



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 49 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 60 OF 2012)

(Appeal from the decree passed on 16th May 2012 in Murang'a CMCC No 52 OF 2009 – A K Kaniaru, SPM.)

DAVID GAKINYA.....APPELLANT

VERSUS

MARY NYAMBURA.....RESPONDENT

J U D G M E N T

1. The Respondent was the plaintiff in the lower court while the Appellant was the defendant. The Respondent's claim was in negligence following a road traffic accident. She claimed general and special damages. Liability was agreed at 85% to 15% in favour of the Respondent. The issue of quantum of damages was tried. The trial court ultimately awarded the Respondent KShs 300,000/00 for pain, suffering and loss of amenities, less 15% contributory negligence, plus special damages of KShs.9,030/00 and costs and interest at court rates.

2. This appeal is against that part of the judgment that awarded the Respondent special damages of KShs 300,000/00 (less contributory negligence). The main ground of appeal is that one of the injuries claimed by the Respondent (a fracture of either the right humerus bone or the right scapula) was not proved on a balance of probabilities.

3. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. I have borne in mind however that I neither saw nor heard the witnesses myself, and I have given duly allowance for that fact.

4. The Respondent herself testified as PW3. Regarding her injuries she stated that after regaining consciousness the day following the accident at about 5.00 a.m. She found herself with –

“... a painful right hand where it joins the shoulder. The shoulder was painful also. My right cheek had a bruise. My humerus was broken near the shoulder joint. My abdomen was painful. I stayed in hospital for 4 days. My right hand was put on a sling....for 3 months....”

5. PW1 (Dr Kimani Mwago) examined the Respondent on 25/09/2008. That was 2 months and 11 days after the accident (which occurred on 14/07/2008). From his examination and documentation that she had (police medical report – P3, treatment card, police abstract and ultrasound report) he gathered that the Respondent had sustained the following injuries: -

- **Painful right shoulder**
- **Painful lower abdomen**
- **Fracture of the right scapula and glenoid**
- **Dislocated right shoulder**
- **Bruise on the right side of the face**

6. In cross-examination PW1 acknowledged that the Respondent's police medical report – P3, indicated fracture of the humerus. But he also pointed out that the scapula is joined by the humerus. The doctor also acknowledged that the Respondent's treatment notes dated 16/07/2008

talked of fracture of the left scapula. Finally, the doctor also acknowledged that he did not have the benefit of any X-rays as she never brought any with her when she was examined by PW1.

7. In re-examination the doctor said the fracture was at the end of the humerus and also caused pain to the right shoulder. He also pointed out that the Respondent's discharge summary dated 16/07/2008 talked of fractured right scapula, and that it referred to an X-ray No 68.

8. PW2 (Dickson Kinyua) was a clinical officer at Murang'a District Hospital. He produced in evidence the Respondent's police medical report – P3 which he filled and signed. He stated that the Respondent had a painful right shoulder, *inter alia*. He stated further that an X-ray showed a fracture at upper end of the right humerus and that the right shoulder was painful and tender. He examined the Respondent on 23/07/2008, nine days after the accident. He explained that the upper end of the humerus

“...is right where the scapula joins the humerus.”

9. PW4 (Patrick Mwangi) was the District Clinical Officer. He sought to correct the apparent mistake in the discharge summary dated 16/07/2008. He therefore prepared an amended discharge summary to indicate that the Respondent fractured her right scapula, not left. This he did at the request of the Respondent's advocates. In doing so he relied on the Respondent's admission file and the police medical report – P3. In cross-examination he acknowledged that he never examined the Respondent himself.

10. To controvert the evidence adduced for the Respondent regarding her fracture, the Appellant called DW1 (Dr Isaac Nderitu Theuri). His testimony was that his colleague, one Dr Eva Wainaina examined the Respondent on 01/10/2009. He further testified that X-rays taken of the Respondent did not indicate any fracture as claimed by the Respondent. This was nearly 11 months after the accident. It was his further testimony that X-rays would always reveal a healed bone fracture as it would show the “remodelling line”. He therefore concluded that the Respondent suffered only soft tissue injuries.

11. The issue facing the trial court, therefore, was whether the Respondent had suffered the claimed fracture, given that her own documents raised doubt, and also in view of the testimony of DW1.

12. The Respondent was never challenged on her statement that her right arm was in a sling for 3 weeks. Nor was she challenged on her statement that when she regained consciousness she had pain in the right shoulder area. The preponderance of the evidence is that the fracture was at the place where the right humerus joins the scapula to make the shoulder joint. Without X-rays PW1 would not have been able to tell exactly where the fracture was – either in the humerus or in the scapula where the two joined, and the confusion is understandable.

13. It will be noted that DW1 though a doctor, was not a radiologist, and his statement that a healed fracture would always show on an X-ray as a “remodelling line” was not the statement of an expert in that discipline. There was also a problem with his medical report which he produced in evidence. Whereas it was dated 01/10/2009, the X-ray report which he said he incorporated into his report was ante-dated 21/05/2010!

14. It is clear that the mistake initially committed by the clinical officer who prepared the Respondent's discharge summary caused the problem. It indicated that her fracture was on the left arm/shoulder whereas it was on the right. Though he never testified, nevertheless the mistake is understandable. It is the kind of mistake that anyone can make through a momentary lapse.

15. Upon my own evaluation of the evidence placed before the trial court, I find that the Respondent suffered a fracture of the upper end of the right humerus where it joins the scapula. This fracture would cause pain and tenderness in the whole shoulder area, and only an X-ray would have shown exactly where the fracture was. It could have been a hairline fracture....

16. As for the general damages awarded, KShs 300,000/00 (less 15% contributory negligence), I have read through the cases cited before the trial court. Bearing in mind that the Respondent was in a sling for three weeks, and though she healed properly and completely, the damages awarded for pain, suffering and loss of amenities cannot be said to have been manifestly excessive. It matters not that this court would probably have awarded a little less.

17. In the result I find no merit in this appeal. It is dismissed in its entirety with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF MAY 2017.

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 31ST DAY OF MAY 2017