



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 4 OF 2016

(Being an appeal from the Judgment of the Chief Magistrate's Court at Naivasha Civil Case No. 86 of 2014, P. Gesora - SPM)

KENNEDY OOKO OUMA DACHL.....APPELLANT

-VERSUS-

JOSEPH MAINA KAMAU.....1ST RESPONDENT

POLYPHASE SYSTEMS LIMITED.....2ND RESPONDENT

J U D G M E N T

1. This appeal emanates from the decision of Gesora CM in Naivasha CMCC No. 86 of 2014. The appeal is confined to the award of damages in respect of pain and suffering as well as future medical expenses.

2. The grounds contained in the memorandum of appeal are as follows:-

“1 THAT the trial magistrate failed to critically evaluate the evidence on record and failed to accord the Plaintiff's Doctor's medical report and submission due weight to the extent that it was able to demonstrate the injuries suffered by the Plaintiff.

2. THAT the trial magistrate erred in law and in fact in failing to consider and analyze the Plaintiff evidence and submission on record and proceed to award very low quantum compared to the injuries suffered by the Plaintiff.

3. THAT the learned trial magistrate erred and misdirected himself in fact and law by awarding damages for future medical expenses that were too low considering the circumstances and evidence on record and thus failed to appreciate the principles applicable in the award of damages.”

3. The background the matter is that Appellant was driving his motor vehicle registration number **KAQ 299V** along Maai Mahiu – Naivasha Road on 9th December, 2013. He was involved in a collision with the motor vehicle **KBW 785R** owned by the 2nd Respondent, and at the time, being driven by the 1st Respondent. He sustained several injuries, the most severe being a fracture to the acetabulum. He received treatment at Mater Hospital initially, and later at Med-hill Nursing Home.

4. In his subsequent suit for damages, he blamed the driver of the Respondent's vehicle for causing the accident through negligent driving. The Respondents denied liability by their defences but did not adduce evidence at the trial. For his part, the Appellant gave evidence and called **Dr. Kiamba (PW2)** as a witness. Subsequent to submissions by the parties, judgment was entered in the Appellant's favour. He was awarded a sum of Shs 1,000,000/= as general damages as pain and suffering, and a further similar sum for future medical expenses, in this case, total hip replacement.

5. The parties agreed to dispose of the appeal by way of written submissions. In his submissions, the Appellant reiterates the injuries documented in medical evidence tendered at the trial.

6. Pointing to a report by **Dr. Wasena Angira**, the Appellant states that total hip replacement surgery would be necessary every ten years. And that since the Appellant was aged 37 years at the time of the accident, he would be required undergo at least three cycles of hip replacement surgery. The Appellant complains that the trial magistrate overlooked this recurrent expenditure and only awarded Shs 1 million which sum could only cater for one such operation.

7. Citing the time-hallowed dicta in **Kemfro Africa Limited t/a Meru Express Services (1976) & Another -Vs- Lubia & Anor. (No. 2) [1985] eKLR**, the Appellant states that there is good ground for interfering with the decision of the lower court, as the judgment overlooked a relevant factor. The Appellant urges the court to review the award upwards to Shs 3 million.

8. On quantum of damages in respect of pain and suffering, it is the Appellant's position that the sum of Shs 1 million was not commensurate with the injuries sustained, or consistent with those suffered by the Plaintiffs in the authorities cited by the Appellant in the lower court. He complains that the trial magistrate did not distinguish the instant case from the cited authorities but nonetheless awarded lower damages.

9. Ultimately, the Appellant has submitted that quantum of damages was wholly erroneous and liable to be disturbed. He relied further on the decision in **Michael Maina Gitonga -Vs- Serah Njuguna alis Serah Wanjiku Mungai [2012] eKLR** and **Florence Hare Mkaha -Vs- Pwani Tawakal Mini Coach & Another [2012] eKLR**.

10. By their submissions, the Respondents have made reference to a cross appeal allegedly filed on 11th February 2016. No such cross-appeal is on record. Indeed, the only pleading filed on 11th February 2016 is the Appellants memorandum of appeal. As such the Respondents are only entitled to respond to the challenge in respect of quantum of damages and not the issue of liability as they have purported to do their submissions.

