



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 399 OF 2009

KENNY NYAGA MBOI.....APPELLANT

VERSUS

MASH BUS SERVICES LIMITED.....RESPONDENT

(Appeal against the original judgment and decree of Hon. W. Mokaya delivered on 20th July, 2009 in Milimani Court Commercial Court CMCC No. 2748 of 2007)

JUDGMENT

1. The Appellant **KENNY NYAGA MBOI** sued the Respondent **MASH BUS SERVICES LIMITED** in Milimani Nairobi Commercial Court CMCC No. 2748 of 2007 seeking recovery of damages. His plaint which was later amended on 11th April, 2007 alleged that at all material times to the suit, the Respondent was the owner and operator of motor vehicle registration number KAR 780B. That on or about the 1st and 2nd April, 2004, at about 12.30 am the appellant was aboard the suit motor vehicle as a lawful fare paying passenger travelling from Mombasa to Nairobi when the said vehicle got a tyre burst overturned and rolled severally.

2. That as a result thereof he sustained the following injuries:-

- a. a compound fracture of tibia and fibula;
- b. soft tissue injuries to the left knee;
- c. soft tissue injuries to the chest, head and neck;
- d. bruises above the right eye;
- e. and loss of substantial amount of blood.

3. The plaintiff attributed the occurrence of the accident to the Respondent's driver who he averred was driving at a speed excessive in the circumstances, failing to steer the said vehicle properly and or to have any or any sufficient control of the subject vehicle and failing to apply brakes sufficiently or in time or at all to avoid the said accident.

4. Other than general damages, the Appellant also pleaded special damages as follows:-

- a. Police abstract KShs. 200/=

the Civil Procedure Act. In **Peter v. Sunday Post (1958) at pg. 429**) it was stated:-

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

11. This appeal is basically on the issue of quantum. Under this head, it has been contended that the trial court did not consider the Appellant's pleadings as presented in the amended plaint. In order to interfere with the trial court's finding, I must satisfy myself that the trial court acted on wrong principles and or misapprehended the law in arriving at her decision on quantum. See **Loice Wanjiku Kagunda v. Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)** the Court held:-

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"

12. This court is also charged with the duty of determining whether or not the amended plaint was properly on record and if the trial court relied on it. The initial plaint dated 29th March, 2007 was filed on 30th March, 2007 and set out the appellant's injuries at paragraph 4 as follows:

- a. Fracture of the left femur
- b. Soft tissue injuries to the knees, elbows and forearms
- c. Soft tissue injuries to the chest
- d. Loss of substantial amounts of blood
- e. Bruises above the right eye.

13. The record shows that summons to enter appearance were issued 3rd April 2007 and on 12th April 2007 the appellant filed an amended plaint dated 11th April 2007. The affidavit of service filed by Kennedy Mutie Mutua on 30th May, 2007 and sworn on 16th May 2007 at paragraphs 2 and 3 show that he effected service of summons to enter appearance together with copies of plaint and amended plaint upon the defendant/respondent on 13th April 2007. In my mind therefore, it is clear that the amended plaint was properly on record as it was filed before service of summons and before pleadings closed. The amended plaint set out particulars of injuries sustained by the appellant as follows:

- a. Compound fractures of tibia and fibula
- b. Soft tissue injuries to the left knee
- c. Soft tissue injuries to the chest, head and neck
- d. Bruises above the right eye
- e. Loss of substantial amounts of blood

14. The medical report dated 27th April 2009 by Dr. Ndiba Wairioko who was the doctor assigned by the

Respondent to examine the Appellant found the injuries to be a compound fracture tibia (mid shaft) on the left leg, cuts and bruising on the right leg and blunt trauma and bruising over the forehead. Dr. Wairioko's report reveals that the Appellant was admitted at Kenyatta National Hospital for two (2) days. That an x-ray done on 23rd July, 2004, revealed that there was delayed union of the fracture and another done on 29th September, 2004 that there was non-union of the fracture which necessitated surgical intervention and the Appellant was admitted in October, for open reduction and internal fixation of the fracture with plate and screws. That he was discharged on gradual weight bearing crutches and follow up orthopaedic clinic. The doctor then drew an inference that the Appellant sustained serious injuries which occasioned him severe pain. That his healing process was protracted due to poor healing of the fracture. That the same affected his ability to work during that period. He estimated the cost of removal of the plate and screw at KShs. 80,000/= to KShs. 150,000/=.

