



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 118 OF 2014

BERNARD KABORO KIARIE.....APPELLANT

VERSUS

PETER KIRIKA KIMANI.....1ST RESPONDENT

WACHIRA MWANGI MICHAEL.....2ND RESPONDENT

(An appeal from Judgment/Decree of Hon. S. Mungai, Chief Magistrate,

Nakuru delivered on 4th August, 2014 in CMCC No.862 of 2012)

JUDGMENT

1. On the 16th October 2011, the appellant then the plaintiff was driving his motor vehicle Registration KAT 603K along Nakuru-Nairobi Highway when a collision occurred with the first Respondent's motor vehicle Registration No. KBK 581U/ZD 3104 that was being driven by his driver the second Respondent.

The appellant sued the respondents jointly and severally for negligence and sought general damages for pain and suffering arising from the injuries he sustained together with special damages in respect of his medical expenses and material damage to his vehicle and damages for loss of user and loss of earnings.

The respondents denied the claim in their defence dated 28th August 2012 and attributed negligence to the appellant.

The issue of liability was however settled when the parties recorded a consent judgment apportioning liability at 80% against the Respondents, and 20% against the Appellant.

The court was then called upon to assess damages under the various sub-heads as stated in the plaint.

Upon hearing the case, the trial Magistrate awarded special damages of Kshs.3,000/=and general damages of Kshs.800,000/=. All other subheads in his findings were not proved to the satisfaction of the court.

2. Being dissatisfied with the said judgment, the appellant preferred this appeal on the following grounds:

1. *That the learned trial Magistrate erred in law and in fact in awarding general damages that are inordinately low as to amount to an erroneous estimate of damages.*

2. That the learned trial Magistrate erred in fact and in law in awarding general damages that are inordinately low and not in tandem with appellant's injuries.

3. That the learned trial Magistrate erred in law in failing to award a sum of Kshs.746,670/= for medical expenses despite the said amount having been specifically pleaded and strictly proved as required by law.

4. That the learned trial Magistrate erred in law in failing to award a sum of Kshs.559,700/= for repair charges of the motor vehicle despite the said amount having been specifically pleaded and strictly proved as required by law.

5. That the learned trial Magistrate erred in law in failing to award a sum of Kshs.5,000/=, 4,500/= and Kshs.700/= for assessor's charges, medical report, police abstract and search certificate despite the said amount having been specifically pleaded and strictly proved as required by law.

6. That the learned trial Magistrate erred in law in failing to award the claim for loss of user despite the same having been sufficiently pleaded and proved as required by law.

7. That the learned Magistrate erred in law in failing to award the claim for loss of earning/loss of earning capacity despite the same having been sufficiently pleaded and proved as required by law.

8. That the learned trial Magistrate erred in law and in fact in inventing his own pleadings to defeat the appellant's claim.

The appellant seeks that the said judgment be set aside and the award in general damages and special damages pleaded at Kshs.1,326,570/= be allowed.

3. I have considered the trial court's judgment. In rejecting the appellants claim for special damages, it was stated that all the claims under the various subheads were not proved strictly as by law required. I shall deal with each sub-head separately below.

The appellant in addition faults the trial magistrate on the award of general damages for pain and suffering and loss of earning capacity as being too low.

4. The appellant's injuries, were stated in the medical reports and medical records from various medical institutions, and doctors.

Dr.M.S. Malik prepared two reports one dated 6th January 2012 and the other dated 8th September 2012 as an addendum.

The following injuries were captured in the medical report dated 6th January 2012.

- Pain in the chest
- Severe pain in right thigh, inability to walk
- Open reduction and internal fixation of comminuted fracture to the right thigh with interlocking and intra medullary nail, and discharged on crutches.

In the second medical report dated 18th September 2012 the following were stated:

- United femur
- Swelling over medial of lower thigh

- Right leg shorter by 5 cm
- Walks without crutch but has a limp.

The doctor concluded a fully united fracture and recommended a removal of the nails at a cost of Kshs.100,000/= and that the shortening of the limb would strain the back, hip and knee joints and should be corrected by a shoe raise. He assessed permanent physical disability was at 15%.

For the above injuries, the trial Magistrate awarded Kshs.800,000/= as damages for pain and suffering.

5. In his submissions the appellant says that the above sum is too low, that it was premised on a misdirection in evaluating all the evidence including the second medical report where a permanent disability of 15% was awarded.

He proposes enhancement to Kshs.2,000,000/=.

6. The Respondents do not agree with the appellant that there was no consideration of the second medical report, and urged dismissal of the appeal on this aspect.

7. In assessing damages, the court must take all factors into account and an appellate court would be slow to interfere with the trial court's discretion in the assessment, unless it is demonstrated that the court took into account an irrelevant factor or left out of account a relevant one and thus arrived at an erroneous estimate of the damages.

