



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 103 OF 2010

IRENE NJERU GODREY.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

J U D G M E N T

1. This appeal arises from the judgment of Wanguru Senior Resident Magistrate in SRMCC No. 63 of 2006 delivered on 14/09/2010. The appellant has sued the defendant for general and special damages for injury suffered when he fell into a hole dug by the respondent's agents beside a path to his residential house.

2. The amended plaintiff was struck out with costs for non-compliance with Order VIA Rule 7. The magistrate proceeded to assess damages that he would have awarded in the event that the suit was successful. The magistrate also found that he would have apportioned liability at 50:50. The general damages were assessed as Kshs.200,000/=.

3. The grounds relied on by the appellant are that the magistrate erred by finding that the amended plaintiff had not complied with the law and by striking it out. The appellant also contended that the general damages of Kshs.200,000/= were inordinately low and ought to be reviewed.

4. In his submissions the appellant relied on Article 159(2)(d) and the overriding objective in arguing that the learned magistrate struck out the plaintiff on technicalities which was wrong. It is further contended that the submissions of the appellant's advocate on the non-compliance of the law were not given due consideration.

5. The apportionment of liability at 50:50 was challenged in that the respondent did not prove it in evidence. The appellant argues that he had proved full liability against the respondent. The respondent did not file any submissions in this appeal despite having been served several times.

6. The duty of the first appellate court was explained in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES [1976] & ANOTHER VS LUBIA & ANOTHER (No. 2) [1985] eKLR**. The court observed: -

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.

7. The respondent's plaintiff was struck out for non-compliance with Order VIA Rule 7 of the repealed rules. The provisions have been reproduced in the Civil Procedure Rules, 2010 Order 8 Rule 7 which are the current rules. The respondent's plaintiff was struck out for non-compliance with Order VIA Rule 7 of the repealed rules. The provisions have been reproduced in the Civil Procedure Rules, 2010 Order 8 Rule 7 which are the current rules.

8. The requirement of the law is that "every pleading amended under this order shall be endorsed with the date of amendment and either the date of the order allowing the amendment.."

9. The appellant relies on Article 159(2)(d) of the constitution arguing that the failure to endorse the date of amendment on the plaintiff was not fatal to his case. It was a procedural technicality that is curable under Article 159(2)(d) which provides: -

Justice shall be administered without undue regard to procedural technicalities;

10. The provision has contributed to growth of jurisprudence in Kenya crippling the impact that technicalities have had in the dispensation of justice. Technicalities refer to strict procedural rules, points of law or a small set of rules as contrasted with the intent and purpose of

substantive law. The rights and duties of the people are defined by substantive law whereas procedural law lays down the rules by which the rights and duties are enforced and realized.

11. In addition to Article 159(2)(d), parliament enacted Section 1A and 1B known as the overriding objective or the oxygen principle in 2009 as an amendment to the Civil Procedure Act.

12. Its purpose is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes garnered by the Act. By these provision, the court has a duty to ensure that they give interpretation to the law that affects the overriding objective to avoid hardship, expense, delay and focus on substantive justice.

13. At the time of delivery of this judgment on 1/09//2010, the new constitution had just come into force on 27/08/2010 while the overriding objective had come into force about one year earlier.

14. In my view, the provisions of subsidiary legislation cannot override constitutional and statutory provisions. The omission of the date of amendment in my view is a procedural technicality that is curable under Article 159(2)(d). the magistrate ought to have given due consideration to the constitutional provisions and the overriding objective in his judgment to prevent undue regard to the technicality that resulted in denying justice to the respondent.

15. In the case of **KAMANI VS KENYA ANTI-CORRUPTION COMMISSION, [2010] eKLR** the respondent in the appeal had applied for the appeal to be struck out on a technicality. He raised an objection that some primary documents, including the handwritten notes of the two trial judges had been omitted from the appeal record.

16. For that reason, it was argued that the appeal was invalid and ought to be struck out. Unlike the case in the old approach before the amendment of the Civil Procedure Act and enactment of Article 159(2)(d), the court declined to strike out the appeal. The court however warned that the overriding objective was not purposed to help indolent litigants but to deliver substantive justice to parties.

17. The court relied on a pre-2010 authorities one being that of **KAROKI KIMANI GITHUA VS JAMES GICHUKI MUHORO Nyeri HCCC No. 257 of 1992.**

18. it is my considered view that the learned magistrate erred in law by adopting the old approach of striking out cases on technicalities.

19. The magistrate had found the respondent liable and apportioned liability at the ratio of 50:50. As argued by the appellant, the respondent did not adduce any evidence to prove contributory negligence. It is not in dispute that the appellant proved his case on the balance of probabilities because the trial magistrate so found. The respondent opted not to file any submissions in this case.

20. The appellant found holes dug by the residence without any warning to the pedestrians using the footpath. The appellant said she had stayed at the residential premises for over five (5 years). She testified that she did not see the hole till she fell inside. It was dark since the time was given as 7.00 to 8.00 p.m.

21. It is however noted that the evidence of PW3 was to the effect that the appellant was trying to evade a vehicle when she fell in the hole. The registration number of the vehicle was not taken by the appellant and neither did she blame the driver of the said vehicle.

22. The act of moving to the side of the road to give way to vehicles moving on the road is really not an act of negligence on the part of the appellant.

23. I find that there was no basis for the apportionment of liability at the ratio of 50:50. I hereby set aside the said orders and find the respondent fully liable.

24. The appellant contended that the general damages of Kshs.200,000/= was inordinately low. The principles guiding appellate courts in dealing with general damages were set out in the case of **KEMFRO** (supra).

25. PW2 Dr. Ephantus Ireri Nyaga examined the appellant at Kimbimbi Sub-District hospital. She complained of pain in the knee and had difficulty in walking. She had tenderness and swelling of the left knee joint. A plaster of Paris was used on the fracture site. The respondent therefore suffered a fracture of the left knee and developed arthritis on the left ankle joint.

26. The magistrate awarded Kshs.200,000/= in the year 2010.

27. The plaintiff relied on two decisions on the quantum of damages as follows: -

i. Nairobi HCCC No. 6050 of 1992 PHILISH SERA MBUVI & 10 OTHERS VS OBADIAH KAMANDE & ANOTHER where the plaintiff was awarded Kshs.450,000/= for injuries to the back on lumbar sacral area that weakened his hand grip.

ii. Mombasa HCCC No. 318 of 1991 ERASTUS SHEM VS KENYA PORTS AUTHORITY. The plaintiff was awarded Kshs.400,000/= for injuries of a compound fracture of fibia and fibula bone as well as several skin loss and leg muscle. He underwent two operations for fixation of the fracture in 1993.

28. The respondent relied on the case of **REBECCA AWANDO VS TAITA TAVETA EXPRESS SERVICES, Mombasa HCCC No. 557 of 1991** where Kshs.180,000/= general damages was awarded in 1994. The plaintiff suffered a fracture of the left ankle, abrasions on the

left ankle, leg up the knee and left foot injury.

29. I have considered the authorities of the appellant and do not find them comparable in this case for the reason that the plaintiffs therein suffered more severe injuries. The case relied by the defendant had similar injuries. The court takes into consideration the factors of inflation since the award of Kshs.180,000/= was made eight (8) years before the judgment in the appellant's case herein.

30. It is my finding that the award of KShs.200,000/= was adequate compensation in the year 2010 at the time of judgment in this case.

31. In my considered view, the trial magistrate took into consideration all the relevant factors in making the assessment of general damages.

32. Consequently, I find that this appeal has merit and it is hereby allowed.

33. The orders of the lower court striking out the plaint are hereby set aside and judgment entered on full liability in favour of the appellant. The proposed award of Kshs.200,000/= general damages is hereby confirmed in favour of the appellant.

34. The respondent will meet the costs of this appeal and those of the lower court. Interest on the damages are hereby awarded at court rates from the date of judgment.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF OCTOBER, 2018.

F. MUCHEMI

J U D G E

In the presence of: -

Ms. Ngige for Mugambi for Respondent