



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 546 OF 2012

BROAKSIDE DAIRY LIMITEDPLAINTIFF

VERSUS

PETER BUTATA WANJOHI DEFENDENT

(Being an appeal from the Judgement delivered on 20th September, 2012 by Hon. C. Obulutsa (Senior Principal Magistrate) Chief Magistrate Court at Milimani Commercial Court in CMCC No. 2099 of 2011)

JUDGMENT

1. The Appellant was sued by the Respondent for damages arising out of a road traffic accident. By the consent of the parties the claim for medical expenses was amended to read Ksh.560, 216/= to bring the total claim for special damages to ksh.563,416/=. By further consent liability was apportioned at 75% against the Appellant and 25% against the Respondent. By further consent the medical reports and medical documents were produced as exhibits. The parties then filed written submissions.

2. The trial magistrate entered judgment in favour of the Respondent as follows:

General damages Ksh.1,000,000/=

Special damages Ksh.563,416/=

Future medical expenses Ksh.120,000/=

Diminished earning Ksh.1,000,000/=

Total Ksh.2,683,416/=

Less 25% contribution Ksh.670,854/=

TOTAL Ksh.2,012,562/=

3. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:

1. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent Ksh.1,000,000/= which is excessive taking into account the circumstances of the accident and the nature of the injuries.

2. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent Ksh.1,000,000/= as damages for diminished earning capacity which is excessive taking into account that the Respondent was not fully incapacitated.

3. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent damages for diminished earning capacity when the Plaintiff/Respondent had not met the required standard of proof.

4. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent excessive general damages and damages for diminished earning capacity in total disregard of the fundamental principles of awarding damages as laid out by the courts.

5. The learned magistrate erred in law and fact in awarding the Plaintiff/Respondent damages for diminished earning capacity when the Plaintiff/Respondent had not demonstrated how his earning capacity had in fact been diminished.

6. The learned magistrate erred in law and fact in awarding special damages exceeding the ones that were pleaded and proved.

7. The learned magistrate erred in law and fact in awarding future medical expenses in total disregard of the principle of awarding the same.

4. During the hearing of the appeal, the counsels for the respective parties opted to file written submissions.

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. In the list of documents filed by the Respondent, the documents therein that can be described as medical reports and medical documents produced are as follows:

- **P3 form**
- **X-ray report dated 21st March, 2010**
- **Discharge summary from P.C.E.A Kikuyu Hospital**
- **Discharge summary from P.C.E.A Kikuyu Hospital**
- **Medical report by Dr. T Wangata**
- **Invoice dated 25th March, 2010 from Mater Hospital**
- **Receipts**

1. The medical report by Dr. Wangata reflects that the Respondent was examined on 4th April, 2011. The 35 year old Respondent was described as having sustained the following injuries:

- **Compound segmental fracture of the right tibia and fibula**
- **Fracture to the right medial malleolus**
- **Fracture to the left lateral malleolus**
- **Blood loss, Physical and psychological pain**

8. According to the said medical report, treatment included the following:

- **Hospitalization on three different occasions for several weeks.**
- **X-rays taken revealed the above fractures**
- **Open reduction and internal fixation with plates and screws was done to the right tibia**
- **Wound cleaning and dressing was done**
- **analgesics, antibiotics and tetanus toxoid injection.**
- **Plaster cast**
- **Ambulated using wheelchair and later with crutches.**

- Surgical toilet was done
- Removal of the plate, surgical toilet, daily wound cleaning and dressing.

9. At the time of examination the findings were as follows:

- He walks with the aid of crutches.
- There was a scar measuring 10 cm on the lateral malleolus of the left leg.
- There was below-knee plaster cast on the right leg with two windows *in situ*.
- There was a 2 cm ulcer/wound on the right shin with purulent discharge on the 1st window.
- There was a 4cm open wound with exposed bone on the 2nd window.

