



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 7 OF 2016

[FORMERLY MOMBASA HIGH COURT CIVIL APPEAL NO 87 OF 2011]

PAUL KIIO KALIA.....APPELLANT

VS

A.A. HAULIERS LTD.....RESPONDENT

(Appeal from the Ruling and Order of Hon R. Kirui, PM dated 5th May 2011 in Mombasa Workmen's Compensation Cause No. 10 of 2007)

JUDGMENT

1. This appeal was initially filed in the High Court at Mombasa as Civil Appeal No 87 of 2011.
2. Pursuant to an application by the Respondent dated 30th November 2015, which the Appellant did not oppose, and a subsequent order issued by **PJO Otieno J** the appeal was transferred to this Court for hearing and disposal.
3. The appeal arises from the ruling of **Hon R. Kirui, PM** dated 5th May 2011, allowing the Respondent's application dated 22nd December 2010.
4. In his Memorandum of Appeal dated 24th May 2011, the Appellant raises two grounds of appeal:
 - a) That the learned trial Magistrate erred in law and fact in holding that the Appellant had been compensated for the sum of Kshs. 393,867 and ordering deduction from the compensation due;
 - b) That the learned trial Magistrate erred in law and fact in failing to appreciate the provisions of the Workmen's Compensation Act.
5. The facts of the case are that on 27th July 2007, the Appellant, who was employed by the Respondent as a mechanic, was involved in an accident whereby his right leg was crushed.
6. The crushed leg was amputated above the knee joint. As a consequence, the Appellant suffered permanent incapacity assessed at 70%.
7. Pursuant to an application for assessment of damages dated 24th July 2007, the lower court assessed the damages payable to the Appellant at Kshs. 840,000.
8. Subsequently, the Respondent moved the lower by way of Notice of Motion dated 22nd December 2010 seeking a review of the ruling dated 29th October 2010, to the extent that the final award had not factored in the sum of Kshs. 393,867 paid by the Respondent towards the Appellant's medical expenses.
9. The Respondent therefore asked the trial court to review its own decision on the ground that there was an error apparent on the face of the record.
10. In a composite ruling dated 5th May 2011, which also addressed the issue of costs and interest, the learned trial Magistrate stated inter alia:

"I have perused the entire record and noted that in my ruling dated 29/10/2010 I assessed the amount payable as Kshs.

840,000/= less Kshs. 420,000/= already paid. I however overlooked the fact that the defendant had also paid additional Kshs. 393,867/= vide exhibit "A-A-1" to the defendant's affidavit sworn on 11/2/2008. That payment was confirmed by the plaintiff in his replying affidavit sworn on 18/2/2011. That amount ought to have been subtracted from the amount eventually awarded. Failure to consider it therefore amounts to an error apparent on the face of the record or at least sufficient reason warranting the review of that ruling/order to correct it."

11. The trial Magistrate therefore went ahead and reduced the award by Kshs. 393,867.
12. The Appellant faults the review order on the basis that he had not received the amount of Kshs. 393,867.
13. The Appellant submits that any amount paid by the Respondent on account of medical expenses arising from the accident cannot be termed as part of compensation for permanent partial incapacity under Section 8(1)(a) of the Workmen's Compensation Act (now repealed)
14. Section 8(1)(a) of the repealed Act provides as follows:

8. (1) Where the permanent partial incapacity results from the injury, the amount of compensation shall be-

(a) in the case of injury specified in the second schedule, such percentage of sixty months' earnings as is specified therein as being the percentage of loss of earning capacity permanently caused by the injury;

15. A plain reading of Section 8(1)(a) of the repealed statute reveals its intention as provision of compensation for loss of earning capacity. I find no basis whatsoever for inclusion of medical expenses as part of that compensation which was statutory in nature.
16. For this reason, the order dated 5th May 2011 allowing the Respondent's application dated 22nd December 2010 is set aside and replaced with an order dismissing the said application.
17. The Respondent will pay the costs of this appeal.
18. It is ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Nyabena for the Appellant

Mr. Olwande for the Respondent