



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.219 OF 2018

[formerly Nakuru High Court Case No.190 of 2007]

ISAAC NJUGUNACLAIMANT

VERSUS

FARMLAND AVIATION LTDRESPONDENT

JUDGEMENT

The matter herein relates to the original suit under Nakuru HCCC No.190 of 2007 and where judgement was delivered on 10th November, 2011 and following which, the respondent, Farmland Aviation lodged an appeal to the Court of Appeal in Civil Appeal No.269 of 2012.

The appeal was heard and determined by the Court of Appeal sitting at Nakuru on 14th March, 2018 and directed as followings;

In those circumstances, there was a breach of the respondent's duty to provide a safe pace of work and system of working to the appellant. It is therefore our holding that the trial judge's findings that the respondent was not negligent or in breach of its statutory duty, and that the appellant was solely to blame for the injuries was erroneous. This is especially so given the learned Judge's factual finding, ...

Being of that view, we allow this appeal and set aside the judgement dismissing the appellants suit. We substitute it with a judgement allowing the appellant's claim on the basis of 100% liability against the respondent. as the learned Judge did not assess quantum, as he ought to have done even though he was minded to dismiss the claim we remit this matter to the high Court Nakuru for assessment and award of damages. The appellant shall have costs of this appeal and of the High Court.

Noting the above, this court direction is single, the liability established at 100%, to assess quantum as the court ought to have done when delivering its judgement on the 10th November, 2011.

In this regard, the parties were invited to address the court with regard to the issue at hand.

The claimant submits that the suit was filed on 15th October, 2010 and the economic reality 8 years ago has changed and in making an award the court should take cognisance of the time change.

During trial the claimant had proposed an award of Ksh. 5 million and based on cited authorities and the court should go beyond that amount as compensation is only done once. The medical report of Dr Malik noted the injury to the claimant was not good especially his affliction to the eye was progressive and this has come to pass. The injury prediction was at 30% but now is at 100% where the claimant is totally blind. He will live with the disability and now requires the support of another person. Where Ksh. 5 million was a lot in the year 2011 this should be escalated to Ksh.10 million. The claimant requires the money to support his whole life.

The award for special damages was pleaded at ksh.300,000.00 and this can be confirmed from the record as there is no change. The claimant shall require future medication all his life to control pain and this is proposed at Ksh.4,000.00 monthly for 34 years. These were pleaded during trial.

The respondent submits that the court has power to award damages under section 12(3) of the Employment and Labour Relations Court Act. these powers re specific and limited. Damages for pain and suffering is a claim under common law which is not written and subsection to the provisions of the Act.

Under the Workmen Injury Benefits Act the claimant was compensated and paid Ksh.242,500.00. Any further award in damages must be under the provisions of the Employment and Labour Relations Court Act and not under WIBA and not under common law which is not written.

above, upon appeal, the task for the court is specific. That of assessment of quantum payable to the claimant and which ought to have been addressed by the court in its judgement on 10th November, 2011. The material before court on such date is therefore applicable and had this been done, the Court of Appeal would have confirmed, reviewed, varied or assessed but there was no material to rely upon and therefore the direction that his should be addressed at this forum.

The claimant suffered what was particularised as;

- a) *severe generalised complications of the skin and its appendages,*
- b) *Scarification on the lid margins and conjunctiva;*
- c) *Lashes touching the cornea (entropion and trichialis);*
- d) *Tear deficiency;*
- e) *Growth of vessels on the right eye;*
- f) ***Complete vascularisation of the left eye and opacity of the cornea (total blindness);***
- g) *Loss of hair and itching of the scalp; and*
- h) *Injuries to the lungs and nose.*

A matter of the court addressing the payment of general damages was raised and on the basis that this is common law award whereas this court has limited jurisdiction under the Employment and Labour Relations Court Act, 2011 section 12(3) with regard to the award of compensation. That the claimant has already been paid Ksh.242,000.00 under the Workmen Compensation Act and that such amount is adequate.

The award of compensation under the Workmen Compensation Act and under the Work Injury Benefits Act, 2007 is not a bar to any claimant injured while at work from claiming the award of damages available under any other law. at common law, where an employee suffers injury at work, upon pleading the injury and damage caused, the court is to assess and make an award in general damages.

In this regard, save for reference of the matter to this court, the Court of Appeal having addressed the issue of liability, the assessment of damages due to the claimant should not be hindered by the award under the Workmen Compensation

Act, released by the Work Injury Benefit Act, 2007 which allow for the employee to move the court and seek payment of general damages.

As not by the respondent, the court has the jurisdiction under section 12 (3) (v) and

- (vi) of the Employment and Labour Relations Court Act, 2011 to award as follows;
- (v) *an award of compensation in any circumstances contemplated under this Act or any written law;*
- (vi) *an award of damages in any circumstances contemplated under this Act or any written law;*

The power and mandate is specific and precise.

The court can award compensation and damages as contemplated under the Act or under any written law. the award of compensation under the Act and under any other written law in matters of employment and labour relations is to be found under various statutes for example under the Labour Relations Act, 2007, the Work Injury Benefits Act, 2007, the Employment Act, 2007 the Labour Institutions Act, 2007 and the related statutes. Equally the award of damages is contemplated under similar statutes upon call of evidence and appropriate finding by the court. see award of damages assessed in the cases of **J W N versus Securex Agencies (K) Limited [2018] eKLR; Samson Kipkoeh Chemai versus Richard Erskine Leakey & 2 others [2017] eKLR and Jane Njeri Wanyoike & 23 others versus Pan Africa Insurance Company Limited & 2 others [2017] eKLR**

It is therefore within its constitutional and statutory powers for the court to assess and award damages in appropriate cases. Such power is appropriate and legitimate.

