REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.132 OF 2012

(Appeal from the Judgment and Decree of the Principal Magistrate at Mombasa by Hon. R.Ondego in CMCC No. 1660 of 2009 on 2nd August 2012)

PETER NAMU NJERU.....APPELLANT

VERSUS

PHILEMONE MWAGOTI.....RESPONDENT

JUDGMENT

1. On the 8.11.2008, it was alleged in the plaint dated the 16.6.2009 that, the plaintiff was lawfully ridding motor cycle Reg. No. KBD 6005 along Moi Avenue, Mombasa, when on reaching old Nation stage the defendant's authorised driver one Mark Njeru negligently carelessly and or recklessly drove and controlled the defendants motor vehicle Registration No. KAD 4200 lost control of it and violently collided with the motor cycle thereby occasioning to the plaintiff severe bodily injuries from which the plaintiff consequently suffered damages(s) and loss.
2. That plaint then proceeded to particularize the negligence injuries as well as special damages in the sum of Kshs.152,452/=.
3. The particulars of injuries were enumerated as.

    a) Comminuted crush fracture of the distal ½ of the right radius.

    b) Avulsion fracture of the right ulna styloid process.

    c) Fracture of the right 6th rib on the posterior aspect.

4. Initially the defendant failed to enter appearance or file a defence and thus a default judgment was entered interlocutorily and the subsequent formal proof led to a judgment dated 2.7.2010 which was however set aside by consent on the 24.9.2010.
5. Upon setting aside, the defendant filed a statement of defence dated the 6.9.2010 in which the occurrence of the accident, the ownership of the motor vehicle as well as the particulars of negligence injuries and damages were all denied and plaintiff put to strict proof.
6. On a without prejudice basis the defendant pleaded that if any accident ever occurred as alleged, but which was denied, then the same was occasioned by the negligences of the plaintiff and the particulars of such negligence were set out at paragraph 7 of the statement of defence.
7. After the preliminary compliance, the suit was set down for hearing at which trial only the plaintiff testified and produced all the documents relied upon by his side while the defense only exhibit being a medical report prepared on the plaintiff by DR. UDAYAN was also produced by consent.

Evidence by the plaintiff.

8. Before court the plaintiff gave evidence and stated that on the material date, 9.11.2008, he was involved in an accident while on his duty as a clerk employed by Toyota Kenya and based at Mombasa. That as a result of the accident he suffered injuries to the right and left hands as well as on the left hands and on the ribs. He was admitted at the Aga Khan hospital for 3 days, and thereafter continued with treatment for one year. He produced treatment notes as exhibit P1 and invoice for Kshs. 62,252 as exhibit P2. The accident was reported and a police abstract was issued to the plaintiff upon payment of Kshs.200/= the abstract and receipt for payment thereof were produced as exhibits P3 & 4 respectively. The plaintiff then consulted Dr.Ndegwa who prepared a medical report (Exh.P5) at a costs of Kshs.1,500 [Exhi.P7(P6).
9. The medical report Exhi. P5 confirmed and detailed the plaintiffs injuries and gave the opinion that the plates planted on the plaintiff's fracture sites, would require removal at a projected cost of Kshs.90,000/=. The plaintiff was subsequently seen by DR.UDAYA for a second medical opinion and the doctor prepared a medial report which was however produced by consent as noted above. At the time DR.UDAYA saw the plaintiff the plates were still in situ and were only removed subsequently at the Coast General hospital at a cost of 103,603 for which an invoice was tendered and produced as exhibit P8 (P7). That cost was met by the plaintiff's insurer once, UAP Insurance Co. Ltd., with whom the plaintiff had taken out a Personal Medical Cover. The last document to be produced on behalf of the plaintiff was the letter before action which was marked exhibit P9.
10. On cross examination by Mr. A.Jengo, the plaintiff admitted that both the P3 ex ray report and discharge summary did not mention fracture of the rib which was only captured by DR.NDEGWA'S report. On further cross examination the plaintiff conceded that he had produced no receipts to evidence payment and that all the bills were paid by his insurer and further that as he spoke in court he was in no need of future medical care but that Dr. Ndegwa report was not conclusive.
11. On re examination the plaintiff pointed out that DR.UDAYA'S report also not captured injuries to the rib and that after the removal of the implants on the 8/3/2011 by which time he had known precisely how much the costs wold be and truly that at at the date the suit was filed he still needed some medical expenses.