15. Dr. Kabora Mogire's report dated 14th March, 2007 on the other hand revealed that the Appellant was admitted at Kenyatta National Hospital on 1st April, 2004 with injuries to his face, head, neck, and left lower limb with serious open (compound) fracture of tibia and fibula. That the wounds on his left leg exposed underlying fracture tibia. He too stated that on follow up treatment, the Appellant's fracture showed delayed union and later non union and surgical intervention was done. That the Appellant was admitted on 14th October, 2004 whereby his left tibia was fixed with plate and screws and a bone graft applied on 16th October, 2004. He stated in the report that the Appellant was discharged on 21st October, 2004 and subsequent out-patient follow up revealed the bone had united. He stated that there was bone union but corrosion of implants with resultant pain makes it necessary to remove the metal implants that are overdue which removal he suggested would cost approximately KShs. 120,000/= at Kenyatta National Hospital. Dr. Mogire rated the Appellant to have suffered permanent functional disability at 15%.

16. The Appellant cited **Kericho HCCC No. 75 of 2001, George Benas Agwata Moturi v. Mosiara Trading Ltd & another** and **HCCC No. 731 of 1987., Sarah Mbone v. Joseph Kimani Mwangi & Another** and urged the court to award KShs. 600,000/= as general damages while the Respondent suggested KShs. 120,000/= and cited **HCCC No. 2637 of 1994., Francis Mwangi Muchine v. Francis Kimani Mbugua** and **HCCC No. 335 of 2004., Isaac Mwenda Micheni v. Mutegi Mirango.**

17. In this appeal the Appellant contend that his injuries as listed in the amended pleadings were never considered. It was argued that since the amended pleadings were admitted before close of pleadings, leave of court was not necessary. He contended that the only amendment introduced concerned the injuries sustained. That in considering the award on quantum, the trial court ought to have considered the pleadings in the amended pleadings. It was contended that the injuries referred to by Dr. Kabora were same as those referred to by Dr. Wairioko since the medical report of Dr. Kabora stated that the injury was a compound fracture of the tibia and not femur. He argued that the failure to award special damages for the p3 form and police abstract was erroneous since receipts were produced to that effect. It was further argued that the trial court did not award costs in light of the authorities cited rather she relied on the original pleadings and that she did not take into account the effluxion of time and attendant inflation.

18. The Respondent on the other hand argued that there were no treatment notes to support the Appellant's claim on injuries. That the injuries confirmed by the p3 form show that the Appellant sustained a fracture of tibia which is lesser in magnitude compared with fracture of the femur. That while it is true that the trial magistrate missed out on the fracture of the tibia since the award made was made on a more severe injury. It was finally contended that the trial magistrate did not fail to consider the authorities cited since she made reference to them in her decision.

19. In my examination of the evidence as contained in the two medical reports produced by consent of both parties, both doctors agree that the Appellant sustained a fracture to the tibia and this is also confirmed by the p3 form. The only difference is one term the fracture an open fracture and the other a compound fracture. **The American Heritage® Stedman's Medical Dictionary Copyright © 2002, 2001, 1995 by Houghton Mifflin Company. Published by Houghton Mifflin Company.** defines an open fracture as follows:-

*"open fracture n.
A fracture in which broken bone fragments lacerate soft tissue and protrude through an open wound in the skin. Also called compound fracture."*

It follows therefore that the two doctors were referring to one and the same thing. This is in fact confirmed by their findings on how the said fracture was managed. Considering that both doctors referred to fracture of the tibia, the Respondent's argument that consideration of the fracture of the femur by the trial magistrate was an error carries the day. It appears that indeed the trial magistrate relied on the original plaint and did not look at the amended plaint which rectified the injuries to accord with those in the medical report by Dr Kabora. The trial magistrate ought to have limited herself to the fracture of the tibia which was supported by the evidence on record and as pleaded in the amended plaint. She was therefore in error.

