



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 542 OF 2014

THE BOARD OF GOVERNORS ONGATA ACADEMY.....APPELLANT

VERSUS

GABRIEL NGAIYAIYA RUMOI.....RESPONDENT

(Being an appeal from the Judgment delivered on 3rd November, 2014 by Hon. Olekeiwa (Principal Magistrate) Chief Magistrate's Court at Milimani Commercial CMCC No.3923 of 2011).

JUDGMENT

1. The Appellant was sued by the Respondent who claimed damages arising out of a road traffic accident. The claim was denied but subsequently the parties recorded a consent on liability in the ratio of 75:25 percent in favour of the Respondent against the Appellant. Parties further agreed to file written submissions and attach medical reports and other supporting documents. The court subsequently entered judgment in favour of the Respondent for the total sum of Ksh.1,561,998/= as general and special damages, costs and interest.

2. The Respondent subsequently filed the application dated 27th March, 2014 seeking a review of the judgment on grounds that the judgment failed to reflect the award for future medical expenses and loss of earnings. The application was opposed. After hearing the application the trial court allowed the application and reviewed the judgment to include loss of earnings at Ksh.1,440,000/= dental fees at Ksh.14,000/= and removal of implants at Ksh.150,000/=. The total came to Ksh.1,605,000/= less 25% which came to ksh.1,561, 998/=. The total judgment for the Respondent was reflected at Ksh.2,765,748/= cost and interests.

3. The Respondent was aggrieved by the said judgment and appealed to this court on three grounds as follows:

1. The Hon Magistrate misdirected himself with respect to the applicable principles of law on special damages by entertaining the plaintiffs claim for future medical expenses and loss of earnings when the plaintiff had failed to specifically plead and prove the same as required by law

2. The magistrate misdirected himself by awarding the sum of Kshs. 1, 605,000 being an amount for future medical expenses and loss of earnings but which came to Kshs. 1,203,750 after being subjected to 25% liability contribution when the same were not specifically pleaded and proven by the plaintiff

3. The magistrate misdirected himself by giving judgment in favour of the plaintiff as against the defendant when the actual fact he ought to have dismissed the suit due to the immense and glaring defects on the faces and body of it.

4. The appeal was canvassed by way of written submissions which this court has considered.

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

6. The Appellant's side submitted that future medical expenses are special damages which ought to be specifically pleaded and proved. It was further submitted that the said special damages were not specifically pleaded in the case at hand. That in any event, the medical report by Dr. Gikenye dated 11th August, 2011 reflected that the metal implants had been removed and were therefore not future medical expenses and ought to have been pleaded.

7. The Respondent's Counsel submitted the medical report by Dr. Wangata and the Medical report by Dr. Gikenye were in agreement that the metal implants needed to be removed at a cost of Ksh. 250,000/= and dental treatment was to be undertaken at Ksh.15,000/=.

8. The law on future medical expenses is well settled. The Court of Appeal in the case of **Tracom Limited & Another –vs-Hassan Mohamed Adan [2009] eKLR** stated: -

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of Kenya Bus Services Ltd vs. Gituma (2004) 1 EA 91, this Court, stated: -

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereof is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right should be pleaded.”

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require...”

9. The Plaintiff in his further Amended Plaintiff, further amended on 7th November, 2012 under the sub-head, 'PARTICULARS OF DAMAGES TO PLAINTIFF'S MOTO CYCLE' pleaded as follows:

“Plaintiff shall rely on the doctrine of Res Ipsa Loquitur and shall further be claiming for future medical expenses and loss of earnings”

10. Thus the Respondent pleaded both the future medical expenses and loss of earnings.

11. On proof, I have perused the record of Appeal and found the two Medical Reports by Dr. Gikenye and Dr. Wangata where both reports confirm that the Plaintiff had several implants on his legs requiring removal at a cost of Kshs. 250,000 and also the replacement of broken teeth that would cost Kshs. 15,000. It is worth noting that only one metal implant was removed according to the medical report and as such the other remaining will require surgical removal at a cost. I do find that under this head, the Plaintiff sufficiently proved his claim for Future Medical Expenses.

12. Similarly the Court of Appeal in *S J v Francesco Di Nello & another [2015] eKLR* 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.”

(See for example Nathan Nyambu Maghanga v Benard M Wanjala & another [2016] eKLR and James Mukatui Mavia v M.A. Bayusuf & Cons Limited [2013] eKLR)

13. Turning to the case at hand, it is noted that the parties relied on the filed documents. The documents which relate to the Respondent's work are reflected in the Record of Appeal as work receipts which comprise of a bundle of receipts issued for various amounts during the period 2009 to 2011. Since no evidence was adduced, the entries made in the said receipts have not been substantiated to enable this court to understand the average earnings per month.

14. The Respondent's counsel submitted that Respondent demonstrated by way of evidence that he earned Ksh.40,000/= per month. I have not seen the evidence by the Respondent that reflects how the Ksh.40,000/= per month was arrived at.

15. The trial court awarded loss of earning at Ksh.40,000/= for a period of six years then reduced the same by 50% which came to Ksh.1,400,000/=. I have already observed hereinabove that there was no evidence on the Respondent's actual earnings. One can however calculate the period of the lost earnings from the date of the accident on 19th March, 2011 to the date of the judgment on 2nd December, 2014 which comes to 44 months. Although the Respondent did not adduce the evidence of the actual earnings, he must have lost some income during the said period. I would adopt a figure of Ksh.10,000/= average minimum monthly labour wages per month which comes to Ksh. 10,000 x 44 months which totals up to Ksh.440,000/=.

16. The total award is therefore as follows:

a. General damages	Ksh.1,200,000/=
b. Special damages	Ksh.882,664/=
c. Loss of earnings	Ksh.440,000/=
d. Dental fees	Ksh.15,000/=
e. Removal of implants	<u>Ksh.150,000/=</u>
Total	<u>Ksh.2,687,664/=</u>
Less 25%	<u>Ksh.2,015,748/=</u>

17. The Appeal succeeds to the extent stated above. Consequently, the lower court judgment is set aside and substituted with a judgment for the total sum of Ksh. 2,015,748/= in favour of the Plaintiff (Respondent) costs and interest. The Appeal having succeeded partially, each party to bear own costs.

Date, signed and delivered at Nairobi this 23rd day of Sept, 2021

B. THURANIRA JADEN

JUDGE