See **Kemfro Africa Ltd t/a Meru Express service and Another -vs- Lubia & Another (1982-88) KAR General damages for pain and suffering (ground No. 1).**

8. The appellant has not put forth any decision to buttress an award in general damages of Kshs.2,000,000/= for comparable injuries.

I have looked at authorities cited before the trial court. **F.G. John Mwangi Ndungu & Another (2011) e KLR** was cited where the plaintiff was awarded Kshs.1.8 Million in 2011. The authority was not provided nor where the injuries itemised. It is of no assistance to the court.

In his judgment, the trial Magistrate considered the said authority that showed the injuries to the plaintiff as head injury, loss of three toes, fracture of the femur and other multiple cuts on scalp and the face. In awarding Kshs.1.8 Million, the court observed that the injuries were too severe for a seven year old plaintiff. As I have stated, the authority and indeed no other has been cited and provided for the court's perusal.

I shall confirm the award of Kshs.800,000/= under this head as having been fair and reasonable.

9. **Damages for loss of earning capacity – ground No. 7**

The appellant pleaded this claim during the time of convalescence for six months. A sum of Kshs.165,240/= was proposed per month, upon the basis that during the period he lost the said income in his cereal business. During his evidence in chief, he produced invoices for supply of various goods to Tusky's Mattresses Ltd, Pembe Flour Mills Ltd and his transactional and statements from Barclays Bank. Also produced was the appellant's accounts prepared by Oseria & Co. Other than the production of the above documents, I do not find that the appellant actually proved the loss that is capable of being considered as a general or special damage.

The accountant who prepared the accounts did not attend court to produce them. Invoices are just evidence of some supply of goods. I have perused the plaint. A sum of Kshs.165, 240/= as a loss of earning per month is pleaded. I find no proof whatsoever of the lost income.

10. In his judgment the trial Magistrate made a finding that the said claim was not proved based on the finding on the appellants own admission, on cross examination that the documents he produced did not disclose his earnings as stated.

The Court of Appeal in **Cecilia Mwangi & Another -vs- Ruth W. Mwangi C.A No 251 of 1996** pronounced itself on the matter of loss of future earning and loss of earning capacity.

It stated:

“Loss of earning is a special damage. It must be specifically pleaded and strictly proved. The damages under the head “loss of earning capacity” can be classified as general damages but these have also to be prove on a balance of probability.”

The court proceeded to add that:

“the plaintiff cannot just “throw figures at the judge and ask him to assess such damages.”

It continued that:

“plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. That they will not get those damages however sympathetic the court may feel towards them.”

The above has been confirmed in numerous decisions as the law.

See also **Butler -vs- Butler C.A No 49 of 1983 (1984) e KLR** where the court stated that:

“It is “different head of damages from actual loss of future earnings which can readily be proved a time of trial---”

From the above observations, it is clear that compensation for loss of future earnings is awarded for **real assessable loss proved by evidence.**

There was no evidence placed before the trial Magistrate that it would have used to assess such damage.

Even when taken as a general damage, the plaintiff is still under a duty to prove the same on a balance of probability.

I find no default with the trial court's dismissal of the claim. See also the case of **A.M -vs- Justus Gisaro Ndareba & Another (2010) e KLR.**

11. Special damages for medical expenses – ground No 3.

A sum of Kshs.746,670/= was pleaded in the plaint. Numerous invoices and receipts were tendered as exhibits. He stated that he had spent the said sum in medication – **Exhibit No. 6, and 7A, B, and C.** I have seen the thirteen payment receipts produced. There is among them a summary by invoice No. 38388 from War Memorial Hospital Nakuru from date of admission on the 16th October 2011 to the 22nd October 2011. The total paid was Kshs.279,500/=. The exhibits produced above represent the said payments.

Other payments to various doctors and Aga Khan Hospital show a sum of Kshs.34,380/= making a total of Kshs.314,380/=.

The payment receipts of Kshs.279,500 from Nakuru War Memorial Hospital are revenue stamped.

The others are not stamped. In rejecting the claim for special damages in respect of medical expenses and the future medical claim, the trial Magistrate held that the pleaded sum of Kshs.746,670 was not specifically proved nor was the claim for future medical expenses of Ksh100,000/=. This sum was proposed in the medical report. No question on it was raised. The court did not give any reasons other than stating that they had not been proved, despite the payment receipts having been produced as exhibits.

Having confirmed that the appellant did spend the sum of Kshs.314, 380/= and payment receipts duly tendered, I find the trial Magistrate's finding without reason.

Though some of the payment receipts have no fixed revenue stamps, in my view, this does not make them faulty. It is the receiver of the money who is obligated to affix the revenue stamps and not the payee.

In the case **Benedetta Wanjiku Kimani -vs- Changwon Cheboi & Another (2013) e KLR** it was held that failure to affix revenue stamps to receipts did not make them inadmissible and the plaintiff (payee) could not be penalised for a third party fault.

