



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**APPEAL NO. 9 OF 2019**

**(Formerly Nairobi HCCA 655 of 2017)**

**Before Hon. Lady Justice Maureen Onyango**

**JOHNSON OUMA OBODHO.....APPELLANT**

**VERSUS**

**HK BUILDERS AND GENERAL CONTRACTORS LIMITED....RESPONDENT**

***(Being an appeal arising from the judgment of Hon. Mrs. T. W. C. Wamae, Chief Magistrate which was delivered on 23<sup>rd</sup> November 2012 at the Chief Magistrate's Court at Milimani Commercial Court in Civil Case No. 5974 of 2009)***

**JUDGMENT**

The Appellant filed the instant appeal against the decision of Hon. T. W. C. Wamae, Chief Magistrate delivered on 23<sup>rd</sup> November 2012. In her Judgment, the Learned Magistrate entered judgment at the ratio of 90:10% being the sum of Kshs.404,580. She dismissed the claim for diminished earnings for reason that the Appellant did not tender any evidence to support his claim. In the appeal, the appellant prays that the decision declining to make an award for diminished earning capacity be set aside and substituted with a reasonable award for diminished or lost earning capacity.

The appellant raises the following grounds of appeal:

1. The learned Chief Magistrate erred by failing to make an award diminished earning capacity.
2. The Learned Magistrate erred by failing to have due regard or any regard for the consent of the parties on the medical reports and minimum wages.
3. The Learned Magistrate erred by failing to take into account the injuries and the percentage of permanent incapacity.
4. The Learned Magistrate failed to consider the authorities cited on the head of diminished earning capacity or the settled legal principles.

The appeal was disposed of by way of written submissions.

**Appellant's Submissions**

The Appellant submitted that the supplementary record of appeal indicates that the case was compromised on liability in the ration of 80:20. He submitted that he previously earned Kshs.10,800 monthly but after the accident he was unable to secure employment and lost his earning capacity. He further submitted that to prove his incapacity, he relied on 2 medical reports which were produced by consent.

He relied on the case of **Mumias Sugar Co. Ltd v Francis Wanalo [2007] eKLR** where the Court held that the loss of earning capacity can be claimed as part of general damages or as a separate head. Further that the judge has to apply the correct principles and take into account relevant factors in order to ascertain the real or approximate financial loss.

He submitted that there is no formula in the award of these damages thus the fact of injuries and disability speak for themselves. He submitted that the parties had agreed that the loss of earnings be based on the minimum wage for the year 2008 which was Kshs.10,239. Relying on the **Mumias Sugar Case** (Supra) he submitted that an award of Kshs.1,000,000 would be sufficient as the disability here was double.

## Respondent's Submissions

The Respondent submitted that the trial judge did not err by failing to award the appellant for diminished capacity as it failed to prove this claim. It further submitted that appellant did not provide any evidence to illustrate that the income he received post-accident was different from what he earned previously.

The respondent relied on the Court of Appeal decision in **Cecilia W. Mwangi and Another v Ruth W. Mwangi [1997] eKLR** where the court opined that damages under the head of "loss of earning capacity" can be classified as general damages but has to be proved on a balance of probability. The respondent further relied on the case of **Paul Otieno Obuya & another v Joshua Atuti Ngoto & another [2016] eKRL** where the court quoted with approval the case of **SJ v Frances Di Nello & Another [2015] eKLR** in which the Court of Appeal expressed the difficulty faced by courts in making awards under this head when it said:-

*"The assessment of damages for loss of earning capacity is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market."*

It submitted that the appellant did not in any way prove that his work was imperilled as a result of his disability. It maintained that the appellant did not prove his claim on a balance of probabilities.

## Determination

In a first appeal like this one, the duty of the court is to evaluate

the evidence in the lower court both on points of law and fact and come up with its findings and conclusions.