20. The principles of awarding damages in cases such as the instant case were laid down in **Rahima Tayab & Others v. Anna Mary Kinanu., Civil Appeal No. 29 of 1982 (1983) KLR; 1KAR 90** where the Court of Appeal held that:-

“whereas in awarding damages, the general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at, some degree of uniformity must be sought, and the best guide in this respect is to have regard to recent awards in comparable cases in the local courts. It is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards, which can only in the end have a deleterious effect.”

21. I will apply the above principle and determine whether the trial court took them into consideration. Both doctors found the Appellant to have suffered an injury to the head. They are also in agreement as to the nature and scope of the fracture injuries and the Appellant's leg healing process which required him to go for further treatment i.e. surgery due to non union and the effect of the implants. The appellant was admitted in hospital while undergoing the said surgery. Dr. Mogire also rated the Appellant to have suffered permanent functional disability at 15%. These are factors which ought to be considered in assessing the award of damages which the trial magistrate ignored and which in my view call for re-assessment and therefore interference with the discretionary award of the trial magistrate.

22. I have considered the fact that the Appellant suffered a fracture to the tibia, which took some time to heal and he had to undergo surgery for a metal fixation whereby he was admitted on 14th October, 2004 and discharged on 21st October, 2004 and underwent subsequent out-patient follow up. The fact that he suffered injury to the head, and that he has disability at 15% and will still undergo surgery to remove the implants is also taken into account. I have compared the Appellant's extent of injuries to the injuries in the case of **Veronica Mwongel Kilonzo v. Robert Karume HCCC NO. 597 OF 2001 (MOMBASA)** where the injuries sustained were Compound fracture fibula and tibia and right fracture dislocation left ankle and an award made for Kshs 500,000/= as general damages. Although the injuries in Veronica's case are slightly grave, I opine that an award of KShs. 150,000/= by the trial court was inordinately low considering the age of the case in **Veronica Mwongel Kilonzo** I have cited hereinabove and the rate of inflation on the Kenyan Shilling. I would therefore interfere with the award made by the lower court and enhance the same to a sum of Kshs 500,000 general damages for pain, suffering and loss of amenities.

23. As to special damages, the Appellant is entitled to KShs. 200/= for police abstract and Kshs 1500 paid for filling of P3 form at the Machakos District Hospital whose receipts he produced in evidence and are on record although the trial magistrate appear not to have seen those receipts. Medical expenses incurred were also claimed. These were proved by receipts which bore revenue stamps. Other receipts from Kenyatta National Hospital which the trial court found to be invoices, I have examined the invoices no. 655222 dated 23.10.2004 for 4900 and no.655190 dated 21.10.2004 for 39,974 and 655226 for 23.10.2004 for 3655. The said invoices from KNH are supported by subsequent payments and ETR receipts issued for the same amount. The appellant also produced receipt for medical report consultation fee of 2000. Other receipts are from Kenyatta National Hospital which are ETR generated while the other

receipts were for purchase of drugs from pharmacies and chemists. Accordingly, I find the trial magistrate to have erred in finding that the appellant had not proved those special damages.

24. On the cost of future operation, although both doctors indicated that the Appellant required further medical treatment, the Appellant did not plead the same specifically. It is worth noting that future medical expenses being a special damage claim must be specifically pleaded and proved. There was no pleading and proof of the same. It is therefore disallowed.

25. In the end, I allow the appeal herein, set aside the order of the trial magistrate on the award of kshs 150,000 general damages and kshs 92,877 special damages and substitute it with judgment for the appellant against the respondent in the sum of Kshs 500,000.00 general damages for pain suffering and loss of amenities, Kshs108, 661.00 special damages.

26. I also award the appellant 80% costs of the suit in the subordinate court and 100% costs of this appeal since he has succeeded on all grounds of appeal.

27. General Damages will carry interest at court rates from date of judgment in the lower court until payment in full. Special damages will carry interest at court rates from date of filing suit until payment in full.

28. Costs will also carry interest at court rates from date of assessment until payment in full.

Dated signed and delivered at Nairobi this 8th day of December, 2015.

R.E.ABURILI

JUDGE