



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO 275 OF 2018

NURU AWADH MBARAK.....APPELLANT

VERSUS

VYAS HAULIERS LIMITED....RESPONDENT

R U L I N G

1. On the 21/2/2018, the trial court delivered a reserved ruling in a suit between the parties and dismissed the appellants suit with costs primarily on the basis that the defendant sued was not the registered owner of the motor vehicle.

2. In that Judgment I do find the following excerpt to be of interest for this determination. At pages 128-9 of the Record of Appeal the trial court said:-

“Whenever a motor vehicle veers off its lawful course and a pedestrian is threat injured, its clear negligence on part the driver who would have been called to deny that this vehicle veered off the road without any negligence on his part. This driver was not called to tell the court how this accident occurred. I have no reason to doubt the version as put by the plaintiff.

Though I have found the driver of this motor vehicle solely to blame in negligence, the defendant VYAS HAULIERS LIMITED cannot be found to be vicariously liable because as at 15.09.2003, it was not the registered owner of this motor vehicle. The registered owners are shown in the copy of records as BAYUSUF BROS LTD & DTK who are not parties in this suit”.

3. Towards its duty to assess damages even where the suit fails, the court assessed damages for pains and suffering at Kshs. 2,000,000/= disallowed the claim for artificial limit on the basis that it was a special damage claim which by law must be pleaded and prayed for but was never so pleaded while special damages would have been allowed in the sum of Kshs. 107,070 had the suit succeeded.

4. That judgment has aggrieved the appellant who filed the current appeal and proffered some seven (7) grounds in the memorandum of Appeal dated 17/12/2018 and filed in court on the 19/12/2018. Even if so set out, the appeal, to me, being a fast appeal my mandate and obligation is to review the entire record at trial and to come to own decision. In executing that mandate I see the issues for determination to be only three.

Issues for determination

- Whether the finding on liability was well founded and merited on the pleadings on record?
- Whether the cost of prosthesis was adequately pleaded and proved?
- Whether the award of Kshs. 2,000,000/= for general damages for pains and suffering was commensurate with the injuries suffered?

Whether the finding on liability was founded on the

pleadings and evidence

5. Being an adversarial system of dispute resolution, the court is bound to consider every dispute placed before it only on the basis of the pleadings as filed by the parties and not otherwise. In other words, both the court and the litigants are bound by the pleadings filed in terms of the evidence to be led and the determination to be made.

6. In the Amended Plaintiff filed, paragraph 3 was pleaded as follows: -

“ 3. At all material times the Defendant was the registered and/or beneficial owner of motor vehicle and trailer registration number KUT 209/ZA 1530”.

7. By dint of Order 2 Rule 11(3) 11(1)&(3) of the Rules the appellant as the defendant at trial was bound to specifically traverse same and in default of such traverse be deemed to admit the fact of ownership of the motor vehicle.

8. In the defence which had been filed prior to the amendment, the respondent chose to give a wide berth to paragraph 3 of the plaintiff which was never touched by the amendment by saying nothing about it. That position invites the application of Order 2 Rule 11(1) and I do find that the respondent is deemed to have admitted being the owner of the offending motor vehicle. Such an admission therefore removed the question of ownership from the list of disputed facts upon which the court was called upon to render a determination. That position is not altered by the general traverse in paragraph 10 of the Defence which Rule 11(3) disqualifies as an insufficient denial.

9. Flowing from that finding, it was an obvious error of law for the trial court to identify and isolate the ownership of the motor vehicle **KUT 209/ZA 1530** as the grand issue and to base his determination of the respondent liability. I find that a court of law must refrain and exercise greatest of the restraints from stepping into the arena of dispute by imposing on the parties a dispute that is not disclosed in the pleadings filed.

10. To the extent that the decision to dismiss the appellant's suit was wholly founded upon the non-issue, I do find that the trial court was clearly in error on that finding and I do not hesitate to set aside that finding on liability and substitute therewith a finding that there was never a denial of the pleaded fact of ownership and the court having found that the driver of the respondent was negligent, the said respondent was by the principle of vicarious liability wholly liable to the appellant. I find the respondent to have been liable to the appellant at a 100%.

Damages

11. Two questions arise from the judgment and assessment of damages. The three are whether the award under pains was an adequate compensation and whether the rejection of the claim for cost of prosthesis was proper.

