assessed on the ordinary multiplier/ multiplicand basis. In contrast, where there is a substantial risk that a plaintiff at some future date before the end of his working life will lose his job and be thrown in the labour market, the assessment of risk and damages is much more difficult. Browne L.J. observes at page 141 paragraph E that, no mathematical calculation is possible and refers to an earlier decision of the English Court of Appeal where two members of the court said that the multiplier/multiplicand approach was impossible or inappropriate (which statement Browne L.J. qualified) and concluded that, it was impossible to suggest any formula for determining the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market.

On the quantum of an award for loss of earning capacity, Browne L.J. said at page 143 paragraph B:

“It was suggested in the course of argument that whenever a plaintiff established a claim under this head the damages was to be considerable and that it can never be right to award only a few hundred pounds damages. I do not agree. Each case must, of course, depend on its own facts, but if the court decides that the risks of the plaintiff losing his present job, or of his being unable to get another job or an equally good job or both, are only slight, a low award is right”.

On his part, Stephenson L.J. said much the same thing at page 144. Referring to the two risks which have to be considered, that is, the plaintiff’s chances of losing his job, and his chances, if he loses it, of getting other employment, his Lordship said at paragraphs D – E:

“The extent of each risk varies with the circumstances of every case. If, as will be rare both are

negligible or fanciful ... no award should be made

If one or both are real or substantial, but neither is serious, the award should not be a token or derisory award but should generally be in hundreds of pounds

If both risks are serious, the compensation should generally be in thousands of pounds”.

The case of ***Clark v Rotax Aircraft Equipment Ltd*** [1975] 1 WLR 1570 illustrates that a court can, in an appropriate case, give an award for loss of future earnings and for loss for earning capacity to the same plaintiff so long as the overlap of the two awards of damages is avoided.

The award for loss of earning capacity was exhaustively considered by this Court in ***Butler v Butler*** [1984] KLR 225. In that case, the superior court awarded both damages for pain and suffering and for loss of earning capacity as separate heads to a lady who had been severely injured in a road traffic accident. Although the plaintiff in that case was not in employment at the time of the accident the superior court, nevertheless, found that with her injuries she would never be able to find a suitable job and computed the loss of earning capacity on multiplicand/multiplier basis. On appeal, the award for loss of earning capacity was attacked on similar grounds as the award in the instant case. After reviewing the English cases, Kneller JA said at the page 233 paragraph 5:

“It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then or at the date of trial)”.

On his part, Chesoni Ag. JA. (as he then was) expressed the view that whilst, loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading, adding:

“once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages, it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if the damages are payable?”.

Lastly, Nyarangi Ag. JA. (as he then was) said at page 236 paragraph 40:

“There was no evidence before the trial judge; that the respondent has before been in salaried employment. There could therefore be no claim for: “Loss of future earnings”. However having been injured to the extent of not being able to find a suitable job, the respondent had lost her capacity to earn”.

And further on at page 237 paragraphs 15:

“The trial judge was here doing his best to assess in monetary terms, the loss of earning capacity. It was immaterial that the respondent had not been on salaried or similar employment. This type of claim could, as Kneller JA says be a claim on its own and the figure need not be plucked from the air, because the plaintiff would be expected to furnish the material on which a reasonable figure would be based”.

From the above analysis of the English case law and the decision of this Court in ***Butler v Butler***, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. 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.

In the instant case, the loss of earning capacity was claimed as part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent incapacity was assessed at 15% by Dr. Juma and at 10% by Dr. Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained – mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial. It was minimal. The trial Judge in assessing the multiplicand of Shs.7,000/= per month took into account that the appellant was earning Shs.8,300/= p.m. during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/multiplier basis. In this, the learned Judge erred in principle. Indeed, considering the method of computation and the degree of the respondent's disability the award of Shs.2,016,000/= was in reality, but in name only, an award for loss of future earnings. That award is in any case, grossly so high that it amounts to an erroneous estimate of the loss. However, it was appropriate in the circumstances of this case to make a fair award for loss of earning capacity. We think that an award of Shs.500,000/= would be adequate compensation for the diminution of respondent's chances of employment in the labour market. There is no appeal or cross – appeal against the award of Shs.200,000/= as general damages for pain suffering and loss of amenities. Since the appellant has not wholly succeeded in this appeal, it is just that each party should bear his/its own costs of this appeal.

In the result, we allow the appeal to the extent that the award of Shs.2,016,000/= for loss of earning capacity is set aside and substituted with an award of Shs.500,000/=. This is in addition to the award of Shs.200,000/= for pain, suffering and loss of amenities with which we have not interfered. We make no orders as to the costs of this appeal.

Dated and delivered at Nairobi this 31st day of July, 2007.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR