



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 173 OF 2016

1 NDUNGU THUO

2. KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANTS

VERSUS

PETER GIKARU MWANGI.....RESPONDENT

(Being An Appeal from the Judgment of Hon. G. H. Oduor Senior Principal Magistrate at Limuru in Civil Case Number 173 of 2016)

J U D G M E N T

1. This appeal emanates from the judgment of **Oduor Senior Principal Magistrate** in **Limuru Civil Case No. 149 of 2013** By the amended plaint filed on 23/10/13, **Peter Gikaru Mwangi** the Plaintiff in the lower court and now Respondent, sued the two Defendants, now the 1st and 2nd Appellants, Ndungu Thuo and Kenya Power & Lighting Co. Ltd (Kenya Power), for damages. The claim was based on a road traffic accident which involved the Respondent as a pedestrian, and the 2nd Appellant's motor vehicle, registration No. **KBD 944 J**, at the time being driven by the 1st Appellant.

2. The accident occurred on 24th October 2011 or 2012, per the plaint. The Respondent claimed to have suffered various injuries in the accident and suffered loss as a consequence. The Appellants denied the claim and all the key averments in the amended Plaint, and in the alternative pleaded that the accident occurred solely due to the Respondent's negligence. On 29/4/12 the parties recorded a consent judgment on liability in the ratio of 70:30 in favour of the Plaintiff. Only the Plaintiff adduced evidence during the trial. In its judgment the court below awarded a total sum of KShs.766,550/= subject to 30% contribution.

3. The award was made up as follows:

General Damages for pain and suffering	-	KShs.450,000
Damages for lost of earnings	-	KShs.288,000
Future medical expenses	-	KShs.350,000
Special damages	-	KShs. 15,000

4. Aggrieved by the outcome, the Appellants filed this appeal listing four grounds of appeal as follows:

“1. The learned Magistrate erred in fact and law in failing to give sufficient consideration to the proof of special damages adduced by the Plaintiff.

2. The Learned Magistrate erred in fact and law in failing to give sufficient consideration to the Defendants' submissions on quantum.

3. The Learned Magistrate erred in fact and law in failing to consider conventional and contemporary awards for general damages in case of similar injuries.

4. The Learned Magistrates erred in fact and law in allowing Limuru SPMCC 149 of 2013 with costs to the Defendants.”

5. The appeal was canvassed by way of written submissions. On the first ground, the Appellants submitted that the evidence in respect of special damages was not credible and that the Respondent was only entitled to the sum of KShs.4,900/= proven through documentary evidence.

6. The Appellants, submit that the Respondent gave contradictory evidence on his occupation and had no proof of income and loss of earning capacity. Moreover, the court below misdirected itself by shifting the burden of proof on this aspect on the Appellants, contrary to the provisions of Section 107 and 109 of the Evidence Act.

7. Regarding the claim for future medical expenses, the Appellants argue that the doctor's opinion was based on the estimated cost of surgery in a private rather than public hospital. And that, the trial court erred by relying on the estimate in awarding damages in respect of future medical expenses.

8. The Appellants further attack the award of damages for pain and suffering in the sum of KShs.450,000/=, which in their view is inordinately high. They relied on the decision in **Thomas Mwangi Gichuhi & Another v Peter Ngugi [2012] eKLR**.

9. As concerns the award of costs, it is the Appellant's contention that the sum ought to have been dismissed with costs as the Respondents case had no merit.

10. The Respondent defended the awards in damages and relied on several authorities including **Mbogo v Shah [1968] EA 93** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 88]** as to when the appellate court may disturb an award of damages.

11. The Respondent's case in the lower court was that the Appellant's vehicle **KBD 944 J** veered off the road and knocked him down. He sustained a fracture to the right lower leg and soft tissue injuries, for which he was treated at Tigoni District Hospital. The fracture healed with a bony deformity which rendered the foot shorter by 1cm. A year later, the Respondent was still dependent on crutches for movement. According to Dr. Bhanji (**PW1**) the mal-union of bones resulting in deformity required surgical correction at a cost of KSh.350,000/= in a private hospital.

12. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify see **Peters v Sunday Post Limited (1958) EA 424**; **Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123**; **Williams Diamonds Limited v Brown (1970) EAI I**.

13. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

14. In **Kenfro Africa Ltd t/a Meru Express Service & Another v A. M. Lubia & Another (1987) KLR 30** the Court of Appeal stated that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.” see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414**; **Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR**.

15. I agree with the Respondent's submissions that the award of general damages is a discretionary matter and that the appellate is not justified in substituting a different figure for the one awarded in the court below, for the sole reason that it would have awarded a different sum had it tried the case. With the above principles in mind, I propose to deal with the separate award heads.

Damages for Loss of earnings

16. The Respondent's evidence was that he had been rendered incapable of carrying on with his livestock business as a result of the injuries sustained. He stated that he earned KShs.18,000 p.m. prior to the accident. During cross-examination he was hard-pressed to explain the disparity between his pleadings and his evidence as to his place of business – Nairobi and Limuru respectively. He did not tender any evidence of his alleged business and income.

17. Although the Plaintiff's evidence on this score was scanty, the trial court correctly sought guidance from the decision of the Court of Appeal in **Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR** where the Court stated inter alia:

“But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ... we do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

18. In **Wambua v Patel [1986] KLR 336** cited in Kimatu's case, the Court grappled with the quantification of loss of earnings of a cattle trader who had sustained injuries in a road traffic accident. Even though the Court found the Plaintiff's earnings rather low, and that he kept no records the Court (Apaloo J (as he then was) stated:

“Nevertheless. I am satisfied that he was in the cattle trade and earned his livelihood from that business, a wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method ... But a victim does not lose his remedy in damages because the quantification is difficult.”

19. The statement by the trial court in the judgment that the Appellants did not disprove the evidence that the Appellant had engaged in an income generating activity prior to the accident must be taken to mean that the Respondent's evidence was not controverted and not a shifting of the burden of proof on the Appellants.

20. The court considered the evidence by the Respondent and concluded that a sum of KShs.6000/= p.m. was appropriate. The court only awarded the damages for lost earnings in respect of in the four years since the accident noting correctly that the Respondent could despite his injury undertake other business activities such as running a shop. This court can find no reason to fault the award.

Damages for pain suffering and loss of amenities

21. In submissions before the trial court, the Respondent had sought a sum of KShs.650,000/= under this head. The trial magistrate, noting the age of authorities cited by the Respondent elected to base his award on the Appellant's more recent authority in **Thomas Mwangi Gichuhi & Another v Peter Ngugi Kamau [2012] e KLR**.

22. The Appellants had proposed an award of KShs.300,000/=. In that case, as herein, the trial court had found that the Plaintiff had suffered a fracture to the right tibia and fibula. **Ouko J** (as he then was) faulted this finding for being inconsistent with medical evidence that there was only one fracture-to the tibia. So it is in this case. Although the Respondent pleaded fractures to the tibia and fibula. The earliest medical record from the **Tigoni District Hospital** tendered at the trial revealed only a fracture to the tibia. The subsequent report by Dr. Bhanji includes a fracture to the fibula. It does not appear that Dr. Bhanji had any x-rays done for purposes of his report as no such evidence was tendered in court.

23. In **Thomas Mwangi Ouko J** (as he then was) confirmed an award of KShs.300,000 made in 2009 in respect of a fracture to the tibia. The instant award was made in 2013. Considering the poor prognosis of the Respondent in this case and the extended period of pain since the accident, this court is not convinced that an award of KShs.450,000/= as general damages for pain and suffering is inordinately high.

Future medical expenses

24. According to Dr. Bhanji the x-ray taken at **Tigoni District Hospital** revealed:

“A fracture between the middle third and distal third of the shaft of the tibia bone with displacement of fragments ... and fracture in the proximal third of the fibula borne with displacement of the fractured fragments. There was little callus at the fractured sites.”

25. On the future prognosis, the doctor noted a **“palpable deformity over the lower third of the right lower leg... displacement of fractured fragments resulting into mal-union. This bony deformity is a feature of permanent nature, unless surgically corrected”**. He further states that such correction would involve refracturing the *bone*, open reduction and internal fixation with metal plates.

26. It is not clear from this conclusion which particular bone requires corrective surgery as unlike the earlier notes, the conclusion is non-specific to the particular bone referred to. Dr. Bhanji further estimated the cost of such surgery in a private hospital to be KShs.350,000/= which includes hospitalization, surgery and attendant costs.

27. As earlier stated, the earliest medical record which is the discharge summary from Tigoni District hospital discloses only one fracture to the tibia. The trial magistrate in his judgment proceeded on the assumption that the Respondent had sustained two fractures – to the tibia and fibula. And while I agree that a Plaintiff is entitled to the best medical care available, the trial court ought to have ascertained from Dr. Bhanji as to which fractured bone required corrective surgery. Of course, corrective surgery in respect of two fractured bones is likely to cost more than surgery on only one fracture bone.

28. The trial magistrate adopted Dr. Bhanji's report observing that his assessment was the only one available. It is true that the Appellants did not tender any evidence on this score, but the trial court did not lose its duty and discretion to consider in detail any assessment placed before it as a professional opinion.

29. For my part, I think that had the court carefully considered the report by Dr. Bhanji, and the discharge summary from Tigoni District Hospital in detail, it would have noted that there were discrepancies as to the extent of the injuries sustained by the Respondent, and therefore scrutinized Dr. Bhanji's prognosis and estimated cost of corrective surgery with more care.

30. This court is prepared, on the basis of the finding that the Respondent suffered a fracture to the tibia bone and which healed with malunion, to accept that corrective surgery was necessary. In the circumstances the estimate of KShs.350,000/= in respect of such surgery appears excessive. This amount will be reduced by half, therefore, so that the award in respect of further medical costs is KShs.175,000/=.

31. This appeal has therefore only succeeded with regard to the cost of future medical expenses which is adjusted to KShs.175,000/=.

32. Regarding special damages, it is trite that special damages must be specifically pleaded and proved. The Respondent tendered evidence in support of his claim for the doctor's report (KShs. 15,000); treatment expenses at Tigoni District Hospital (KShs.1,400) and fees paid to the Kenya Revenue Authority in respect of the ownership details of the accident vehicle (KShs.500/=). The Respondent was therefore entitled to KShs.16,900/= and it seems the court did not consider all the evidence in respect of special damages.

33. Judgment is therefore entered for the Respondent against the Appellants in the reduced quantum as follows:

- a) General damages for pain and suffering KShs.450,000/=
- b) Damages for lost earnings KShs. 288,000/=
- c) Cost of future medical expenses KShs.175,000/=
- d) Special damages KShs.16,900/=

Less 30%

Net KShs. 650,930/=

34. Costs will always follow the event and in this case, the appeal has only partially succeeded. Therefore the Appellant is awarded ¼ of the costs of this appeal.

DELIVERED, DATED AND SIGNED AT KIAMBU THIS 21 DAY OF SEPTEMBER 2018

In the Presence of:

Appellant – No appearance

Respondent – No appearance

Court Clerk - Kevin

C. MEOLI

JUDGE