



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 100 OF 2019

VIONA NASIMIYU NDOMBE.....APPELLANT

VERSUS

1. TSUSHO CAPITAL KENYA LIMITED

2. TRINITY TRANSPORTERS & LOGISTICS LIMITED

3. MOSES INDIAZI LUYANI.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. E. K. MAKORI, Chief Magistrate delivered on 24/4/2019 in Mombasa CMCC No. 165 of 2017)

JUDGMENT

1. The Appellant VIONA NASIMIYU NDOMBE filed a suit against the Respondents, **TSUSHO CAPITAL KENYA LIMITED** in **CMCC No.165 of 2017**. The Appellant's case before the trial court was one of personal injury claim where the facts of the case were that on or about **31st August, 2016**, she boarded Motor Vehicle **Registration No.KCF 008A Hino Bus/Coach** which operated under **Trinity Transporters & Logistic Limited**, the 2nd Respondent herein, from Nairobi headed to Mombasa.

2. It was the Appellant's case that she was lawfully travelling inside the said Motor Vehicle along Mombasa Road, when the 2nd Respondent's driver so negligently, carelessly and recklessly drove, managed and controlled Motor Vehicle Registration **No.KCF 008A Hino Bus/Coach** that caused it to lose control and veer off the road before landing in a ditch near Capital Centre area.

3. The Appellant stated that due to the negligent actions of the 3rd Respondent that caused an accident, she suffered soft tissue injuries on the neck, frictional burns on the left side of the face, soft tissue injuries to the left leg and amputation of the left arm around the deltoid region.

4. From the trial court, the Appellant sought for general damages, special damages of Kshs.5,391,294/=, Cost for hiring house help of Kshs.5,110,896/=, loss of future earning of Kshs.7,121,822/= and cost of the suit plus interest.

5. On **2nd March, 2017**, the Respondents filed a **Statement of Defence** in which they stated that there is any accident that occurred, the same was due to the negligence of the Appellant and/or an act of God for which no party can be held responsible. The Respondents then sought that the Appellant's suit against them be dismissed with costs.

6. At the hearing, the Appellant called 2 witness while the Respondent did not file any witness statements nor call any witnesses to testify. The Plaintiff/Appellant testified as PW1 and stated that she got into an accident and suffered injuries. She reported the accident at a Police Station in industrial area where she was issued with a **P3 form** that stated the motor vehicle was **KCF 008A** and the driver was **Moses Indianzi Luyani** who was then charged with careless driving.

7. PW1 stated that she was taken to Kenyatta National Hospital where she was examined by a doctor. She produced her medical reports as evidence before the court. She stated that, there after she carried out a search and found that the Motor Vehicle was owned by **Tsusho Capital Kenya Ltd** and **Trinity Transporters and Logistics Ltd**.

8. It was PW1's further statement that during a treatment process, the doctor referred her to a specialist so that she could get an artificial arm and that Kshs.5,235,500/= was the estimated costs of the artificial hand.

9. She testified that she was further seen by a psychiatrist who did advise her on how to live with one arm. She stated for the service she was

charged Kshs.70,000/= for the service. She stated that a further Kshs.60,000 was spent on private investigators.

10. It was PW1's testimony that she wanted to be a nurse, but now with one arm, she cannot attain that dream. She thus sought for general damages for pain and suffering and loss of amenities.

11. **PW2** was **Dr. Titua Ndeti**, who explained that the Appellant was involved in a Road Traffic Accident as passenger on the Mombasa Nairobi Highway. He stated that the Appellant suffered injuries as captioned in his medical report which included several burns, amputation of the left arm around the shoulder joints, fractured pubic bone and was admitted to Kenyatta National Hospital. He stated that the Appellant was given appropriate medication, an X-ray conducted and on observation, she had a huge irregular extensive scar along the left pectoral region.

12. PW2 testified that the Appellant suffered serious skeletal injuries and endured a lot of pain and loss of blood. He stated that the loss of the left arm was permanent and she will require an artificial arm which will cost around Kshs.3 million in India and 4 million abroad.

13. It was PW2's testimony that he did refer the Appellant to a specialist and her degree of injury was 100%. He stated that he was paid Kshs.6,000/= and the specialist's proper examination was assessed at Kshs.5,235,500/=.

