



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 107 OF 2017

CATHOLIC DIOCESE OF NAKURU.....APPELLANT

VERSUS

STEPHEN WACHIRA KARIUKI

A.K.A STEPHEN KARIUKI.....RESPONDENT

(An appeal from the judgment and decree of honourable B. Mararo Principal Magistrate in Nakuru CMCC No. 804 of 2017 Stephen Kariuki Wachira aka Stephen Kariuki vs Catholic Diocese of Nakuru dated 3rd August 2017)

JUDGMENT

1. The respondent herein instituted the lower court case through a plaint dated 17th November 2011 and amended on 15th August 2014 seeking for judgment against the appellant herein jointly and severally for; general damages for pain, suffering and loss of amenities, loss of income and or future earning capacity, cost of future medication or treatment, special damages of Kshs. 244,700/= costs of the suit and interests on all the prayers therein at Court’s rate and any other relief the court may deem fit.

2. The action arose from an accident that occurred on 31st May 2014 along the Njoro – Mau Narok road when the driver of motor vehicle registration KBP 404H Toyota Hilux hit the respondent who was riding in a motor cycle. The Respondent blamed the Appellant for driving negligently and recklessly without due regard to other road users resulting in the accident which occasioned him injuries for which he sought general and special damages.

3. The appellant filed its statement of defence dated 11th November 2014 denying the allegation of the plaint and having driven the Motor vehicle registration no. KBP 404H Toyota Hilux negligently and/or carelessly. The appellant in their defence blamed **George Kimani Muchiri** the driver/owner of motor cycle registration no. KMCM 698X for the occurrence of the accident. They stated that they would enjoin him as a 3rd party to the suit and urged Court to dismiss the respondent’s suit with cost.

4. The case proceeded for hearing on 13th April 2015 with the plaintiff calling 3 witnesses while the defence did not call any witness. Record show that parties recorded consent on liability at 30: 70 in favour of the respondent.

5. By consent of the parties consent on liability was recorded at the ratio of 70: 30 in favour of the respondent against the appellant a judgment. By judgement delivered on 2nd August 2012 damages were assessed as follows: -

- a. Pain and suffering Kshs. 1,000,000/=,
- b. Future medical expenses..... Kshs. 500,000/=
- c. Loss of future earning capacity..... Kshs. 200,000/
- d. Special damages of Kshs. 188,035/=
- e. Cost of the suit & interests at court’s rate.

6. The Appellant being aggrieved and/or dissatisfied by the judgment of the trial court on assessment of damages payable filed this appeal on the following grounds: -

i. That the Hon. learned trial magistrate erred both in law and in fact in awarding damages not commensurate with the nature and extent of the injuries;

ii. That the Hon. learned trial magistrate erred both in law and in fact in failing to apply the applicable principles in the award of damages

iii. That the Hon. learned trial magistrate erred both in law and in fact in failing to apply the principles of precedent.

APPELLANT'S SUBMISSIONS

7. The appellant filed submissions dated 4th June 2020 and supplementary submissions dated 24th June 2020. The appellant submitted that the damages awarded were excessive in the circumstances and the trial magistrate failed to apply the applicable principles of precedence in the award of damages; that the trial magistrate erred in assessing damages under pain and suffering, future medical expenses and loss of future earning capacity in the absence of evidence of economic loss and/or earnings and evidence of need for future medical expenses and without taking into account the vicissitudes of life.

8. Appellant submitted that the trial court award of future medical expenses to the respondent only on account that it was not challenged but the cost ought to have passed the test of special damages of being specifically pleaded and proved before the same is awarded.

9. On general damages for pain and suffering the appellant submitted that it is common ground that the respondent suffered mere soft tissue injuries apart from displaced fracture of the neck of the right femur and dislocation of the right hip joint as shown by medical report produced; therefore, the amount awarded by the Court should represent a fair compensation but should not be excessive as awarded in this case.

10. On loss of earning capacity, the appellant submitted that it is only awarded to someone who was employed at the time of the accident. The respondent did not endeavour to prove income. Thus the said award should fail.

11. The appellant submitted that an award of Ksh. 400,000/= should suffice for general damages as it befits the fairest compensation to the respondent and the said damages are commensurate with the nature and/or extend of the injuries and in conformity with the principles of precedent in the award of damages.

RESPONDENT'S SUBMISSIONS

12. The respondent's advocate submitted that the learned trial magistrate did not error in law or in facts in awarding the respondent the quantum in the lower court. The respondent submitted that the appellant's advocate did not submit in the lower court and it was his first time submitting in the appellate court; that they failed to challenge the respondents claim and the awards they claimed from the Court. Respondent relied on the lower court submissions.