Analysis and determination:

12. The memorandum of appeal, the judgment, submissions and the evidence on record apparently proceeded on the basis that there was a consent on liability recorded prior to hearing. I have however been unable to find that record. However as the question of liability is not in issue before me I take it that the parties agreed on liability as stated by the trial court in the judgment.
13. On the basis of the evidence adduced, the trial court in its reserved judgment dated and delivered on the 2.8.2012 awarded to the plaintiff an agreegate sum of Kshs.852,452 made up as follows:-

General damages	700,000
Special damages:-	
P3 form	500
Police abstract	200
Medical report	1,500
Medical expenses	60,252
Medical expenses	90,000
Total	852,452

14. It is that judgment which has provoked this appeal in which the appellant/ judgment debtor has enumerated six(6) grounds of appeal. Grounds 1, 2 & 3 attack the award of general damages for pains suffering and loss of amenities as being inordinately too high in that the trial court failed to consider relevant matters including binding precedent.
15. Grounds 4,5 &6 attack the award of special damages on grounds that the future medical expenses were not needed as stated by the plaintiff; that the special damages were never specifically pleaded and strictly proved and that there was an error in awarding special damages when the plaintiff had stated that he did not in person make payments claimed as special damages.
16. What I am called upon to do is to exercise my jurisdiction as a first appellate court court to interfere with the award of general damages which basically is an exercise of discretion by the trial court and secondly to upset the award of general damages on the basis complained about in the memorandum of appeal.

General damage for pains suffering and loss of amenities

17. In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirety erroneous estimate of compensation to which the respondent was entitle or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was wholy injudicious not expected of a reasonable adjudicator.
18. Before the trial court, the parties cited decided cases among them:-

(I) **Bridgitte Schoiz -vs- Thomas Njuguna & 2 others, Msa Hcc No. 27 of 1998** decided on 12.5.2003 in which for compound comminuted fracture of *radius* and *ulna* leading to loss of sensation of the right small finger and part of the palm, the court awarded a sum of Kshs.500,000.

ii. **Suleiman Eliot -vs- Mvita Construction Co. (K) Ltd. Msa.Hcc No. 120 of 1998** decided on 10.3.2000 in which the court for injuries disclosed as compound fracture of ulna and radius of the right arm which healed with a resultant shortening of 3 centimetres as well as severe brain injury resulting in unconsciousness for one (1) month, the court awarded kshs.400,000/=.

Relying on those case the plaintiff's advocate proposed a sum of kshs.750,000/=.

19. On the defendants side, the court was cited for:-

(I) START TRANSPORT CO. & ANOTHER -VS- FOUNDATIONSKANKA JOINT VENTURE KUNCO: HCC. NO.472 OR 1988 in which for injuries described as fracture of ulna and radius the court awarded kshs.130,000 in January 1993.

(ii) **CHRISTINE OMBETA -VS- KENYA BUS LTD, HCC NO. 529 OF 1990** decided on 18/2/1993 and on which similar injuries were pleaded the court awarded kshs.100,000.

20. In addition the appellant cited **NARKESO KOKO NYANDARA -VS- JOHN NGANGA MAYRA & ANOTHER, ESTON OBWAYI -VS- CIRCUS WELLS LTD & ANOTHER** and **FRANCIS MWANII KAHUTHU -VS- DANIEL MWENE NJOROGE** all of which awarded sum not exceeding Kshs.100,000. As expected, of counsel, the counsel took into account the fact of the ages of the decided and the incidence of inflation together with the lesser severity of the injuries in the cited cases as compared to the matter before court and proposed an award of Kshs.160,000.
21. This court takes notice that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be of binging nature on the trial court being a subordinate court. However the duty to assess damages remains a discretionary factor and there must be a clear and demonstrable show that there was an error to invite interference by an appellate court.
22. In this appeal the appellant has faulted the trial court for having acted arbitrarily and thus made a manifestly inordinate and excessive award. For this court to establish if indeed there was

arbitrariness or error in principle, it is important to examine the judgment by the trial court. The court in coming to the figure of Kshs.700,000 for general damages said;

"Both medical reports, ie exhibit P6 and Exhibit D1 hold a common ground that the plaintiff suffered fracture on the right radius as well as the 6th rib..... I have considered the cited injuries and find that they are as close as possible to the authorities cited by both counsels in their submissions. I find the authorities cited to be relevant.

Most of the authorities cited are very old cases and certainly the value of money has changed several times therefore taking into account the lapse of time and the value of money now, I am of the opinion that Kshs.700,000/= is reasonable compensation in this case."

23. The issue I have to consider and determine is how arbitrary was the award or rather what is it that was relevant that the court ignored or what was it that was irrelevant that the court considered? The entire submission by the appellant does not address the question at all and therefore fails in its onus of proof. In this appeal the burden was at all times, upon the appellant to prove on a balance of probabilities that there was an error entitling this appellant court to interfer. In the absence of such demonstration I find that the appellant has failed on its burden and I have no justification to find for him. Granted that this being a first appeal, I have the duty to re evaluate and examine the entire evidence and come to own conclusion. It is indeed a very strong thing and requires a clear case for a appellate court to interfer with a decision in exercise of discretion.
24. As the court appeal said in **OBWOGI -VS- ABURI [1995-1998] 1 EA 252.**

"As an appeal court we are not entitled to review this finding merely because it is possible that had we been sitting in the first instance, we should have awarded a larger sum"

