



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 251 OF 2015

AMREF KENYA.....APPELLANT

VERSUS

MARY AWINO OBONYO.....RESPONDENT

(Being an appeal from the judgment of Hon. Charles L. Obulutsa (SPM)

in CMCC No. 1065 of 2005 delivered on 30th April 2015)

JUDGMENT

1. The appellant, *Amref Kenya* was sued as the 2nd defendant in a suit instituted in the lower court by the respondent. The appellant was sued together with one *Moses Nyakundi Chweya* who was named as the 1st defendant but who is not party to this appeal as suit against him was withdrawn with no order as to costs on 22nd January 2009.

2. In her amended plaint dated 2nd May 2012, the respondent, then the plaintiff averred that on 23rd May 2002, she was in Kibera walking towards her home when a water tank belonging to the appellant installed in the 1st defendant's premises fell on her occasioning her serious injuries which led to the amputation of her leg. She blamed the appellant and the 1st defendant for her injuries claiming that the accident occurred because they failed to exercise due care and good workmanship when installing the tank in question. The particulars of the appellants and 1st defendant's negligence were pleaded in paragraph 5 of the amended plaint.

3. On the strength of the above allegations, the respondent prayed for general and special damages against the appellant and 1st defendant together with costs of the suit and interest.

4. The appellant in its statement of defence dated 4th March 2005 denied the respondent's claim in total and put her to strict proof thereof.

5. After a full trial, the learned trial magistrate, *Hon. C. L. Obulutsa (SPM)* entered judgment on liability in favour of the respondent against the appellant at 100% and awarded her general and special damages in the total sum of KShs.3,536,740 together with costs of the suit and interest.

6. The appellant was aggrieved by the trial court's decision. It proffered this appeal relying on seven grounds which can be condensed into three main grounds as follows:

i. That the learned trial magistrate erred in law in finding that the respondent had proved her case against the appellant as required by the law.

ii. That the learned trial magistrate erred in law and in fact by awarding the respondent special damages which had not been pleaded and proved and in awarding general damages which were excessive.

iii. That the learned trial magistrate erred in law in awarding costs of the suit to the respondent.

7. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed. The submissions were highlighted before me on 24th September 2019.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am well aware of my duty as the first appellate court

which as summarized by the Court of Appeal in *Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira & Company Advocates, [2013] eKLR* is to:

“... re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. I have carefully considered the grounds of appeal, the rival written and oral submissions made on behalf of the parties as well as the evidence on record. I have also read the judgment of the learned trial magistrate. Having done so, I find that only three key issues arise for my determination in this appeal which are the following:

- i. Whether the learned trial magistrate erred in his finding that the respondent had proved her claim against the appellant to the standard required by the law.
- ii. If the answer to issue number (i) is in the negative, whether the trial court's award on both general and special damages was erroneous.
- iii. Whether the learned trial magistrate erred in awarding costs of the suit to the respondent.

10. Turning to the issue of liability, the respondent in her amended plaint pleaded the particulars of negligence attributed to the appellant, its servants or agents as follows:

- i. Failing to install the tank properly, steadily and strongly.***
- ii. Failing to take proper caution and diligence while installing the tank.***
- iii. Not knowing that other members of society may be injured by the tank.***

11. During the trial, the respondent testified as PW1 and called one additional witness. In her evidence, PW1 claimed that on 23rd May 2002, she was at Kibera walking home from a shop when a water tank which was installed near a road fell on her. She claimed that the water tank had been installed by Amref. Her testimony was corroborated by the evidence of PW2 who testified that he was the chairman of the village in which the offending tank was installed. He confirmed that the tank fell on the respondent on 23rd May 2002 and that the tank had been installed by people who wore Amref badges. He claimed that the tank had been placed on wooden poles which gave way due to water weight. He also claimed that even after installation, Amref personnel used to go and inspect it.

12. On its part, the appellant called one witness (DW1), its Kibera project officer. DW1 adopted his witness statement dated 23rd May 2014 as his evidence in chief. He testified that once Amref donated water tanks to Community Based Organizations in Kibera like the group known as *Mradi Wa Afya Ya Msingi Wa Maendeleo (MRAMMA)*, its responsibility ended there and it was up to the groups to decide where and how to install the water tanks at their own cost. He claimed that the tank that fell on the respondent could not have been one of the tanks donated by the appellant allegedly because according to its records, the 1st defendant on whose plot the water tank was allegedly installed was not one of its tanks beneficiaries; that all Amref donated tanks were installed at a maximum height of 1¹/₂ feet and could not have caused the kind of injuries sustained by the respondent and lastly, that at the time the accident occurred, the appellants activities were restricted to Kibera Laini Saba.