14. The Defendant did not call any witnesses and hence their suit was thus undefended.

15. After hearing the parties, the trial court delivered its Judgment on **24th April, 2019** allowing the Appellant's suit and awarded her general damages at Kshs.3,000,000/=, future medical expenses at Kshs.5,325,500/= and other special damages at Kshs.155,749. The total award being Kshs.8,481,249/=. The Appellant was not awarded costs of hiring house help and loss of future earnings.

16. Being dissatisfied with the quantum of future medical treatment, loss or earning capacity and cost of hiring a domestic helper of the decision delivered on **24th April, 2019**, the Appellant has filed an appeal before this court and raised the following grounds, that: -

1. The Learned Trial Magistrate erred in law and in fact in failing to award the Appellant future medical cost for the change of the MYO electric shoulder disarticulation prosthesis arm, which is expected to be done after every three (3) to four (4) years.

2. The Learned Trial Magistrate misdirected himself in law and fact in failing to consider the permanent incapacity which was assessed at 100% and loss of earning capacity and/or diminished earning capacity of the Appellant in assessing general damages.

3. The Learned Trial Magistrate misdirected himself in law and fact by failing to appreciate the degree and/or standard of proof for claim on diminished earning capacity.

4. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the evidence adduced by the Appellant that gave rise to an inference that her capacity to earn had diminished.

5. The Learned Trial Magistrate misdirected himself in law and fact by failing to consider the Appellant's submissions and authorities on awards made in similar cases.

6. The Learned Trial Magistrate misdirected himself in law and fact by holding that the Appellant would not require the services of a domestic helper since she was living with her mother.

17. The Appellant prayed that the Appeal be allowed with costs and the award of future medical treatment be enhanced from Kshs.5,325,500/= to Kshs.15,706,500/= or such other higher award as will be deemed fit; the court be pleased to set aside the order declining to award damages for loss of earning capacity and substitute it with an order awarding loss of earning capacity and the court be pleased to set aside the order declining to make provision for the costs of hiring the services of a domestic helper and substitute it with an order awarding the cost for hiring the services of a domestic helper.

18. On **2nd November, 2020**, directions were given that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions, which they relied on in their entirety in support of their respective cases. I have read through the said submissions and find that I will consider the arguments raised therein in the analysis and determination of the appeal.

Analysis and determination

19. This is a first appeals, and the duty of the 1st appellate court is as stated by the Court of Appeal in the case of **PIL Kenya Ltd Vs. Oppong [2009] KLR 442**, that:-

“It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.”

20. I have carefully considered the pleadings and submissions filed herein in line with the grounds of appeal. I find the issues for determination arising thereof being as follows: -

a. Whether the award on future medical treatment can be enhanced from Kshs.5,325,500/= to Kshs.15,706,500/=

b. Whether the Appellant is entitled to an award for costs of hiring a domestic house help.

c. Whether the Appellant is entitled to an award of loss of earning capacity.

a. Whether the award on future medical treatment can be enhanced from Kshs.5,325,500/= to Kshs.15,706,500/=

21. The Appellant has submitted that PW2 indicated that a prosthesis arm will be required to be renewed after every 6 years a fact that the Respondents never disputed. It was stated that the prosthesis arm would be changed at least three times and an amount of Kshs.15,706,500/= was proposed by PW2.

22. The Appellant states that the amount of Kshs.5,235,500/= is only sufficient for the first six years and that at the time of hearing, the Appellant was a teenager of **19 years** who was still growing and cannot use the same prosthesis arm for the rest of her life.

23. The Respondents objected to this finding and state that an amount of Kshs.15,706,500/= was never pleaded hence the Appellant should not be allowed to ask for what was never pleaded.

24. I have looked at the Appellant's **Amended Pleat** dated the **10th March, 2017** and at paragraph 14 thereof, the Appellant listed particulars of special damages and at paragraph 14(i) she pleaded for future medical treatment at Kshs.5,235,500/=.

25. It is now trite law that parties and the court are bound by the pleadings as filed by parties. The Court of Appeal in the case of **Dakianga Distributors (K) Ltd –vs- Kenya Seed Company Limited [2015] eKLR** cited with authority that: -

“...Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited v Nyasulu [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves...”

