REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 343 OF 2012

PARODI GIORGIO ..... APPELLANT

VERSUS

JOHN KURIA MACHARIA ..…….. RESPONDENT

J U D G M E N T

The appeal herein arises from the judgment and decree of Hon. W. Mokaya Principal magistrate in Nairobi CMCC 4237 of 2008 delivered on 20th September 2010.

The respondent John Kuria Macharia sued the appellant Parodi Giorgio claiming for special as well as general damages arising from the injuries he sustained when the appellant's motor vehicle registration No. KAG 338S knocked him while he was walking along Tom Mboya Street, Nairobi near Diamond Trust.

The respondent blamed the occurrence of the accident on the negligence of the appellant and filed NRB SRMCC No. 4237 of 2008.

When the suit came up for hearing before W. Mokaya Principal Magistrate, on 14th July 2010, the parties entered into a consent judgment on liability in the ratio of 70%:30% in favour of the plaintiff against the defendant. The parties then agreed to file written submissions to enable the court determine quantum of damages to compensate the respondent herein for the injuries he sustained following the accident.

From the pleadings in the lower court, the respondent is alleged to have sustained the following injuries:

a) Fracture of the left navicular bone

> ***"The respondent also pleaded as follows:- And as more detailed and particularized in the medical report to be produced during the hearing this suit."***

The medical report prepared by Dr. Theophillus Wangata, a medical practitioner dated 26th August 2008 outlined the injuries sustained by the respondent on examination as follows:

- Fracture of the navicular bone, left foot
- Blunt trauma on the right hip
- Blunt trauma to the left foot

The said medical report states that the respondent was treated as an outpatient at Kenyatta National Hospital as follows:

- The left leg was found to be swollen
- X-ray of the left leg revealed the above fracture
- He was put on a plaster cast for about two months
- He was given analgesics and antibiotics.

The said doctor had seen the treatment record from Kenyatta National Hospital, the P3 and the police abstract.

At the time of examination, the respondent complained of occasional numbness and pain at the left foot. On examination, the doctor found the respondent to be in good general condition and that he walked with a slight left sided limping gait.

He formed the opinion that the respondent was at risk of osteoarthritis of the foot as a result of the fracture. He assessed the prevailing extent of permanent and functional incapacity as a result of injuries sustained in the accident and estimated it at 2%.

The medical patient's treatment notices from Kenyatta National Hospital dated 3rd April 2008 shows the brief history as RTA wound pain Lt foot, ran over by a motor vehicle. When he was observed, he was found to be fair. An X-ray showed a fracture of the left foot.

The P3 form filled on 5th April 2008 by Dr. Kamau showed the injuries as swollen left foot and the X-ray showed fracture of the left navicular bone. Dr. Wambugu P.M., MBchB, M.Med (Surg) Nrb examined the respondent and prepared a medical report dated 28th October 2008.

The said medical report gives the injuries sustained by the respondent as closed fracture navicular bone, left foot. He further stated that X-rays taken confirmed the above fracture. The fracture was immobilized in a plaster cast bandage and he was managed as an outpatient on appropriate medication. As at the time of medical examination, the respondent complained of occasional pains of the left foot especially on exertion or when it is cold.

The physical findings were that he was in good general condition, walked with a normal gait and unaided, wore closed shoes, normal foot aches had been retained. The toes were normal and ankle movements were complete in range and pain free. There was no swelling or crepitus noted.

Dr. Wambugu's opinion and prognosis was that the respondent had sustained the skeletal and soft tissue injuries which occasioned him pains and morbidity. The respondent had since made adequate recovery and it was expected that the pains complained of would subside with time and medication, albeit, intermittently. According to him, no total permanent incapacitation occurred.

In the defendant/appellant's submissions before the learned magistrate filed on 27th July 2010, it was proposed that Ksh. 150,000/- would adequately compensate the respondent/plaintiff. They relied on the authorities of:

(a) **Kellen Wanjiku Kimato – Vs – Muranga Timber Co. Ltd NRB HCC 4888/90** where **Githinji J** on 22nd February 1994 awarded the plaintiff who sustained fracture of the heel bone and a sprain left ankle joint Ksh. 100,000/- on general damages and

(b) **Peter Mwamunga – Vs – Mwatelo Chiji NRB HCC 337/89** where **Githinji J** again on 4th January 1991 awarded the plaintiff Sh. 150,000/- for a crash injury on the left ankle and fractures of the 1st, 2nd and 3rd metatarsals bones of the left foot.