13. In cross examination, DW1 admitted that in the year 2002, he was not working for the appellant and that what he had recorded in his witness statement was information he had received from one *Sakwa Mwangale*, the appellant's former manager. It is important to note that the said *Sakwa Mwangale* was not called as a witness in the suit.

14. In his judgment, the learned trial magistrate reproduced the evidence of the respondent and her witness before making his decision that the appellant was liable for the respondent's injury at 100%.

15. After my own independent analysis of the evidence on record, I find that the respondent had established through her testimony and that of PW2 that the tank which collapsed on her causing her a serious injury on her leg was not only donated but was also installed by the appellant. PW2 was very categorical in his evidence that the people who installed the water tank wore Amref badges. His evidence and that of PW1 on this point was not shaken in cross-examination. DW1's evidence which sought to prove that the appellant did not have anything to do with the tank's installation was mainly hearsay given his admission that he had obtained the information he recorded in his witness statement from another person who was not called as a witness during the trial. It was thus inadmissible in evidence and it did not have any probative value.

16. The appellant's argument that it could not have donated or installed the water tank allegedly because its activities were exclusively restricted to Kibera Laini Saba and had not extended to Soweto village at the time of the accident cannot come to its aid because the respondent did not claim in her pleadings or evidence that the accident occurred in Soweto village. She testified that she was a resident of Soweto village and that she was injured in an undisclosed area of Kibera when she was on her way home.

17. In view of the foregoing, I am unable to fault the trial magistrate's finding that the appellant was the entity that had installed the water tank which fell on the respondent as alleged. The appellant owed the residents of Kibera village a duty of care to ensure that the installation of water tanks would be for the welfare and benefit of the area residents and would not be a source of danger to their lives or property.

18. The fact that the water tank collapsed under the weight of the water it was supposed to hold means that its installation was poor and

lacked a strong and solid foundation. In failing to properly and safely install the water tank, the appellant breached its duty of care to Kibera residents who included the respondent. It is thus my view that the respondent managed to prove on a balance of probabilities a causal link between her injuries and the poor installation of the water tank by the appellant's agents.

19. Consequently, I find that though the learned trial magistrate did not expound on the reasons that informed his decision to find the appellant fully liable for the respondent's injuries, there is no doubt from the evidence on record that the appellant's agents negligently installed the water tank in question without taking into account the safety of the area residents. The appellant was thus vicariously liable for the acts of its servants or agents.

20. The appellant in its submissions also faulted the judgment of the learned trial magistrate on grounds that he did not make any finding on the 3rd party who it had enjoined in the proceedings. While it is true that the learned trial magistrate did not make any finding on the 3rd party, this omission cannot vitiate his decision on liability since the appellant did not adduce any evidence to prove that the 3rd party participated in any way in the installation of the water tank in question. The memorandum of understanding between the appellant and MRAMMA does not show that MRAMMA, the 3rd party, was tasked with the role of installing water tanks donated by the appellant. This is besides the fact that the memorandum of understanding between the appellant and the 3rd party was executed on 28th July 2003 slightly a year after the respondent's cause of action accrued.

For all the foregoing reasons, I find no basis to interfere with the trial court's finding on liability. The same is hereby upheld.

21. Regarding the appellant's complaint on quantum of general damages, I wish to start by pointing out that as a general rule, the award of damages is always at the discretion of the trial court. An appellate court should be slow to interfere with the discretion of the trial court unless it is satisfied that the award was either inordinately high or too low that a reasonable inference may be drawn that it was based on an erroneous estimate of the damage suffered or the court was satisfied that the award was based on wrong legal principles. See Arky Industries Limited V Amani, [1990] KLR 309; Kemfro Africa Limited T/A Meru Express Services [1976] & Another V Lubia & Another, [1987] KLR 30.