10. The doctors opinion was as follows:

“He remains with scars that are of cosmetic significance and still has wounds that have not fully healed. He already has features of chronic osteomyelitis on the right leg, this is a chronic bone infection that presents with a lot of pain and discharge from the bone and requires prolonged use of antibiotics and painkillers. Because of the osteomyelitis, surgery is required in future in the form of sequestrectomy and bone grafting. Such an operation is estimated to cost about ninety thousand shillings (Ksh.90.000/=). As a result of the injury sustained, he is not able to work as a driver as he is still on a plaster and has to use crutches to walk. This has adversely affected his career. The extent of permanent and functional incapacity as a result of injuries sustained in this accident is estimated at forty percent (40%).”

11. The Appellant filed a medical report dated 20th April, 2012 prepared by Dr. Wambugu. This medical report essentially agrees with the report by Dr. Wangata. At the time of examination on the findings were as follows:

“...walks with a right sided limping gait aided by a single elbow crutch, has a 2.0 cm shortening of this limb, the leg was held in a brace, two dressed septic wound spots along the shin which are discharging pus, the leg is deformed and scarred, ankle joint movements are within normal range and there was a healed surgical scar over lateral malleolus noted on the left limb.”

12. The doctors opinion was as follows:

“...Sustained skeletal and soft tissue injuries which occasioned him pains and ongoing morbidity. There was residual osteomyelitis right tibia which requires further surgical intervention to control the infection at an estimated all inclusive cost of Ksh.120,000/= at Kenyatta National Hospital. The Respondent was unlikely to ever fully exert himself manually using the right limb.”

The doctor assessed as the degree of permanent incapacitation at 30%.

13. The Respondent submitted for an award of Ksh.1,500,000/= as general damages. He relied on the case of **Samuel Mwangi Kamau v Joseph M Kimema & another [2004] eKLR** where award of Ksh.1,000,000/= was made for injuries which included fractures of the head, right tibia and fibula and soft tissue injuries.

14. The Appellant submitted for an award of Ksh.500,000/= as general damages. The court was referred to the case of **John Kariru Njoroge t/a jingo & Association Advocates v David Njiru [2008] eKLR** where an award of Ksh. 450,000/= was made for fractures of the right hip bone, tibia, fibula and soft tissue injuries.

15. Taking into account the passage of time and inflationary trends, I find the award of Ksh.1,000,000/= made by the trial magistrate reasonable and it is within the range of similar awards and therefore I will not interfere with the same. As stated by the Court of Appeal in case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

16. The medical evidence reflects that the Respondent requires further surgical intervention. The Respondent’s doctor, in the year 2011, approximated the cost of the same at ksh.90,000/=. The Appellants doctor gave the figure of ksh.120,000/=. In the circumstances the sum of Ksh.120,000/= awarded by the trial magistrate is reasonable.

17. Both medical reports reflect permanent incapacity and inability to exert the right leg or work as a driver. The Respondent’s earning capacity was therefore diminished. The Respondent may not be able to compete in the job market with other able bodies persons. The award of Ksh,1,000,000/= by the trial court is reasonable.

18. As stated in the case of **Mumias Sugar Company Ltd v Francis Wanalo**

The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. ”

20. Special damages must be specifically pleaded and specifically proved. The Respondent pleaded for special, damages and produced receipts as follows:

- i) Receipt for medical report Ksh.2,000.00**
- ii) 2 receipts for copy of records for the Cabin and Trailer Ksh.1,000.00**
- iii) 21 receipts for purchase of medicine Ksh.29,819.00**
- iv) 87 receipts from Oasis Health Services for Ksh.26,501.00**
- v) 11 Receipts from the Mater Hospital Ksh.391,557.63**
- vi) 53 receipts from PCEA Kikuyu Orthopedic Hospital Ksh.109,339.00**
- vii) 15 Receipts from Kiambu Medical Centre Ksh.3,000.00**

- Total Ksh.563,416.00**

After going through the receipts produced, I find that the special damages claimed were proved.

21. Having evaluated the evidence on record, I am satisfied that the trial magistrate arrived at the correct award of damages. Consequently, I find no merits in the appeal and I hereby dismiss the same with costs.

Date, signed and delivered at Nairobi this 26th day of Sept, 2018

B. THURANIRA JADEN

JUDGE