In the lower court, the plaintiff/respondent herein proposed Sh. 500,000/- general damages for pain,

suffering and loss of amenities. He cited the case of **Nyundo Mwakoso – Vs – Paul Musyoka Mutemi & 2 Others HCC 879/91 Mombasa** where the plaintiff who sustained a fracture of the femur was awarded Sh. 350,000/- by **Hon. Mbogholi Msagha J** in 1992. He however did not attach the said authority to enable the lower court and even this court appreciate the details in the judgment. I have only seen an authority on page 15 of the record of appeal relating to the case of **Willy Lewis – Vs – Leisure Lodges Ltd HCC 931/88 Mombasa** where the plaintiff suffered fracture of navicular bone left foot. He was awarded Sh. 800,000/= for pain and suffering and loss of amenities. The plaintiff in that case was a Swiss tourist aged 47 years, hospitalized for 3 weeks and was off duty for 4 months. The fracture site healed leaving permanent painful limitation of the inversion and aversion of the foot and pain when walking for long. He was left with a 6" scar on the medial aspect of the foot. The injury dislocated his sporting life being a renowned mountain climber, tennis player and swimmer which were curtailed by the injuries.

In the **Nyundo Mwakoso case (Supra)**, the plaintiff was hospitalized for 8 days, underwent an operation to insert and remove the K-nail and remained off duty for many months and had to be sacked from his job. In awarding general damages, the court took into account his loss of employment as a factor.

In this case, the Principal Magistrate in her judgment delivered on 29th September 2010 stated as follows regarding the injuries sustained by the respondent:-

> ***"The plaintiff sustained a fracture of the navicular bone, left foot, blunt trauma to the right hip and a blunt trauma to the left foot. The injuries were sustained after the plaintiff was hit and injured by the defendant motor vehicle registration No. KAG 338S on 30th November 2007 as the plaintiff walked along Tom Mboya Street. The plaintiff pleaded the said injuries in his plaint dated 15th July 2008. The injuries confirmed by medical reports of Dr. Wangata and Dr. Wambugu dated 26th August 2008 respectively. The reports reveal that the plaintiff was treated at Kenyatta National Hosptal and a plaster paris cast on his foot for about 2 months. Dr. Wangata assessed permanent incapacity at 20%"***

The learned Principal magistrate then went on to state as follows:-

> ***"I have considered the cases cited to guide me on quantum. The plaintiff submitted for an award of Sh. 500,000/- while the defendant considered Sh. 150,000/- as being adequate. The case of Nyundo Mwakoso – Vs – Paul Musyoka mutemi & 2 Others HCC 879/91 will offer sufficient guidance for me and accordingly I proceed to enter judgment on general damages for pain and suffering and loss of amenities at Sh. 350,000/- (subject to 30% contribution on liability)."***

Appeal

Being dissatisfied with the judgment of W. Mokaya delivered on 20th September 2010 on quantum of general damages, Ksh. 350,000/- awarded to the plaintiff/respondent herein for the injuries sustained in the accident, the appellant preferred this appeal challenging the quantum of general damages as assessed and awarded to the respondent herein complaining that

1) The learned Magistrate erred in law in awarding judgment of Ksh. 350,000/- on general damages for injuries that do not deserve such a high award;

2) That the learned Trial Magistrate erred in law and fact in failing to consider sufficiently or at all the appellant's evidence and submissions as to facts and the law placed before her; and

3) That the learned Trial Magistrate erred in law and fact in awarding the plaintiff a sum that was manifestly excessive in the circumstances.

They prayed that the appeal be allowed and such or other orders be made as may be appropriate in the circumstances.

The appeal was admitted to hearing pursuant to the provisions of Section 79B of the Civil Procedure Act on 20th may 2014 and directions were given on 30th July 2014 by **Hon. Justice Mulwa**. The parties agreed to dispose of the appeal by filing written submissions.

On 25th September, 2014, the parties confirmed filing the written submissions and asked the court to deliver judgment on the basis of the said written submissions.

From the onset, it is clear that the respondent did not file any cross-appeal to the appellant's appeal filed on 9th July, 2012. However, by their submissions filed in court opposing the appeal herein on 14th August 2014, they urge the court to dismiss the appellant's appeal and substitute the finding of award in general damages of Ksh. 350,000/- with an award of Ksh. 500,000/- general damages in favour of the respondent.