In his plaint, the appellant sought judgment against the respondent for –

(a) General damages for –

(i) diminished capacity to earn or loss of earning capacity

(ii) pain, suffering and loss of amenities of life

(b) Special damages Kshs.5,125 tabulated as follows –

Medical report..... Kshs.2,000

Medical costs..... Kshs.3,725

**Total            Kshs.5,725**

(c) Costs and interest

During the hearing, parties agreed on apportionment of liability at 80:20. They also agreed on admission of the medical reports filed by the parties and on special damages. They further agreed that should the claim for diminished capacity to earn be successful, the court would base the award for the same on the minimum wage for carpenters for 2008. The case was determined on the basis of pleadings, documents filed by parties, medical reports and submissions.

The appellant did not testify at the trial court. There is also no witness statement filed by the appellant in the record of appeal. I have however noted from the file of the lower court that the appellant filed a statement on 3<sup>rd</sup> May 2012. The statement is dated 10<sup>th</sup> April 2012.

In the statement the appellant states that he was employed by the respondent between 2005 and 2008 when he got injured following which he was stopped from working by a director of the respondent. That the accident occurred on 16<sup>th</sup> April 2008 when the appellant and a helper were setting a shutter for fitting into a door frame. That while the helper was hammering a steel nail into a wall, he turned to call the assistant to hold the door shutter when the steel nail the helper was hammering into the wall flew off and got lodged into his right eye causing severe injury which led to the loss of sight in that eye.

The statement constitutes the only evidence adduced at the hearing before the trial court which the court considered together with the medical reports and submissions.

In his submissions at the trial court at paragraph 7, the claimant submitted as follows –

*"The parties urged court to apply the 2008 basic wages for carpenters. The court may opt, in its discretion, we think, use the global award approach, if it considers that such approach would be just. But we think, also, that such an approach would offend the consent of the parties. But the court is the custodian of justice and sees no evil, hears no evil and speaks no evil. So if that is just in the mind of the court, we propose a global sum of Shs.2,000,000/=. We urge court to go the consent way."*

*“The second question which arises for determination is whether the trial court should have awarded damages for loss of earnings capacity. The respondent has faulted the trial court for failure to award damages on this head. Counsel for the appellants on his part has opposed the respondent’s position that the learned trial magistrate was in error in failing to award the respondent damages for loss of earning capacity. Counsel for the appellant argued that the respondent did not lead any evidence on this issue and that the same was not pleaded in the plaint and therefore no award could be made on it. Counsel for the respondent on his part submitted that the trial court should have awarded the respondent Kshs.360,000/- damages for loss of earning capacity. Counsel had argued before the trial court that the respondent was a small scale farmer who, for reason of the injuries he suffered, had been rendered incapable of doing any farming activities for his own sustenance and that of his family. According to counsel, loss of earning capacity was not special damages which required pleading and proof, as*

*submitted on behalf of the appellant.*

*Loss of earning capacity is different from loss of future earnings.*

*While loss of future earning refers to the actual amount a party would have earned save for the injuries sustained in the accident and are therefore special damages which should be pleaded and proved, loss of earning capacity on the other hand, is compensation diminution of earning capacity and is usually awarded as part of the general damages under the head general damages for pain, suffering and loss of amenities. Chesoni Ag. JA in the case of **Butler vs Butler 1984] KLR 225** said at page 235:-*

*“Loss of earning capacity or earning power may and should be included as an item within general damages ... but where it is not so included, it is not improper to award it under its own heading as the learned Judge did in this case.”*

*The Court of Appeal drew the distinction between loss of earnings and loss of earning capacity in the case of **Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR** thus.*

*“Loss of earning 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 assessing damages under this head, the court considers the disadvantage the respondent will suffer in future for not working because of the injuries, and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others.”*

I agree with the opinion of the court as expressed therein and would say the same herein. The trial court had no evidence on loss of earning and no basis therefore to grant the same. Loss of future earnings was not proved.

No evidence was adduced by the appellant to prove that with one eye his earning capacity as a carpenter had been diminished. No mention is made in his statement about diminished earning capacity, other than pleading the same in the plaint. I would therefore agree with the trial court that the appellant did not tender any evidence to support his claim for diminished earning capacity and the Learned Magistrate therefore made no error in dismissing the prayer.

For the foregoing reasons, I find no merit in the appeal with the result that the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**