Liability thus established at 100% the assessment of general damages due to the claimant should follow.

In addressing a case of multiple chemical burns of the plaintiff following a motor accident and resulting in multiple scars on the scalp, extensive scars on the posterior to the thighs and legs, effects to the muscles the court in the case of **Wycliffe C Ndiema versus pan Africa Chemicals Ltd [2016] eKLR** made an award of Ksh.400,000.00 in general damages. the accident arose in the year 2009.

Victor Ndege Manase versus Ashton Apparels [EPZ] Limited [2016] eKLR the court awarded an employee Ksh.200,000.00 in general damages following loss of two fingers and a permanent disability assessed at 17%.

In a case where the plaintiff suffered burns and blisters to both legs, wounds and scars to both hands and legs and loss of memory and concentration following a work injury the court awarded general damages at Ksh.3, 000,000.00 in the case of **Nickson Muthoka Mutavi versus KARI [2016] eKLR**. this logic was also applied by the court in the case of **Patrick M. Were versus Kenya Power & Lighting Co. Ltd [2014] eKLR** where the court held that;

... the plaintiff blamed the defendant for:-

- a. **Failing to provide the plaintiff with safe working place;**
- b. **Exposing the plaintiff to risk and injury;**
- c. **Failing to take adequate safety precautions to protect the plaintiff from any dangers that could arise from the work he was engaged in;**
- d. **Exposing the plaintiff to danger the defendant knew or ought to have known;**
- e. **Requiring the plaintiff to work on their installations without switching off the electricity.**

As a result the plaintiff suffered the following injuries:

1. **Deep electric burns on the face, neck, chest, abdomen, back and both hands.**
2. **Contractures and keloid scars on the abdomen neck and back;**
3. **Contractures and keloid scars on right upper arm with right shoulder joint of abduction to 15 degrees limitation of forward and backward extensions to 20%, Elbow joint contracture deformity of 30 degrees, lack of pronation and supination;**
4. **left upper arm – left shoulder joint limitation of abduction 20 degrees limitation of forward and backward extension to 20%;**
5. **Neck: contracture with severe limitation of extension and rotations.**

All leading to a general disability of 70% of total body function.

In this case the court made the following award;

Having considered the decisions in which awards were made though decisions cited by the defendant, are comparable as regards the injuries sustained, the awards were made 10 years and 30 years ago respectively. This court must take into account the incidence of inflation over the years. In doing my best to fairly compensate the plaintiff, I hereby make an award of Kshs.3,000,000/- in general damages for loss of amenities. The doctor also suggested that the plaintiff will need Kshs.2,000,000/- for future operations and treatment. The plaintiff will also have the Kshs.2,000,000/- for future medical expenses. ... in the end the plaintiff will have judgment as follows:-

Loss of amenities Kshs.3,000,000.00

Future medical expenses Kshs.2,000,000.00 ...

In Lear Wambui Githuthu versus Attorney General & another [2005] eKLR

following an attack against the plaintiff on 15th July, 1994 while admitted in hospital, a claim was filed at the High Court In HCCC No.1915 of 1997 and judgement delivered on 17th March, 2005 with a finding that the plaintiff had suffered 100% visual incapacity since the year 1994 and will continue to experience such suffering for the rest of her life. That;

In all the circumstances, balancing one thing against another, including the notoriety of inflationary trends, the need to maintain reasonable awards for comparable injuries, lump-sum payment upfront, earnings from pension by the plaintiff, and doing the best I can, I award the sum of Shs. 2 (two) million in general damages for pain, suffering and loss of amenities.

There will thus be judgment for the plaintiff for: -

(a) **Special damages Shs. 61,760/=.**

(b) **General damages Shs. 2,000,000/=.** ...

With the citations above, it is apparent that where there is permanent disability the court have made award in general damages to address the loss and the future medical expense(s) resulting therefrom. With each case addressed on its special circumstances.

In this case the medical report by Dr Owen Ogony dated 27th April, 2007 details the effects of the chemical burns to the claimant as including;

- a) Illness to the eyes;
- b) Skin and its appendages;
- c) Loss of both finger and toe nails;
- d) His left eye was blind while there was poor vision to the left eye;

In the report by Dr Joseph Aluoch dated 7th November, 2007 he noted the following;

- a) Severe skin reaction; and
- b) Eruptions involving the eyes and the whole body.

The permanent disability to the claimant noted and the possibility of future medical attention thus addressed and noted that there are is continued loss of vision to the left eye and continued eruptions involving the eyes and the whole body. At the time of injury the claimant was aged 32 years and it has since been fourteen (14) years. an award for general damages at Ksh.4, 000,000.00 and Ksh.2,000,000.00 for future medical expenses is hereby found appropriate.

The claimant pleaded for special damages of Ksh.300, 000.00 and his evidence is that the respondent paid for some of the hospital bills and he produced receipts for the amounts pleaded. Such amount is due;

There will thus be judgment for the claimant against the respondent for: -

- (a) Special damages Ksh. 300,000.00;.**
- (b) General damages Ksh. 4,000,000.00;**
- (c) costs for future medical expenses Ksh.2,000,000.00; and**
- (d) Costs of the suit as directed in Civil Appeal No.269 of 2012 – Isaac Njuguna versus Farmland Aviation.**

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of:.....