25. Put in the content of this appeal this court will not seek to interfer with an assessment by the trial court merely because had I sat at the trial court I would have awarded a lesser sum.
26. Look at the other way, the trial court noted, and it cannot be faulted, that most of the decisions cited were very old. Infact most of the decisions cited y the appellant were two decades old and to me were concerned with injuries that, albeit comparable, were of lesser severity.
27. The latest of the cited decisions was that of Bridgitte School which was itself a decade old, and in which the plaintiff suffered, injuries already described above. The plaintiff in that case was admitted in hospital for 4 months and was treated in different hospital both here and abroad, was to me the best guide for the trial court. That an award of Kshs.500,000 was reasonable in 2003, to increase that by Kshs.200,000 in ten years to me was neither arbitrary nor unjustifiable.
28. It must be appreciated that there is no natural science employable in assessment of damages. It remains a discretion and a discretion to this court is best exercised when a sense of justice can be inferred. That sense of justice will not be best judged by the parties to a dispute but by an impartial bystander.
29. Sitting as such impartial arbiter, while well aware that the trial court had the benefit of seeing, hearing and observing the plaintiff as the only witness as he testified, that court had the benefit of appreciating the plaintiffs injuries first hand a benefit this court lacks. I find that there is no demonstration of a an error by the trial court to invite me to interfer in the judgment appealed from and I decline to interfere.

Was the award of special damages erroneous:

30. It is contended in this appeal that the award of special damages was unjustified because there was no need for the award for future medical expenses?
31. By the plaint dated 16.6.2009 the plaintiff pleaded special damages as follows:-

Medical report	1500
Police abstract	200

P3 form	500
Medical expenses	60,252
Costs of future medical expenses	90,000

32. In evidence during trial the Respondent, then as plaintiff, produced, a receipt for payment of payment of Ksh.1500.00 to Dr.Ndegwa, receipt of Kshs.200.00 for the police abstract invoice from Aga Khan hospital for Kshs.60,252.00 a medical report which approximated the cost of removal of implants at Ksh.90,000.00 and an invoice for Kshs.103,603.00 for Coast General hospital for the actual removal of the implants.
33. In his judgment the court grappled with the submissions that special damages ought to be those for which the plaintiff personally met the expenses and that since the surgery to remove the implants had been conducted by the time the plaintiff testified it was imperative that the plaint be amended to specifically plead the sum as special damage and not future medical expenses.
34. On the first question of payment by the insurer, which I think also applies to the sum Kshs.90,000 court said on its judgment:-

"I respectively disagree that money was paid on behalf of the plaintiff. If plaintiff had not taken on that cover, he would have paid it from his pocket. From whatever sources it was paid, I find it to be special damages as it accrued on account of the plaintiff hospitalization."

35. To this court the trial court was apt in its appreciation of what special damages were. To hold otherwise would e to put the stricture that if one borrows from a bank or paid for by a relative or good Samaritan then the same ceases to be special damages. That to me would be splitting hairs. I find as the trial court did that the plaintiff as a result if his injuries sought and obtained medical services at a costs those costs once incurred even if not paid remain an obligation upon the plaintiff to be settled. Once settled or before settlement, the same have accrued and are clearly special damages which if proved as was done before the trial court are available to be awarded.
36. Looked at a from different angel on the perspective of the insurer, it would easily , under its right to subrogation, used, the plaintiff as it nominee plaintiff and recovered upon proof. Would the appellant lent in that event go back to find out whether it was the plaintiff or its insured who recovered the money. I find no merit on this ground of appeal and the same fails.
37. Equally the award of Kshs.90,000/= was awarded to the Respondent as special damages. Semantics aside, by the time the plaintiff came to court the expenses had been approximated but was yet to be paid. It was paid when the surgery was undertaken and became special damage already incurred and not futuristic as it was before the surgery. To that extent it would have been neater to amend the plaintiff and plead the sum of Kshs.103,603. However that failure did not by itself dis-entitle the Respondent to the award. We now have the overriding objective of the court to do justice, proportionately, efficiently, in a timely manner and without undue regard to undue technicalities. In my very respectful opinion, the purpose of the rule that special damages be specifically pleaded and strictly proved is by itself a requirement of the right to a fair hearing. The defendant ought to be put on notice of what expenses its alleged wrong has put the plaintiff to. In this case, prior to the hearing, the defendant was by the plaint and the documents filed, notified that the plaintiff would require a medical procedure to remove the implants on the fracture site. Having been so notified and the documents having been produced by consent to show that indeed the plaintiff spent not more than he had asked for, I fail to follow what prejudice the Appellant suffered so as to insist that the plaint needed to have been amended to change the words future medical expenses to special damages for removal of implants. I take it that the trial court appreciated its obligation to the constitution under Article 159 2(d) when he awarded the sum of Kshs.90,000 as special damages rather than future medical costs.
38. The upshot of the foregoing is that I find the appeal to lack in merit and therefore the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

In the presence of:-

Mr. Wafula for Jengo for Appellant.

No appearance for Respondent.

P.J.O.OTIENO

JUDGE