



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 139 OF 2017

JOSEPH KIMANI GATHAGA

BLUE SKY OUTSOURCING LIMITED..... APPELLANTS

VERSUS

ZIPPORAH WANGECI RUO.....RESPONDENT

(Being an appeal from the Judgment and Orders of Hon. B. Khaemba Senior Resident Magistrate delivered on 18th August 2017 in Kiambu CMCC No. 342 of 2016)

J U D G M E N T

1. This appeal emanates from the judgement of the lower court in **Kiambu CMCC No.342 of 2016**. In that suit the Plaintiff, now Respondent, had brought a claim against the two Defendants, now Appellants for compensation. The claim was based on the tort of negligence. It was averred that on 3rd July 2016 the 2nd Appellant's motor vehicle, **KCC 308V**, then being driven by 1st Appellant in a negligent manner, collided with motor vehicle **KBH 929 U**, and as a result the Respondent, a passenger in the latter vehicle sustained injuries. The accident allegedly occurred along the **Nairobi/Limuru road**.

2. The Appellants filed a defence statement in which they denied ownership of the accident vehicle **KCC 308 V** but admitted occurrence of the accident. However they denied liability for the accident and averred that the accident was caused through the negligence of the driver of the vehicle registration **No. KBH 929 U**. They further denied the particulars of injuries and loss as pleaded in the plaint.

3. Following a consent judgment on liability at 85:15% in favour of the Respondent recorded on 10/2/17, the matter proceeded to assessment of damages. Only the Respondent adduced evidence. To the effect that she sustained injuries on her body, and particularly fractures on the left hand following the accident and was in hospitalized for a period of over one month. That due to the injuries she is unable to resume her employment at the flower farm she worked in previously, earning KShs.13,000/= per month, and that she requires further medical treatment at a cost of KShs.1,000,000/=

4. She produced several exhibits, including a medical report through **Dr. Bhanji** who testified as **PW1**. Also produced by consent was a report by **Dr. Wambugu**. Judgment with costs was given for the Respondent against the Appellant as follows:

a) General damages for pain and Suffering - KShs. 800,000/=

b) Future medical expenses - KShs.1,000,000/=

c) Loss of earning capacity - KShs. 657,042/=

d) Specials - KShs. 22,700/=

Less 15% contributions

Net - KShs.2,107,780.70/=

5. Although the memorandum of appeal in some grounds erroneously states that the total award was KShs.4,279,742/= the gross award is KShs.2,479,742. The essence of the eight grounds of appeal was that the composite awards were based on wrong principles; that the trial

magistrate failed to evaluate the evidence in support of the Plaintiff's injuries and to relate them to the case law cited; failed to give reasons for the awards, and fell into error by awarding inordinately high awards as can only be judged to be wholly erroneous.

6. The parties agreed to dispose of the appeal by way of written submissions. Concerning damages awarded in respect of pain and suffering the Appellants take issue with the fact that although the discharge summary from Kenyatta National Hospital (KNH) reflected injuries to the left hand, left upper limb and left palm wound, the trial magistrate took into account a chest injury, not reflected in the KNH discharge summary. As regards the deformity and hypo-pigmented scarring of the right index, middle and ring fingers, the Appellants assert that the injuries were not included in the said discharge summary, and medical reports by **Dr. Bhanji** and **Dr. Wokabi**.

7. The Appellants further reiterate the contents of the medical reports in connection with the fractures especially to the left 3rd to 5th metacarpals and assert that no permanent disability resulted therefrom. Citing the need for conformity in awards for comparable injuries, as stated in **Esther Owuor v Nairobi Bus Union HCCC 735 of 1984**, the Appellants urge a reduction of the award in respect of pain and suffering.

8. Relying on **Rose Makombo Masanju v Night Flora alias Nightie Flora and Another [2016] e KLR**, the Appellants assert that the Plaintiff therein who suffered comparable injuries was awarded KShs.500,000/= as damages for pain and suffering. Also cited in support of a comparable award is the case of **Agnes Wakarua Njoka v Josphat Wambugu Gikungi [2015] e KLR**.

9. Submissions in respect of future medical expenses border on an *ad hominen* attack on **Dr. Bhanji**. Authorities are cited in support of the contention that the doctor's estimates of future medical expenses tend to be exaggerated (**Michael Adeka Khaemba and 2 Others v Rassangylo Muli Kimuyu [2018] e KLR** and **Cecilia W Mwangi and Another v Ruth W Mwangi Civil Appeal No.251 of 1996**). The Appellants contend that the cost of the treatment would be lower in a public hospital similar to the one attended by the Respondent herein. Thus the trial court erred in relying on **Dr. Bhanji's** estimate. The Appellants offer KShs.250,000/= under that head.

10. On the question of damages for lost earning capacity, the Appellants attack the finding of 100% loss of earning capacity, reiterating that the Respondent was right handed and that only 50% incapacity was expected; and further the estimated period of recovery (five years) was too long and ought to be reduced to 18 months, at the rate of 50% lost earning capacity.

11. The Respondent on her part defended the exercise of the court's discretion in assessing damages. That the discretion can only be interfered with by the appellate court where it is shown that the trial court considered irrelevant matters or failed to consider a relevant one, or misapprehended the law or evidence and manifestly arrived at an unjust decision due to a wrong exercise of discretion. The authorities are relied on, include **Mbogo v Shah [1968] EA 93** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 - 88] I KAR 1**. The Respondent submits that the Appellants have not brought their appeal within these parameters and the appeal ought to be dismissed.

12. The court has considered the submissions of the parties and the evidence adduced at the trial. There is no dispute that the Respondent sustained injuries to her left hand in the accident. On this appeal, the court is called upon to determine the extent of that injury and sequela, and whether other injuries were sustained by her. Ultimately the court must determine whether the award of damages under the three heads were properly arrived at.

13. Before doing so, it is pertinent to state that cases are determined on the basis of pleadings and evidence. The Appellants have on this appeal put up a spirited fight against the evidence of the Respondent. This is in contrast to the almost perfunctory questioning of the Respondent's witnesses during the trial, as revealed in the proceedings.

14. Secondly, there is no requirement that a trial court must consider every miniscule bruise, laceration or other trauma sustained by a claimant in order to make a proper assessment of damages. What is required is an appreciation of the most significant injuries and a comparison thereof with comparable decided cases, in order to come to an award that conforms with the general or current trend of damages for such injuries. Even so, it is not always not possible for the court to find a decided case where injuries are on all fours with those of a claimant in a case at hand. The court must do the best it can based on the material before it.

14. On the first question, the Respondent had during her testimony adopted her statement as filed on 4th November 2016. In that statement, she stated that she "**sustained severe bodily injuries, endured and continues to endure pain and have suffered loss and damages.**" The statement refers to admission to Kenyatta National Hospital and subsequent outpatient treatment at Karuri Sub-County hospital. That she was later reviewed by Dr. Mwaura who prepared a medical report.

15. In her evidence before the court, she stated concerning her injuries that:

"I was injured in the left hand (she shows the hand with deformities on fingers and muscles wasted). I had other injuries."

16. She further narrated that she was treated at Ndenderu or Tigoni hospital and later at Kenyatta National Hospital. She stated that she could no longer work in a flower farm as before, having lost the ability to grasp with the affected hand. That **Dr. Bhanji** had recommended further treatment at a cost of KShs. 1 Million. She did not state what the further treatment entailed.

17. At this moment, it is well to note that the discharge summary from Kenyatta National Hospital (**Exh.1**) indicated that she had sustained a fracture of the left radius-ulna, crush injury to the left hand and an open wound on the left palm and that the treatment involved K-wiring of

both the radio-ulna and 3rd to 5th metacarpals.

18. Dr. Bhanji's report produced at the trial as **Exhibit 1** outlined the following injuries:

- a) fracture of the proximal left hand phalanges of the 3rd to 5th fingers with displaced fragments.
- b) fracture of the left radius ulna bones, fixed with wires.
- c) hypopigmented scarring patch on dorsum of left foot and pain in left side chest wall.

19. Dr. Bhanji apparently carried out a further X-ray which showed that there was callus formation on site of the ulna and radius fracture angulation; and that the union of the bones was incomplete; and malunion of the fractures to the fingers (left hand) with degeneration of the left wrist joint which restricted mobility of the affected fingers and wrist. He also referred to head injuries and cerebral concussion which he predicted may lead to epileptic fits in the future. In his view the restricted movement of the left hand wrist could be corrected by surgery at a cost of KShs.1 million in a private hospital.

20. Based on the earliest available treatment notes, in this case the Kenyatta National Hospital discharge summary, and the Respondent's evidence, there is no evidence to support **Dr. Bhanji's** finding that the Respondent suffered a head injury, foreign body in the right eye or injury to the chest. **Dr. Bhanji** examined the patient some six months since the accident. While he based the bone fracture findings on the X-rays from Kenyatta National Hospital and Aga Khan Hospital, the source of findings in respect of concussion it is not clear from his report.

21. As for the chest pain, there is no evidence to link it with the accident, if at all. Neither the KNH discharge summary nor the Respondent referred to any related injury to the chest. Ditto for the report by **Dr. Wambugu**: there is no basis for the finding of a chest injury. Apart from the stated chest and head injuries the reports by **Dr. Bhanji** and by **Dr. Wambugu** are consistent with the discharge summary from KNH so far as the injuries sustained are concerned.

22. There can be no disputing that the substantive injury sustained by the Respondent was the fracture to the left radius/ulna bones which had not united in January 2017, a crush injury to the left hand that resulted in soft tissue injuries and fractures of the 3rd to 5th fingers and a wound in the left palm. The hand injuries had resulted in stiffness, thereby restricting movement as well as scarring. According to **Dr. Bhanji**, intervention by surgery could fix the stiffness. **Dr. Wambugu** was of the view that a final assessment of the residual disability was only possible after physiotherapy Upon the union of fractures.

23. The two reports were made four months apart. Thus, while it is doubtful on a perusal of the evidence adduced by the Respondent that she sustained chest injuries, and concussion of the head, it is beyond disputing that, based on the earliest medical record, the Kenyatta National Hospital discharge and two subsequent medical reports by **Dr. Bhanji** and **Wambugu**, that she sustained the following significant injuries:

1. Fracture of ulna-radius
2. Crush fracture of left hand involving 3 fingers

24. The trial court correctly observed that the two medical reports by **Dr. Bhanji** and **Dr. Wambugu** appeared to agree on these injuries. Nonetheless, the kind of technical language employed by **Dr. Bhanji** is perplexing. His report was intended for the consumption of the court and not a medical expert. The medical jargon and repetitious rendition of injuries only served to obfuscate matters. There must be a simpler way of communicating a doctor's findings; **Dr. Wambugu's** report is brief and easy to comprehend. Expert witnesses testify in cases to help the court understand the issues before them not to introduce confusion by extensive use of the jargon of their trade.

25. That said, there is no doubt that the injuries sustained by the Respondent were serious, and in particular, the crush injury to the left hand, which resulted in restricted movement and a limited ability to grasp. The Appellants have raised objections to the use of the word deformity in relation to the said defect. The deformity the court referred to twice and therefore erroneously, related to the crush injury of the left hand and wrist and appear to be based on the repetitious documentation of injuries in **Dr. Bhanji's** medical report. There is consistent evidence in both medical reports herein that the Respondents left hand has marked evidence of wasted muscle, limited wrist movement and stiffness in the affected fingers (3rd to 5th) and inability to grasp with the hand. This is clearly a deformity resulting from the accident, whether temporary or permanent.

26. The sentiments of the English Court in **Lim Poh Choo v Health Authority (1978)1 ALLER 332** were echoed by Potter J in **Tayab v Kinany (1983) KLR14**, quoting dicta by Lord **Morris Borth-y-Gest** in **West (H) v Sheperd (1964) AC 326**, at page 345 as follows:

“But money cannot renew a physical frame that has been battered and shattered. All the courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said and done, it still must be that amounts which are awarded are to a reasonable extent conventional.” (emphasis added)

27. General damages for pain and suffering are awarded for physical and mental distress to a plaintiff, including pain occasioned by the injury itself, treatment necessitated by the injury and any embarrassment, disability or disfigurement or anxiety suffered by the plaintiff – see **HALSBURY'S Laws of England 4th Ed. Reissue Vol 12(1)** at page 348, paragraph 883.

28. The trial magistrate was alive to the need to award comparable damages for comparable injuries. Having discussed the authorities placed before him in some detail, the trial magistrate settled on an award of KShs.800,000/=. In view of the proven injuries suffered by the Respondent and the prognosis, this court is unable to agree with the Appellant's contention that the award was too high and therefore erroneous. Indeed, the Plaintiff in **Rose Makombo** may have suffered comparable injuries but they were less severe, and did not result in restricted movement of the hand such as in this case. Even so the awards in that case, and in **Agnes Wakarua Njoka v Josphat Wambugu Gakungi** approximate to the award made herein. In my view the award is not inordinately high and the court does not feel justified to interfere.

29. Turning to the award of KShs.1million as future medical costs, it is well to revisit the evidence of **Dr. Bhanji**. Again, in characteristic style, the good doctor was content to throw the figure at the head of the court stating that the sum is for "surgeries, hospitalizations and anaesthetic costs" as well as physiotherapy. The estimated cost is a large amount of money by all accounts. The court does not lose its discretion and obligation to evaluate evidence placed before it even by expert witnesses. The court is not bound to accept as gospel truth any evidence only because it has fallen from the lips of an expert.

30. The duty to prove the claim for future medical expenses lay with the Respondent. In her evidence, she made a vague reference to "treatment" which **Dr. Bhanji** had apparently recommended to help her "heal". As for **Dr. Bhanji**, he seemingly saw no need to elaborate on the surgeries, hospitalizations etc that would be required to correct the deformity on the Respondent's left wrist. As the trial court observed, **Dr. Bhanji's** report was the most current, the examination itself having been done 4 months after **Dr. Wambugu's** and 6 months after the accident. In both cases, the doctors state that the bones had not united. **Dr. Wambugu** chose a cautious route, observing that it was best to assess the final disability after healing. Not **Dr. Bhanji**. Even while noting that the bones were yet to heal, he peremptorily recommended unspecified surgical procedures without caring to explain how each was necessary for returning the Respondent as close as possible to her initial frame.

31. In my view this attitude pervades the entire lengthy report by **Dr. Bhanji** – marked as it was by repetition and exaggeration of both documented and undocumented injuries such as head concussions which he claimed predisposed the Respondent to epilepsy. The Respondent herself did not mention any such injury or even complain as **Dr. Bhanji** reports, of the onset of severe and incapacitating headaches.

32. Looking at the evidence of the Respondent and the notes of the trial court when **PW2** testified, the report by **Dr. Wambugu** regarding her affected hand, I do not doubt that possibly, some surgical intervention might help. But whether she needed several of such procedures is difficult to tell. I agree with the Appellants that the award of KShs.1 million for future medical expenses was not properly justified, even though their argument that the Respondent ought to seek treatment from a public hospital has no basis. This court is prepared to accept that the Respondent might possibly benefit from at least one surgery in the future to increase the mobility of her left hand. There is a wide range of private hospitals – some of them quite reasonable and others fairly expensive. It is upon the Respondent to choose which one is best suited for her surgery.

33. In the lower court and on this appeal, the Respondents have defended the award of KShs.1 million as future medical expenses. For their part, the Respondents had erroneously submitted in the lower court that future medical expenses could not be awarded but on this appeal have changed tack and urged an award of KShs.250,000/= on that head.

34. Considering the medical costs pleaded and proved by the Respondent in respect of treatment after the accident at public hospitals, it is reasonable to anticipate that corrective surgery in an average private facility would cost much more. The figure of KShs.250,000/= may be on the lower side, but a sum of KShs. 1 million is manifestly inordinate. The court must find a middle ground, and doing its best in the circumstances, considers an award of KShs.400,000/= to be adequate and reasonable. The award of KShs.1 million as future medical expenses is therefore reduced to the sum of KShs.400,000/= (**Four Hundred Thousand**).

35. The Respondent had by her amended plaint sought damages for lost earnings and loss of earning capacity. The trial court correctly observed the distinction between the two, and finding no proof of the former, awarded damages in respect of loss of earning capacity.

36. The distinction between the two awards was revisited by the Court of Appeal in **Mumias Sugar Company Ltd v Wanalo [2007] e KLR**.

The Court observed that:

"As Lord Denning MR said in Fairley v John Thompson Ltd [1973] 2 LLoyd's Rep. 40 at page 41:

It is important to realize that there is a difference between award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

37. The Court proceeded to consider several English authorities before making the following observations:

"The award for loss of earning capacity was exhaustively considered by this Court in Butler v Butler [1984] KLR 225. In that case, the superior court awarded both damages for pain and suffering and for loss of earning capacity as separate heads to a lady who had been severely injured in a road traffic accident. Although the plaintiff in that case was not in employment at the time of the accident the superior court, nevertheless, found that with her injuries she would never be able to find a suitable job and computed the loss of earning capacity on multiplicand/multiplier basis. On appeal, the award for loss of earning capacity was attacked on similar grounds as the award in the instant case. After reviewing the English cases, Kneller JA said at the page 233 paragraph 5:

“It can be a claim on its own (where the plaintiff had not worked before the accident) or in addition to another (where the plaintiff was in employment then or at the date of trial)”.

38. The court further stated:

“On his part, Chesoni Ag. JA. (as he then was) expressed the view that whilst, loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading...

“From the above analysis of the English case law and the decision of this Court in Butler v Butler, the following principles, among others, emerge. The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. 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. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modes tor substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability”.

39. In this case, the trial magistrate considered several relevant factors including the age, occupation and sequela attending the Respondent’s hand injuries which temporarily rendered her incapable of carrying on with her employment in a flower farm. The trial court proceeded on a multiplier approach, based on the minimum monthly wage applicable in 2015 in respect of a general laborer (KShs.10,950.70/=) and a multiplier of 5 years, the latter based on the estimated period expected for the anticipated surgery and recovery.

40. As rightly observed by the trial magistrate and by the Appellants on this appeal, the Respondent’s incapacity was expected to be temporary. Even though the Respondent’s right hand was not affected, the court noted that healing had not occurred in the left hand at the time of the trial.

41. The Respondent was a general labourer; she does not have to return to work in a flower farm to earn a livelihood once substantially recovered. There are several imponderables here including the period it would take for the Respondent to fully recover from corrective surgery or even the degree of such recovery. In a sense, the fact that the suit has moved very quickly in the courts, may well turn out disadvantageous for the Respondent in the event that surgery does not restore the use of her hand adequately for her to resume gainful employment.

42. Whatever the case, the Respondent could not be expected to be employed as a laborer in the recovery period, even though her right hand was not affected and likely could be used in other lighter occupations. In applying a multiplier of 5 years the court was awarding damages for future but temporary loss of earning capacity given these circumstances. In my view the multiplier of five years is not erroneous or excessive in the circumstances. For these reasons the awards in respect of damages for pain and suffering and damages for loss of earning capacity are therefore upheld.

43. In the result, this appeal has succeeded to the extent that the award of damages in respect of future medical expenses is set aside and substituted with an award of KShs.400,000/= (**Four Hundred Thousand**). This being in addition to awards in respect of pain and suffering (KShs.800,000/=) and loss of earning capacity (KShs.657,042/=) which have not been interfered with. The awards are subject to the agreed contribution ratio of 85:15 in favor of the Respondent.

44. The Appellants having only partially succeeded are awarded 30% of the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 19TH DAY OF OCTOBER, 2018.

C. MEOLI

JUDGE

In the presence of:

For the Appellants – Miss Maina

For the Respondent – No appearance

Court Clerk - Nancy