With utmost respect, the prayer herein is incapable of being granted as there was no cross appeal challenging the award of the trial magistrate and I need not belabor that point with any citations as it is a matter of law hence I decline to make any order substituting the trial magistrate's award of Ksh. 350,000 with Ksh. 500,000/- in favour of the respondent.

Back to the appellant's grounds of appeal contending that the trial magistrate's award of Ksh. 350,000/- was excessive and requires the court's interference to ensure justice is seen to be done and the compensation is reasonable. They submit that Ksh. 150,000/- would be reasonable compensation considering the injuries the plaintiff/respondent sustained.

The only issue for determination is whether the trial magistrate's award of Sh. 350,000/- general damages was excessive in the circumstances.

As to whether I should interfere with an award of damages made by the trial court, I am guided by several authorities to which I will heavily rely on in determining the merits of this appeal.

The case of **Mbogo & Another – Vs – Shah (1968) EA 1993** is a landmark in testing whether or not the appellate court may interfere with an award of damages. The position was stated thus:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a figure which was either inordinately high or low."***

The principles espoused in the above case have been replicated in many judgments of this court and the Court of Appeal. Counsel for the appellant cited the cases of **Wamuyu Childrens' Fund – Vs – Michael Mutuku HCCA 125B/2001**, where two other decisions of **Robert Musioki Kitavi – Vs – Coastal Bottlers Limited (1982-1988) KAR 891** and **Daniel Nachela Kahungu (1982 – 1988) KAR 682** were cited by **Hon. Justice Ruth Sitati** with approval as follows:

> ***"From the above two authorities, it is apparent to me that this court can only interfere with the award made by the court below if I am satisfied that the court below proceeded on wrong principles or that the learned Trial Magistrate misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low."***

In the appeal before me, it was submitted by the appellant that the award of Ksh. 350,000 was inordinately high hence it requires the appellate court to interfere to ensure justice is seen to be done and the compensation is reasonable. It was further submitted that the award of Ksh. 150,000/- would have been reasonable considering the injuries the plaintiff/respondent sustained.

Regrettably, the appellant did not point out any aspect of the award that made it inordinately high other that "considering the injuries sustained by the respondent." In addition, counsel did not submit how the

trial magistrate misdirected herself or acted on matters on which she should not have acted. Further, there was no submission that the trial magistrate failed to take into consideration matters which she ought to have taken into account and consideration and in doing so, arrived at a figure which was inordinately high.

The duty of this court as an appellate court under Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya is to 78 (1)

a) Determine a case finally;

b) To remand a case;

c) Frame issues and refer them for trial;

d) Take additional evidence or to require the evidence to be taken;

e) Order a new trial.

Subsection 2 thereof provides that:

> ***"Subject to the aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act, on courts of original jurisdiction in respect of suits instituted therein."***

Armed with the above provision of the law, I am empowered to analyze and re-evaluate the evidence and the law, and exercise as nearly as may be, the powers of the trial court, and come to my own conclusion.

In addition, it is now trite law that an appellate court shall not be bound to follow the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally see **Selle – Vs – Associated Motor Company (1968) CA 123**.

In saying so, however, I am conscious that no witness testified in the trial court. The parties hereto agreed and filed documentary evidence by consent and it was expected that the trial magistrate would analyze the said documentary evidence and the submissions and arrive at a just and fair decision.

Regrettably, the judgment delivered by the trial magistrate on 27th August, 2010 fell short of an examination of the pleadings, documentary evidence and the submissions and authorities cited by both counsels, in support of assessment of quantum of damages payable to the respondent. In this judgment, I have reproduced the submissions and crucial parts of the learned trial magistrate's judgment which clearly show that she failed to take into consideration matters which she should have taken into account and consideration and in so doing, arrived, in my view, a figure which was excessive, for the following reasons:

First, the plaintiff's pleadings clearly set out the injuries sustained by the respondent as:-

a) Fracture of the left navicular bone

b) And more detailed particulars in the medical report to be produced during the hearing of this suit.

On the other hand, the medical report by Dr. Wangata sets out injuries as follows After examining the respondent on 26th August 2008:-

"a) Fracture of the navicular bone, left foot

b) Blunt trauma to the right hip

c) Blunt trauma to the left foot

The respondent walked with a slight left sided limping gait. He assessed the extent of permanent incapacity and functional incapacity at 2%."

Dr. Wambugu's report which showed that the respondent was examined on 24th October 2008 two months later and had sustained the injuries as

Closed fracture navicular bone, left foot. His prognosis was that the respondent had normal gait. He had since made adequate recovery. No total permanent incapacitation occurred.