I therefore come to the finding that a sum of Kshs.314, 380/= was spend on medication, and was proved. I shall allow the said sum of Kshs.314,380/=:, and Kshs.100,000/= for future medical expenses.

12. **Special damage on material damage to the appellants motor vehicle.**

I now come to the matter of material damage to the appellants motor vehicle Registration number KAT 603K. It was pleaded that a sum of Kshs.559,700/= was spent as repair charges. I have looked at the plaint.

No particulars of damages were pleaded at all.

It is trite that any special damage must be specifically pleaded and proved. An assessment report of damage was produced by the appellant PEx 16, and showed a repair estimate of the said damage. In addition, the appellant produced a receipt for Kshs.5,000/= being assessors fees. He paid to the repairer, **Sammy's Spray Works** but the receipt was marked for identification It was not produced as an exhibit. He stated that while the vehicle was at the garage for five months he paid Kshs.3,000/= daily for taxis. He urged the court to allow the said expenditure on the alternative taxi transport.

I have looked at the assessment report. The particulars of damage were not pleaded as I have stated above. However, the Assessment report prepared by Paramount Assessors Limited the particulars of damage are itemised, and the cost of spare parts to be fitted are shown. Photographs of the damaged vehicle were also produced.

13. Upon the uncontroverted evidence of the appellant on the material damage to the vehicle, and buttressed by the Assessment report and payment of the repair charges, the triable magistrate nevertheless held that as the appellant did not specify the damage as well as loss of user that claim was not proved.

The assessment report on the damage to the vehicle and the payment receipts were produced by the appellant without any objection by the respondent and therefore became admissible as evidence. Does failure to itemise particulars of damage to the vehicle in the plaint, and which was subsequently stated in the Assessment report make the claim fatal? I do not think so. I am guided by the following authorities.

In **HCA No. 154 of 2005 Nkuene Diary Farmer Co-operative Society Ltd -vs- Ngacha Ndeiya(2010) e KLR.**

On second appeal before a three Judge bench of Justices Bosire Onyango Otieno and J.G. Nyamu (as they were then) held that in their view,

“special damages in a material damage claim need not be shown to have actually been incurred, that the claimant is only required to show the extent of damage and what would cost to restore the damaged item as near as possible to the condition it was before the accident.”

As in the above case, the assessor gave an estimate of repair and itemised the damaged parts. The assessors report was not challenged at all. It gave an expert report and opinion.

The three bench Judge above held that the appellant had provided acceptable evidence to prove the value of the material damage and all agreed that the assessors report was sufficient proof, and that failure to produce receipts for the repairs was not fatal to the claim.

14. In the present case, the appellant provided receipts for the repair charges. They amount to Kshs.559,700/= as pleaded in the plaint. It is my finding that the appellant was able to prove the claim for special damages for Kshs.559,700/=. I allow the claim as proved to the required standards.

15. Ground No 6 – Loss of user of motor vehicle

The appellant further faulted the trial Magistrate for failure to award damages for loss of user of the motor vehicle which he stated as Kshs.3,000/= per day for five months. He stated that during the period, he used to hire taxis at Kshs.3,000/= per day. My view is that a reasonable repair period for a vehicle is normally allowed upto fourteen days. The appellant did not explain why the vehicle had to take five months at the garage. The five month period cannot be justifiable in all circumstances without plausible reasons for the delay which the appellant failed to adduce. Being a private vehicle for the use by the appellant, I think a fare taxi charge for a day ought to have been in the region of 2,000/= per day in the year 2011. I shall allow a daily expense of Kshs.2,000/= for fourteen days, an amount of Kshs.28,000/=.

Receipts produced by the appellant showed a daily hire of Kshs.3,000/=.

16 . Having exhausted re-evaluation of the grounds of appeal and made my own findings. It is my conclusion that the appeal succeeds substantively. For the above reasons, the trial court's judgment is set aside, and substituted with a judgment that the appellant is entitled to damages under the sub heads as pleaded and is hereby awarded the following, but subject to the agreed contributory negligence of 80% in favour of the appellant.

These are:

1. General Damages for pain

and suffering and loss of amenities - Kshs. 800,000/=

2. Damages for loss of earning capacity - Nil (not proved)

3. Special damages for medical expenses - Kshs. 314,380/=

4. Special damages on material damage

to vehicle - Kshs. 559,700/=

5. Damages for loss of user of motor

vehicle - Kshs . 28,000/=

6. Future medical expenses - Kshs. 100,000/=

Total award - **Kshs.1,802,080/=**

80% thereof

- Kshs.1,441,664/=

As the appeal succeeds in part, each party shall bear its own costs.

Dated, signed and delivered in court this 27th Day of October 2016

JANET MULWA

JUDGE