11. Regarding the injuries sustained by the Appellant, the Respondents referred to the medical reports by **Dr. Wasena Angira** and **Dr. Malik**. No reports by **Dr. Mali** is on the record. The Respondents' complaint is that their submissions in support of their proposal on general damages for pain and suffering were not considered hence an inordinately high award of general damages was made. They relied on the decision in **Nairobi HCC No. 2654 of 1997 Richard Mungai Gichuhi -Vs- Peter Ngilu Kahia** are cited. Thus the Respondents argue that the sum of Shs 1 million awarded in the lower court is too high.

12. Regarding further medical expenses, the Respondents refer yet attain to reports by **Dr. Malik** and **Dr. Wasena** the former who from the record did not testify or tender report at the trial. The Respondents, citing the **Kemfro** case urged this court to revisit the evidence and dismiss the appeal or review downwards the general damages in respect of pain and suffering, as well as future medical expenses. In their view, the trial court failed to take into account relevant factors.

13. The court has considered the evidence at the trial, both oral and documentary, as well as submissions made on this appeal. The injuries sustained by the Appellant are not disputed, even though the prognosis is implicitly disputed by the Respondents through a challenge to quantum on future medical expenses. The sole issue for determination is whether the general damages awarded in respect of pain and suffering and future medical expenses were inordinately high, and inconsistent with the principles expressed in the **Kemfro** case.

14. In **Selle -Vs- Associated Boat Co Ltd. [1968] EA 123**, it was stated that:-

"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif -vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

15. In the **Kemfro** case that both sides have relied on, the Court of Appeal set out the circumstances in which a court sitting on appeal may intervene to review an award in damages, observing per **Kneller J.A** (as he then was) that:-

"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 that 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. See *Ilanga -Vs- Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukeny Ranching and Farming Co-operative Society Ltd -Vs- Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."

16. For his part, **Nyarangi J.A** (as he then was) emphasized in his judgment that:

"This court will not interfere with the question of damages awarded by the trial court unless it is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred. *Obongo -Vs- Municipal Council of Kisumu* [1971] EA 91 at page 96, Letter H – *I Witu -Vs- Peake*, [1913/1914] 5EALR 17, and *Marumba -Vs- Clark* [1952] 19EACA 60."

17. The foregoing is the legal lens through which this appeal has to be considered. The Appellant's submissions in respect of general damages for future medical expenses are founded on the report by **Dr. Wasena Angira**. This report was tendered during the trial as exhibit 2. The relevant portion of the report states that:-

"The acetabula fracture will have a malunion (not heal properly) and he (Appellant) is bound to get arthritis of the left hip and he will be required to have total hip replacement after probably 8 to 10 years."

18. This report *ex facie* does not state that hip replacement would be required every 8 to 10 years, as stated by the Appellants in their

submissions. The medical report which makes such a statement is one by **Dr. Tobias Otieno**, marked MF13 at the trial and not produced as an exhibit. What was produced was the Magnetic Resonance Imaging (MRI) report requisitioned by one **Professor Jowi** and undertaken by **Lakeside MRI** (marked Exhibit 4).

19. As for the medical report produced by **Dr. Kiamba** at the trial, the relevant portion states:

“He (Appellant) has not recovered from the comminuted fracture of the left acetabulum. This fracture will eventually malunite and he will develop osteo arthritis of the left hip joint. He will eventually require total hip replacement. This operation will cost at least Kshs 1 million”

20. In his oral evidence **Dr. Kiamba** stated inter alia that:-

“He (Appellant) will require a total hip replacement at a cost of 1 million (shillings).....The (2) hip replacements will cost 3 million (shillings)”

This latter statement is not included in the report produced by **Dr. Kiamba** at the trial.

21. In his oral testimony, the doctor did not state the basis of the said statement, and particularly the cost of Shs 3 million for two hip replacements. He however was not challenged on this aspect in cross-examination. The trial magistrate’s judgment did not address the medical reports in much detail restating only the cost of the hip operation.

22. The submission by the Appellant at the trial had proposed a sum of Shs 3 million for three hip replacements, which is not based on the evidence tendered or pleadings. The plaint in fact did not specifically state the amount that was to be sought by way of medical expenses, which on all accounts were known prior to the filing of the suit. (See **Daniel Kosgei Ngelechei -Vs- Catholic Diocese Registered Trustees of Eldoret & Another [2016] eLKR**).

23. I prefer to say no more on this question beyond stating that the Appellant’s complaints regarding the award of general damages in respect of future medical expenses have no basis: no relevant proven factor was overlooked by the trial magistrate. Going by the evidence of the Appellant, there was no evidence to support a claim in respect of expenditure three hip replacements.

