



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Civil Appeal 30 of 2008

MUMIAS SUGAR CO. LTD.....APPELLANT

VERSUS

BENON NANJIRA KWEYU.....RESPONDENT

(From the Judgement and decree of A.O. Osofo, Principal Magistrate in Busia PMCC No. 96 of 2007).

JUDGEMENT

This appeal arises from a judgement by A.O. Osofo, Principal magistrate. There was an interlocutory judgment entered in favour of the plaintiff at 80% to 20%.

The plaintiff Respondent, had in his paragraph 7 of the plaint claimed

"...damages for pain and suffering and loss of future income." In his final relief prayers he had sought against the defendant –

- (a) **General damages**
- (b) **Special damages**
- (c) **Costs.**
- (d) **Interest**
- (e) **Any other or further relief.**

When the court decided to award the quantum of damages it stated at page 1 of the judgement -

"The plaintiff claims general damages for pain and suffering and loss of earning capacity."

The stress is mine in this judgement. The magistrate then concluded as follows:

"I therefore award damages as follows:-

1. General damages for pain and suffering - KShs.400,000/=

2. Loss of earnings - KShs.200,000/=

3. Special damages - KShs. 1,500/=

TOTAL KShs. 603,500/=

He then reduced the total by 20% as agreed between the parties on liability to balance at Kshs. 482,800/=.

The appellant's claim in this appeal is that the plaintiff had not pleaded or proved "loss of earnings" of KShs. 200,000/=.

I have examined the pleadings, the relevant parts of which are quoted herein above. Clearly, loss of earnings was not pleaded by the Respondent anywhere in the pleadings. Loss of earnings in the way this court would understand it, is the total sum of funds actually lost by the plaintiff because of the wrongful or negligent act or conduct of the Defendant. It is a specific sum based on the net income lost from the date complained of until judgment is made or until he obtains a new employment or occupation which begins to give him the lost income. It always falls within special damages and must be pleaded and strictly proved. It is not the same as "loss of earning capacity" which is a general damages item.

The plaintiff/Respondent herein had sought "loss of future income" It is not even clear to this court what that stands for. Which future is this and when will it start. Will it be greater or small from what the plaintiff was earning at the time of the accident?

This court's view is that the plaintiff was more in the "earning capacity" line than the loss of earnings which start to accrue immediately the plaintiff is disabled from continuing to earn at the rate of his present net income.

I have tried to understand where the trial Magistrate got the "loss of income" from as it is not appearing in the whole pleadings but I cannot get it. As earlier stated, loss of income was not pleaded in this case and was not proved. The learned magistrate accordingly erred in awarding it. I accordingly must strike it out of the awarded items.

The result will be as follows:-

1. General damages for pain and suffering - Kshs 400,000/=

2. Special damages - Kshs. 3,500/=

Total Kshs. 403,500/=

Less 20% (Kshs 80700) Kshs. 80,700

Kshs 322,800

The final sum to earn interest at court rates from the date of judgement.

Costs of the appeal to be borne at the ratio of 80% to 20% in favour of Respondent.

Dated and delivered this 21st day of September 2010.

D.A. ONYANCHA

JUDGE



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