General damages

12. An appellate court would only interfere with an assessment of general damages where it is shown that the award is too high or too low as to exhibit an outright error in assessment of damages[1]. This flows from the understanding that assessment of damages is at the discretion of the court[2] and a different task[3]. Where however, it be shown that an irrelevant consideration went into the decision or if it be that a relevant consideration was ignored, the court would be entitled to revisit the award. The complaint here is that the award was too low when compared to the awards made in the decisions cited to court.

13. I have had the chance to read and review those decisions. I note from my review that appellant cited cases giving awards ranging between **Kshs 1,500,000** and **Kshs 2,200,000** and proposed a sum of Kshs. 3,000,000 while the respondent proposed a sum of **Kshs. 1,500,000** and cited to court two decisions in which a sum of **Kshs. 1,500,000** was awarded for comparable injuries. I take the view that the decisions cited to court were indeed on comparable injuries and that the same were merely a guidance to the court but did not take away the discretion to assess damages.

14. In coming to the sum awarded, I have found no error on the part of the trial court nor have I discerned consideration of an irrelevant factor to have gone into the assessment. For that reason, I find no merit in faulting to assessment. Even though I think a slightly higher award would have been made had I sat at trial, that however is not a reason to disturb the award by the trial court.

Costs of artificial arm

15. The claim was disallowed by the trial court on the basis that it was a cost of future medical expenses, which is a special damage claim and ought to have been pleaded and prayed for but was never so pleaded and prayed for. In fact, the record reveals that the court found that in the original plaintiff as amended there was never a claim for the sum.

16. That finding calls for the perusal of the pleadings on record. At paragraph 7 of the amended plaintiff, it was pleaded as follows: -

“ 7. The Plaintiff further avers that she shall requires further medical treatment and will need has an artificial limb which shall needs to be changed from time to time as she grows up and thus claims damages for loss of amenity and costs of fixing and changing the artificial limbs”

17. In the evidence, the plaintiff called PW 2 who produced a medical report dated 6/2/2010 in which the doctor asserted the cost of rehabilitation and prosthesis at **Kshs 1,500,000**. While it is true that cost of future medication are special damages within general damages, the same is awarded as general damages because in many occasions by the time the claim is heard the cost would not have been incurred and could in fact be continuing. They are thus not special damages strictly and wholly that must be specifically pleaded and strictly proved, but the proof expected of a plaintiff would be as the circumstances of the case may permit. Even the exactitude with which to plead such damages must depend on the circumstances of the case. In **John Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR** the court had these comments on pleading of special damage's:-

“In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaintiff acreage of the parcel of land which

was 0.2 hectare (paragraph 3 of **Plaint**), average cane proceeds per acre was given as 135 tonnes and the price per ton was pleaded as Kshs. 1553/=. The trial magistrate was not unpersuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge on first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof”.

18. In this case I do find that the pleading at paragraph 7 was sufficient for the claim and the evidence by PW 2 was equally adequate. That claim was sufficiently proved by the evidence of PW2 which was never challenged in respect of cost of prosthesis. It must however be remembered that strict proof of special damages does not mean that receipts are to only mode of proof^[4] and that the proof must be to the level of some complicated mathematical equation. It is enough that on a balance of probability the damage and loss was visited upon the claimant.

19. I do find that that in finding that the claim for cost of prosthesis had not been pleaded, the court went into an error which error I must correct by setting aside the order dismissing the claim and substituting the same with a decision that the same with an order awarding to the appellant costs of artificial limb in the sum of **Kshs 1,500,000**.

20. In the words of the trial court, special damages were proved in the sum of **Kshs 107,070**. That sum remains awarded to the appellant now that I have found for him on liability.

21. In conclusion, the appeal is allowed, the decision of the trial court dismissing the claim with costs is set aside and in its place substituted a judgment for the plaintiff on liability at 100% and for damages as follows: -

a) General damages for pains and suffering Kshs 2,000,000.00

b) Cost of artificial limb Kshs 1,500,000.00

c) Special damages Kshs 107,070.00

22. The appellant shall get the costs of this appeal as well as the costs before the trial court together with interests on such costs and general damages from the date of the judgment of the trial court till payment in full. Interests on special damages shall be calculated from the date of the suit.

Dated, signed and delivered at Mombasa this 16th day of October 2020

P J O Otieno

Judge

[1] Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR

[2] Gitobu Imanyara & 2 others v Attorney General [2016] eKLR

[3] Sosphinaf Company Limited v James Gatiku Ndolo [2006]eKLR

[4] Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR