



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR

RELATIONS COURT AT MOMBASA

CIVIL APPEAL NUMBER 1 OF 2019

[Formerly Mombasa HCCA No 26 of 2011]

BETWEEN

NICHOLAS WAMBUA MAKOVU.....APPELLANT

AND

KAJAL ENTERPRISES LIMITED.....RESPONDENT

(An Appeal from the Judgment of the Hon. SPM P.Mutende

delivered on 8th February 2007, in Mombasa RMCC No. 3284 of 2007)

BETWEEN

NICHOLAS WAMBUA MAKOVU.....PLAINTIFF

VERSUS

KAJAL ENTERPRISES LIMITED.....DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Mathew Nyabena & Company, Advocates, for the Appellant

Kishore Nanji, Advocate for the Respondent

JUDGMENT

1. In his Complaint filed at the Trial Court in 2007, the Appellant herein sued his Employer, the Respondent herein, for work injury. He prayed for general damages for *pain, suffering and loss of earning capacity*. He also asked for special damages, which included *medical report at Kshs. 2,000, medical expenses at Kshs. 20,780 and loss of earnings at Kshs. 4,500 per month for 6 months up to the date of the suit [and thereafter at Kshs. 4,500] up to the date of Judgment.*

2. Parties recorded consent on liability, with the Respondent shouldering 75% liability.

3. In its Judgment of 8th February 2011, the Court awarded the Appellant:-

- General Damages at Kshs. 600,000.
- Loss of earnings of 43 months at Kshs. 193,500.

- Special damages of Kshs. 20,780.
- Costs and Interest.

4. The Appellant preferred an Appeal at the High Court Mombasa, which was transferred on jurisdictional ground, to the E&LRC Mombasa.

5. He raises 3 Grounds of Appeal:-

- The Trial Magistrate erred in law and fact in failing to award damages for loss of earning capacity.
- The Trial Magistrate erred in law and fact in intertwining the claims for lost earnings and loss of earning capacity, hence misdirected herself in awarding damages.
- The Trial Magistrate erred in law and fact in awarding special damages at Kshs. 20,780 whereas what was proved and pleaded is Kshs. 22,780.

6. Parties agreed on 13th June 2019 to have the Appeal considered and determined on the strength of the whole record.

The Court Finds:-

7. Loss of earnings, or lost wages, refers to income the Plaintiff lost because of injuries suffered and recovery time taken. In this dispute the Appellant pleaded Kshs. 4,500 per month, ending on the date of Judgment. The Trial Court endorsed Appellant's computation of loss of earnings, at Kshs. 193,500.

8. Loss of earning capacity is compensated by an award of general damages. It is not the same thing as loss of earnings, and cannot be redressed together with loss of earnings. Loss of earning capacity is redressed as part of the general damages. In ***Mombasa HCCA No. 436 of 1995, Henry Moriasi Osiemo v. Quid J. Mohammed & Another***, and ***Industrial Court at Mombasa, Civil Appeal No. 4 of 2014, Ngoro Kaka Kakondo v Salt Manufacturers [K] Limited***, it was held that loss of earning capacity is classified as general damages, while loss of earnings is to be treated as special damages. The latter must be specifically pleaded and proved, as was done by the Appellant in his persuasion of the Trial Court, in granting him Kshs. 193,500 in lost earnings.

9. The Appellant in his Complaint correctly pleaded for loss of earning capacity as part of general damages. He pleaded *General Damages for pain, suffering and loss of earning capacity*. He was granted general damages under this prayer, in the sum of Kshs. 600,000. The Appellant pleaded for one set of general damages. The Court does not agree with the Appellant that he was entitled to damages for loss of earning capacity, separate from the award made for general damages for pain and suffering.

10. Whereas the Court agrees with him, in that the Trial Court erred in treating loss of earnings and loss of earning capacity as remediable through the same kind of damages, the error did not adversely affect the final award availed to the Appellant; he received Kshs. 600,000 in general damages, which as pleaded, included remedy for loss of earning capacity. He received compensation too, for loss of earnings.

11. On special damages relating to medical expenses, the Appellant pleaded Kshs. 22,780. The Trial Court found in its Judgment, at page 105 of the Record of Appeal, that the Appellant specifically proved Kshs. 25,780. What was the rationale in granting him Kshs. 20,780 in special damages, if he had exceeded in his proof, the sum pleaded of Kshs. 22,780? There is no explanation in the Judgment why the sum of Kshs. 2,000 was excluded in the award of special damages.

12. In the end the Court finds Ground 3 in the Memorandum of Appeal to have merit.

IT IS ORDERED:-

a) Ground 3 of the Memorandum of Appeal is allowed, with special damages allowed at Kshs. 22,780, instead of Kshs. 20,780 granted by the Trial Court.

b) No order on the costs.

Dated and delivered at Mombasa this 25th day of October, 2019.

James Rika

Judge