My observation is that there are no credentials for Dr. Theophilus Wangata, unlike Dr. Wambugu. The former is described on his letter head simply as medical practitioner whereas the latter is a consultant surgeon with a masters degree in medicine (surgery) from the University of Nairobi.

Secondly, that the respondent filed suit before he was subjected to medical examination to determine the exact extent of his injuries hence, the prayer No. b which provided that ***"and more detailed particulars in the medical report to be produced during the hearing of this suit."***

In my humble view, parties are bound by their pleadings they adduce evidence that tend to prove what they have pleaded and not otherwise. If the respondent had not been subjected to medical examination before filing suit in court, it was incumbent upon him to seek leave of court at any stage of the proceedings to amend the plaint to reflect the exact injuries than he sustained in the accident. The medical reports could not prove what was not pleaded. As Dr. Wangata's medical report states more injuries that those which are contained in the plaint, I hold that the learned magistrate erred in law and fact in failing to consider those facts and in relying on the medical report by Dr. Wangata to describe the injuries which were not pleaded and I set aside that finding to the extent that it refers to more injuries than those which were pleaded in the plaint.

I am fortified by the decision in the case of Joash M. Nyabicha – Vs – Kenya Tea Development Authority & 2 Others, Court of Appeal at Kisumu in CA No. 302 of 2010 that parties could not change an averment without amending the pleading appropriately. They can not do so in cross-examination or in submissions and they are bound by their pleadings. Citing with approval the decision in Puspa – Vs – Fleet Transport Co. [1960] EA 1025 and Lord Normond in Esso Petroleum Co. Ltd – Vs – South Port Corporation (7) (1956)AC 218 that:-

> ***"The function of pleadings is to give a fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them."***

The Court of Appeal further observed that to hold otherwise than in accordance with the pleadings and evidence supporting that pleading is tantamount to the court amending the averments in the judgment and that the Judge could not descend into the arena of battle strictly reserved for the parties to the dispute before him.

I have no reason whatsoever to depart from the above findings of the Court of Appeal which is good law and applicable in the circumstances of this case relating to the injuries sustained by the respondent.

Thirdly, I observe that the only injury which was pleaded and proved by the medical examination reports of Dr. Wangata and Dr. Wambugu is the fracture of the navicular bone, left foot and the resultant pain, and this is what the learned trial magistrate should have relied on in assessing damages.

Fourthly, whereas Dr. Wangata's report states that the respondent had a limping gait, the subsequent report of Dr. Wambugu states otherwise. That he had a normal gait. In addition, whereas Dr. Wangata stated that the respondent had a 2% permanent incapacity, Dr. Wambugu assessed otherwise, that there

was no permanent incapacity. All these factors/evidence should have been analyzed by the learned trial magistrate to assist her arrive at a just decision on how much the respondent was entitled to as compensation for the injuries he sustained.

Fifth, the learned trial magistrate relied on the authority of **Nyundo Mwakoso – Vs – Paul Musyoka Mutemi & 2 Others HCC 879/91** as sufficient guidance in assessing general damages without analyzing the said authority. In this appeal, I have reproduced what was contained in the said authority and what guided the learned Judge in awarding the plaintiff Sh. 350,000/-. I reproduce it here as follows:-

> ***"The plaintiff … at the time of accident suffered fracture of the left femur. He was hospitalized for 18 days during which he underwent operation of insertion and removal of the "K" nail.***
>
> ***He remained off work for many months and had to be sacked. At the time of medical examination the plaintiff complained of mild pain in the left leg otherwise recovered without any permanent incapacity. It was however noted that the plaintiff suffered childhood polio deformity and weakness in the right leg.***
>
> ***General damages for pain, suffering and loss of amenities including loss of employment assessed at Sh. 350,000/-"***

The above authority as attached to the respondent/plaintiff's advocates submissions show that the decision was by **Wambiliyangah J** on 10th June 1994.

In the body of the submissions at page 2 as filed on 27th July 2010, counsel for the plaintiff/respondent herein submitted as follows:

> ***"The plaintiff in this case suffered fracture of the femur and was awarded a sum of Ksh. 350,000/- general damages by Mbogholi Msagha J on 11.9.1992"***

From the above analysis, it is clear that the trial magistrate did not take into account and consideration the discrepancies between submissions by counsel for the plaintiff/respondent's on the authority relied on and the authority itself as annexed to the submission. In addition, it is clear that she did not read the said authority. Had she read it, she would have discovered that at the end, the court's award of Ksh. 350,000 was not only for the injuries sustained but also for loss of employment.