22. In this case, according to the medical reports authored by *Dr. Ndonga* and *Dr. Wokabi*, the respondent sustained compound fractures of the left tibia with severe sepsis and onset of gangrene which led to amputation of the leg above the knee. *Dr. Wokabi* opined that owing to the aforesaid amputation, the respondent suffered permanent disability assessed at 45%. After considering the respondent's injuries as confirmed in the two medical reports, the learned trial magistrate awarded her general damages in the sum of KShs.3,000,000.

23. The appellant has complained that this amount was manifestly excessive and was not comparable to previous awards made for similar or more serious injuries. The appellant relied on the authority of David Kigotho Iribe V John Wambugu Ndung'u & Another, [2008] eKLR where the plaintiff was awarded KShs.1,300,000 for injuries which included amputation of the right lower limb and partial amputation of the right lower leg which led to permanent disability assessed at 75%.

24. The respondent on the other hand claimed that the award was too low and urged the court to enhance it to KShs.5,000,000. She did not cite any authority as a basis for her submissions on quantum.

25. I have considered the case of Kurawa Industries Ltd V Dama Kiti & Another, [2017] eKLR where the High Court on appeal upheld an award of KShs.2,000,000 made in 2015 to a plaintiff whose leg was amputated above the knee and the case of John Kipkemboi & Another V Morris Kedolo, [2019] eKLR where this court on appeal set aside an award of KShs.3,000,000 and substituted it with an award of KShs.2,500,000 where the plaintiff had sustained several injuries including amputation of the left leg and where the degree of permanent incapacity had been assessed at 50%.

26. The learned trial magistrate did not disclose the reasons that informed his award of KShs.3,000,000 even though it was brought to his attention that an award of KShs.1,300,000 had previously been made for almost similar injuries. In the absence of any reason to justify the award of KShs.3,000,000, considering the awards made in the above authorities, I am persuaded to find that the award made by the trial court was inordinately high and must be set aside.

27. Given that the award in David Kigotho Iribe V John Wambugu Ndung'u & Another, [supra] was made many years prior to the trial court's award and taking into account awards in the decisions I have cited hereinabove, I find that an award of KShs.2,000,000 would have been reasonable and sufficient compensation for the respondent's injuries at the time the trial court's award was made. I therefore set aside the trial court's award on general damages and substitute it with an award of KShs.2,000,000.

28. On special damages, it is trite law that special damages must be specifically pleaded and proved. The respondent pleaded special damages in the sum of KShs.56,740. The original record of the trial court contains evidence in the form of a Patient Hospitalization Account Summary issued by St. Mary's Mission Hospital produced as Pexhibit 2 confirming that the amount pleaded was paid on 1st August 2002. In the premises, I find that the amount was pleaded and proved. The trial court's award on special damages was therefore correct and it is hereby confirmed.

29. On the award for cost of prosthesis, though the amount was proved by way of the medical report prepared by *Dr. Wokabi*, the same was not pleaded in the amended plaint. Since the cost of prosthesis was a claim for future medical expenses, it amounted to a special damage claim which as stated earlier, must be pleaded and specifically proved. Since the claim was not pleaded, the learned trial magistrate erred in law when he awarded an amount of KShs.480,000 for cost of prosthesis. The award had no basis in law and it is therefore set aside.

30. Lastly, the appellant faulted the trial court's decision to award costs of the suit to the respondent. *Section 27* of the *Civil Procedure Act* is clear that an award of costs is at the discretion of the court but as a general rule, costs should follow the event. In this case, the respondent succeeded in her suit which was contested and she was therefore entitled to costs of the suit. The trial court was therefore right in awarding costs of the suit to the respondent.

31. In the end, the appellant's appeal partially succeeds to the extent specified above. The judgment of the trial court is set aside and is substituted with a judgment of this court in favour of the respondent against the appellant in the total sum of KShs.2,056,740 made up as follows:

General damages - KShs.2,000,000

Special damages - KShs.56,740

32. The amount of special damages shall attract interest from the date the suit in the lower court was filed until payment in full. The award of general damages will attract interest from the date of judgment of the lower court until payment in full.

33. On costs, the respondent is awarded costs of the suit in the lower court and since the appeal has partially succeeded, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY DECEMBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Onyango for the appellant

Mr. Kamwenda holding brief for Mr. Masese for the respondent

Mr. Kibet: Court Assistant