13. On the award of future medical expenses. The appellant concede in its submissions that it never challenged/controverted the issue of future medical expenses and the same ought not to be pleaded as special damage. It is a future expense yet to be incurred but it will be incurred in the future. The respondent submit they relied on the medical report tendered by **Dr. Kiamba** which is sufficient evidence as was held by the Court of Appeal in **Tracom limited & Another v Hasssan Mohamed Adan (2009) eKLR** where it held as follows: -

” The respondent did not give evidence in Court. None did. However, there was evidence adduced through the medical reports that were provided as exhibits in court... It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will need future medication is not in our mind in dispute... Thus we would allow for future medical expenses an amount of Ksh.40,000/= per year for 22 years from the date of the superior court's judgment. That totals to Ksh. 880,000/=.”

14. In respect to the award of Kshs. 200,000/= for loss of future earning capacity the respondent submitted that it was appropriate. The respondent was not employed and as submitted by the appellant this award under this sub heading is awarded to all person unemployed or employed as long as they prove they had an income prior to the accident.

15. Respondent further submitted that the award of Kshs. 1,000,000/= for pain and suffering was not excessive, that it was commensurate to the injuries suffered by the respondent as he suffered 40% permanent disability and suffers present complains from the injuries sustained from the accident. The Respondent urged court to dismiss the appeal for lack of merit.

ANALYSIS AND DETERMINATION

16. This being the first Appellate Court, the appellant is entitled to have this Court re-evaluate evidence adduced in the lower court and arrive at an independent determination.

17. From the record and the respondent's submissions, it is clear that the appeal was only on the aspect of the assessment of damages as the parties recorded a consent at the ratio of 30: 70 in favour of the respondent. The appellant argument is that awards granted in headings under general damages were not commensurate to the injuries suffered for failure to take into account precedence and applicable principals in awarding damages.

18. The issue to be determined by this Court is whether amounts awarded under general damages were manifestly excessive.

19. It has been decided in various cases that an assessment of general damages is an act of exercise of discretion on part of a Court and an Appellate Court is always called upon to exercise restraint in the interference of such exercise of discretion unless on well settled and clear principles. The Court of Appeal in the case of **Kemfro Africa Limited T/A Meru Express Service, Gathogo Kanini Vs A.M.M. Lubia & Ano. (1982-88)1 KAR 777** laid down the principles in the following words: -

‘...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.’

20. Injuries sustained by the respondent as per pleadings are as follows: -

- i. Displaced fracture of the neck of the right femur;
- ii. Dislocation of the right hip joint;
- iii. Severe soft tissue injuries of the right knee joint; and
- iv. Soft tissue injuries of the right ankle joint.

21. The medical report produced indicated that the plaintiff suffered long term effects being restricted movements of the right hip joint and right knee joint, pain in the right ankle on execution of movement, scars, inability to walk leading to permanent disability and exposure to posttraumatic arthritis of the hip joint.

22. Record show that the appellant did not challenge the respondent’s case in the lower court. I note that in respect to general damages, the trial court took into account the injuries suffered by the plaintiff together with other decided cases, inflationary trends and effluxion of time before awarding damages. I have taken into consideration the injuries suffered by the respondent and the resulting effect; the fact that the respondent suffered 40% permanent disability and find that general damages of kshs 1,000,000 under pain and suffering was reasonable and does not warrant any interference by this Court.

23. On the issue of future medical expense, the amount pleaded by the respondent remained unchallenged and the sum was stated by the doctor in the medical report produced in Court; and during examination in chief the respondent stated the said amount was the cost that he will incur to remove the metal. The appellant’s advocate did not cross examine the respondent on the said amount or challenge it. The future medical expenses were awarded at Kshs. 500,000/= as the same was unchallenged by the appellant. No alternate estimate was given by the appellant. I therefore have no reason to disturb the award.

24. On loss of future earning capacity, the trial court awarded a sum of Kshs. 200,000/= The respondent relied on the case of **Mumias Sugar Company Limited Francis Wanalo (2007) eKLR** where the Court of Appeal awarded Kshs. 500,000/=. In my view the award of kshs 200,000 was reasonable for the respondent suffered 40% permanent disability and was aged 50 years.

25. In regard to special damages the law is quite clear on the head of damages called **special damages**. Special Damages must be both **pleaded and proved**, before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716**, at P. 717, and 721 where the Learned Judges of Appeal – **Kneller, Nyarangi JJA, and Chesoni Ag. JA.** – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

26. Record show that respondent pleaded special damages of Kshs. 244,700/=; Kshs. medical legal report, Kshs. 500/= for motor vehicle search certificate and Kshs. 238,200/= as medical expenses. The trial court awarded a sum of Kshs. 188,035/= which was proved.

27. From the foregoing I find that damages awarded by the trial court under general and special damages are not manifestly high to warrant interference by this Court.

28. **FINAL ORDERS**

1. This appeal is hereby dismissed
2. Costs of the appeal to the respondent.

Judgment dated, signed and delivered via zoom at Nakuru

This 24th day of September, 2020

RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Cheloti for the Appellant

Muchemi for Respondent