26. Being bound by the pleadings that she filed before the trial court, the Appellant cannot purport to require an award of Kshs.15,706,500/= on Appeal. The prayer for enhancement of Kshs.5,235,500/= to Kshs.15,706,500/= amounts to the Appellant raising a new issue that was never considered by the trial court. This court cannot therefore award the Appellant Kshs.15,706,500/= for future medical treatment as it was not pleaded nor proved before the Trial Court.

27. Also, future medical treatment was pleaded as a special damage, and it is trite law that special damages must be specifically pleaded and proved as was held by the Court of Appeal in the case of **Capital Fish Kenya Limited –vs- The Kenya Power & Lighting Company Limited [2016]eKLR**, where it stated that: -

“...Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit...”

28. The amount of Kshs.15,706,500/= was never sought before the trial court. This court can therefore not enhance an award on special damages that was never pleaded nor proved.

b. Whether the Appellant is entitled to an award for costs of hiring a domestic house help.

29. The Appellant submitted that due to the accident, her left arm was severely damaged that it was amputated and she would require assistance for her to perform basic house chores like cooking, washing clothes, polishing shoes among other chores. In her **Pleat**, the Appellant had set the cost for hiring house help at Kshs.5,110,896/= which was not awarded by the trial court on the basis that the Appellant never placed a foundation or justification for the said award.

30. The Appellant contends that her disability was assessed at 100% since her left hand was amputated causing her permanent incapacity. The Appellant stated that this claim for an award for domestic help was never traversed by the Respondents and thus they were entitled to the Kshs.5,110,896/= award.

31. On the other hand, and in opposition to the said claim, the Respondents submitted that the Appellant has not provided proper justification before the court for the award of Kshs.5,110,896/= as she was being assisted by her mother, who never testified to shed more light on why the Appellant needed domestic help.

32. I have read through the record of appeal and find that the Appellant did not lay a justifiable reason for the award of Kshs.5,110,896/= for a domestic help hence agree with the finding of the trial court and decline to award the same.

c. Whether the Appellant is entitled to award of loss of earning capacity.

33. In the submissions, the Appellant has admitted that they did not plead for loss of earning capacity but they pleaded for loss of future earnings. The Appellant claims that the prayer for loss of future earnings instead of loss of earning was a technicality that ought to be covered under **Article 159(2)(d)** of the **Constitution of Kenya, 2010**.

34. In the case of **Anchor Limited-vs- Sports Kenya (2017) eKLR**, Njagi J, stated as follows:-

“...One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwongo, in Kenya Ports Authority Vs. Kenya Power & Lighting Co. Limited (2012) e KLR and another one supplied by the Learned Hon. Justice C.W. Githua in James Muriithi Ngotho & 4 others Vs. Judicial Service Commission (2012) eKLR; both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit”.

35. In the case of **Kenya Ports Authority –vs- Kenya Power & Lighting Co. Limited (supra)**, Justice Mwongo stated: -

“Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying structures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.

I can think of no better example of a technicality than citing a wrong provision of the law being used as a basis to dismiss a suit application. I need not say more about this argument by the Defendant”.

36. The instant claim on technicality is on a prayer as sought by the Appellant before the trial court. In applying the findings on technicalities in the above cases, a prayer as sought by a party cannot be termed as technicality as it is impossible for the court to read the mind of a litigant and establish what they wanted from the said court.

37. The principles of loss of future earnings and loss of earning capacity both exist in law and the Court, as found above is bound by pleadings as filed by parties, and therefore cannot be presumed to know what the parties intended to seek for but is guided by what parties pleaded before it.

38. In its decision, the trial Court found that there is difference between loss of future earnings and loss of earning capacity as was pleaded by the Appellant. The Trial Court found that loss of future earnings and loss of earning capacity are two distinct prayers in that loss of future earnings needs to be proved by evidence whilst loss of earning capacity is awarded as part of general damages.

39. I agree with the finding of the trial court and dismiss this ground since loss of earning capacity was neither pleaded nor proved. I proceed to find that loss of future earnings has been awarded under general damages as was the finding in **S J –vs- Francesco Di Nello & Another [2015] eKLR** where the court held that:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in Fairley v John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40 at pg 14 wherein Lord Denning M. R. said in part as follows:

“It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”

40. The upshot is that the Appeal lacks merit and is dismissed with costs.

41. The Judgment of the learned trial Magistrate is upheld.

42. Each party to bear their own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2021

D. O. CHEPKWONY

JUDGE