24. Concerning general damages awarded for pain and suffering, the Appellant has stated that his authorities in support of an award of Shs 2 million were not considered. It is not in doubt that the main injury suffered by the Appellant was the fracture to the acetabulum and that the prognosis was not a good one; not only would the Appellant be predisposed to osteo-arthritis but also he would also require total hip replacement in the future.

25. Although **Dr. Kiamba** in his report classified the degree of injury as grievous harm, he was to state during his evidence that the Appellant had sustained 45% permanent disability. One wonders why such crucial information was left out at the time of examination of the Appellant and preparation of the medical report. As with the oral evidence relating to the number of possible hip replacements, my view is that the matter of the alleged 45% permanent incapacity was made up as the doctor went along. This is not acceptable at all, even if the defence did not challenge the evidence. The record prepared soon after examination is more reliable than oral evidence often given several years since examination.

26. That said, the Appellant did suffer debilitating injuries with adverse future sequela. Although the trial magistrate remarked at the extremities of the positions taken by the parties concerning general damages, he did not distinguish this case and the nature of the injuries sustained by the Appellant with the injuries Plaintiffs in the authorities referred to him. This court having considered the cases cited by the Appellant to support an award of Shs 2,000,000/= namely **Florence Hare Mkaha** and **Michael Maina Gitonga** noted that the Appellant’s injuries were less severe.

27. In that, **Florence** suffered the following injuries:-

- Concussion
- Fracture of left iliac crest
- Fracture to superior ramus and interior ramus pubic bone
- Dislocation fracture of the left knee
- Fracture of the left acetabulum
- Degloving injury that left both tibia and fibula bare.

28. As a result, her left leg was rendered shorter by 4cm and she had to walk by means of crutches and was therefore permanently disabled. She was awarded Shs 2.4 million in general damages for pain and suffering. **Michael Maina Gitonga** also sustained serious injuries including:-

- Multiple fracture of pelvis

- Dislocation of right hip with displaced fracture of right acetabulum

- Comminuted fracture to tibia and fibula

29. The trial judge (**Ouko J**, as he then was) remarked on the seriousness of the injuries and the fact that the doctors' report tendered at the trial, including one by **Dr. Kiamba** arrived at varying degrees of permanent disability and he expressed his displeasure. Nonetheless, despite noting, as the trial magistrate did in the instant case, that the parties' proposals or damages were worlds apart, the judge awarded the sum of Shs 1,500,000/= as general damages for pain and suffering. The decision was delivered in May, 2013.

30. In the present case, I note that the Appellant sustained one severe skeletal injury with a poor prognosis, as well as soft tissue injuries to the right knee, left forearm and left shoulder joint. On the date of examination on 14th February, 2014 he had a prominent scar on the knee and another on the forearm. It is the acetabulum fracture that will no doubt have the most far reaching and severe consequences to his health, due to the possibility of developing osteo-arthritis.

31. The case of **Peter Kingori & Another -Vs- Fabian Kagiri & Aother HCCC 2916 of 1993** cited by the Respondents at the trial is an old decision and the injuries therein did not compare well with the present cases. Similarly the Plaintiffs in the case of **Richard Mungai** and **Abdi Risak Ibrahim** cited by the Respondents on this appeal are old decisions. Although actual decisions were not attached, the injuries recited in the submissions as suffered by the Plaintiffs therein do not compare well with the instant case.

32. A fracture to the tibia or femur for instance, is very different from a hip fracture, especially in terms of long term consequences to the victim's health, and especially mobility. Besides, the awards in the authorities cited by the Respondents are too low. In my view, the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis.

33. Had the trial magistrate given attention to this factor, he would have awarded a higher figure as general damages. The court is satisfied that it is justified to interfere with the award for damages in respect of pain and suffering as the trial court failed to take into account the serious medical consequences arising from the fracture to the acetabulum. However, an award of general damages in the sum of Shs 2 million as sought on this appeal by the Appellant would be too high.

34. This court therefore while setting aside the award of Shs 1 million for pain and suffering is of the view that a sum of Kshs 1,400,000/= (One million four hundred thousand) would be adequate compensation for pain and suffering. To that extent the appeal has succeeded. The cost of this appeal will be borne by the Respondents.

Delivered and signed at Naivasha on this 16th day of March, 2018.

In the presence of:-

Mr. Owuor for the Appellant

N/A for the Respondents

Court Clerk - Quinter Ogutu

JUDGE