In the instant case, no pleading or evidence was led to prove loss of employment by the respondent. The injuries as pleaded, accorded with Dr. Wambugu's medical report and the medical treatment note from Kenyatta National Hospital issued on 3rd April 2008 namely, fracture on the left foot, and the P3 form filled on 5th April 2008 showing fracture of left navicular bone. In my view, as at the time of filing suit on 16th July 2008, the respondent had in his possession the treatment notes and P3 form and they formed the basis of his pleadings. If it later turned out that he had sustained more injuries as described in Dr. Wangata's medical report, it was necessary to amend the plaint to include them, which he did not!

As I have stated, the authority cited by the plaintiff/respondent's advocate was only relevant in so far as the injury was concerned but the award included a figure for loss of employment. Furthermore the plaintiff in that case was admitted in hospital for 18 days, had an operation for implantation of a "K" nail and was off work for many months leading to his loss of employment.

In the instant appeal, the respondent was treated as an outpatient and a plaster paris cast on his leg. It was removed after 2 months and he was in pain. He however never lost his employment as he would have stated so in his submissions. He had made adequate recovery as at the time of being examined by Dr. Wambugu who was the last doctor to examine him, with occasional pains left foot especially on exertion or when it is cold. The limping gait reported 2 months earlier by Dr. Wangatia had gone and he wore closed shoes. He had no permanent incapacity.

In the circumstances, I find that the learned trial magistrate's award of Sh. 350,000/- general damages for pain, suffering and loss of amenities was excessive and this calls for interference by this court.

The appellant's counsel's submissions filed in court on 6th August 2014 in support of the appeal cites the injuries sustained as stated in the plaint as filed by the respondent and as contained in Dr. Wambugu's medical report which I have reproduced and distinguished it from Dr. Wangatia's medical report. The injury as pleaded in the plaint is a closed fracture, navicular bone, left foot. They proposed Sh. 150,000/- general damages would be sufficient compensation and relied on the 2 authorities which I have also reproduced in this judgment. Having examined all the cited cases, the one of **Kellen Wanjiku HCC 4888/90** by **Githinji J** delivered on 22nd February 1994 was more relevant. In that case, the plaintiff was hospitalized for 2 days for a plaster paris cast following fracture of the heel bone and sprained ankle joint. The plaster paris was removed after 2 weeks and the injuries sustained healed without any permanent incapacity. She was awarded Sh. 100,000/- general damages for pain, suffering and loss of amenities.

In the **Peter Mwawuganga case HCC 337/89** per **Githinji J**, 4th January 1991, the plaintiff sustained more serious injuries involving crash injury with loss of skin on left ankle and fractures of 1st, 2nd, 3rd metatarsals bones of left foot. He underwent operation of skin graft of the thigh. He was hospitalized for 2 months and remained off work for a further one year.

The above injuries healed with a resultant keloid scar 8" on the medial side of the left ankle and foot with patch of skin graft 3" X 2", walked with a limp and developed secondary arthritis of the left foot. He was awarded Ksh. 150,000/- general damages for pain, suffering and loss of amenities.

The injuries sustained by the respondent in this appeal are not, in my view comparable to the ones sustained by the plaintiff in the above second authority. I however take cognizance that there was time lapse from 1994 when the **Kellen Wanjiku case**, which is more relevant was decided and inflation had set in. I am also conscious of the fact that no two injuries are likely to be exactly the same in as much as they may be similar.

In the circumstances I find that the trial magistrate did not make any comparisons of the authorities cited by both parties and having failed to analyze the authority she relied on in making an award of 350,000/-, she was in error.

Accordingly, I find the award excessive and I set aside the judgment and decree of the learned trial magistrate on quantum of Sh. 350,000/- in favour of the respondent.

In its place, thereof, I substitute with an award of Ksh. 200,000/-, general damages for pain, suffering and loss of amenities, taking into account the injuries sustained by the respondent as pleaded and proved, the time lapse from the time the case of **Kellen Wanjiku** had been decided and inflation.

The upshot is that I allow the appellant's appeal herein. As it was clear the trial magistrate did not analyze the authorities cited and availed to her to arrive at the fair decision, I order that each party shall bear its own costs of this appeal. The respondent shall have costs of the subordinate court.

Dated, signed and delivered at Nairobi this 8th day of December, 2014.

R.E. ABURILI

JUDGE