



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 8 of 2006

THOMAS KABAYA NGARUIYA &

MARY KNOLL FATHER & BROTHER.....APPELLANTS

VERSUS

DAVID CHEPSISROR.....RESPONDENT

*(Being an Appeal from judgment and decree of Hon. Florence N. Muchemi Chief Magistrate in Eldoret CMCC NO. 484 OF 2005 delivered on the 16<sup>th</sup> day December 2005)*

JUDGEMENT

This is an appeal from the Judgment of the Hon. Florence Muchemi Chief Magistrate in Eldoret CMCC No. 484 of 2005 delivered on 16<sup>th</sup> December 2005.

In the said case, the Plaintiff (now respondent) claimed general damages for future medical expenses in respect of injuries sustained in a road traffic accident involving two motor vehicles along Eldoret – Nakuru road near Lorian area on 23<sup>rd</sup> July 2000. The Plaintiff was travelling in motor vehicle KAB 160 Q when it was involved in an accident with KAD 747 V owned and driven by the Defendant’s driver, servant or agent. The Plaintiff pleads that the Defendant’s said vehicle was driven, controlled and/or managed so negligently, carelessly and/or recklessly that it knocked motor vehicle registration number KAB 160Q thereby causing an accident in which the Plaintiff suffered severe bodily injuries that led to loss and damages. He also claimed special damages in the sum of Kshs. 302,617/= being medical expenses.

The injuries that the Plaintiff claimed he sustained were blunt trauma to the pelvis, swollen left thigh and a fracture of the upper third of the left femur. The Plaintiff complained of pains and tenderness in both hips and left thighs as well as having large surgical scar on the left thigh. In the words of the Honourable Learned Magistrate described the injuries in a more clear language as follows:-

***“The plaintiff according the medical reports and treatment notes produced suffered a comminuted fracture of the left femur and dislocation of the left one. The Plaintiff was admitted in Uasin Gishu District Hospital for one month.***

***He was discharged but re-admitted three months later due to lack uniting of the fracture of the femur. He stayed in hospital for one month (Moi Teaching and Referral). A metal plate was fixed on the fracture which has not been removed to date due to Plaintiff financial inability (five years later)”.***

According to Dr. Gaya, the Plaintiff will walk with a permanent limp due to shortened leg and is likely to develop early post traumatic osteoarthritis of both hip joints. The Learned Magistrate found in favour of the Plaintiff and made the award as follows in a judgment delivered on 16<sup>th</sup> December 2005:-

General damages	-	Kshs. 600,000/=
Medical expenses	-	Kshs. 136,437/=
Future medical expenses	-	Kshs. 100,000/=
Balance in unpaid medical expenses	-	<u>Kshs. 266,000/=</u>
<b>Total</b>	-	<b><u>Kshs. 1,202,437/=</u></b>

The parties had on 21<sup>st</sup> October 2005 entered into a Consent on liability and assigned to the Plaintiff 30% contributory negligence whilst the Defendant accepted a fault of 70% for causing the accident. The consent was adopted as Court order on 21<sup>st</sup> October 2005. Therefore the award of Kshs. 1,102,437/= is reduced by 30% attributed blame to the Plaintiff. The amount due to the respondent was thus Kshs. 771,705/=. It is this judgment that gave rise to the present appeal. The appellants contended in their Memorandum of Appeal lodged on 12<sup>th</sup> January 2006 as follows:-

- 1. That the learned trial magistrate erred in law and in fact in awarding the sum of Kshs. 600,000/= as general damages an award that is inordinately high and excessive in the circumstances considering the injuries sustained and pleaded by the respondent.**
- 2. That the learned trial magistrate erred in law and in fact in failing to consider that the injuries suffered and pleaded by the respondent did not warrant the award of Kshs. 600,000/=.**
- 3. That the learned trial magistrate erred in law and in fact in holding that the respondent had proved the sum of Kshs. 136,437/= as special damages in the form of medical expenses.**
- 4. That the learned trial magistrate erred in law and in fact in holding that the respondent had proved the sum of Kshs. 266,000/= as special damages in the form of unpaid medical expenses.**
- 5. That the learned trial magistrate erred in law and in fact in awarding the sum of Kshs. 266,000/= as balance of unpaid medical expenses notwithstanding that the same was not specifically pleaded and proved.**
- 6. That the learned trial magistrate erred in fact and in law in awarding special damages in excess of what was specifically pleaded.**
- 7. The learned magistrate erred in law and in fact in awarding the amount of Kshs. 100,000/= as costs of future medical expenses an award that is too high in the circumstances.**

The Appellants pray in their Appeal that;

- (a) The award of general damages be re-assessed downwards.
- (b) The award of Kshs. 266,000/= as balance of unpaid medical expenses be dismissed.
- (c) The award of Kshs. 136,437/= be dismissed.
- (d) The award of Kshs. 100,000/= as costs of future medical expenses be dismissed.
- (e) Costs of this appeal.

At the hearing of this appeal on 22<sup>nd</sup> January 2008 both parties were represented by counsel.

Counsel for appellant submitted in support of grounds no. 1 and 2 that the award was high and it is clear that the trial magistrate took into account irrelevant factors. He contended that according to medical evidence the fracture would heal in 3 months. He referred to the medical reports by Dr. Gaya and Dr. Lelei. There was no dislocation of the knee and that no medical evidence influenced her assessment. He referred to the several decisions where severe injuries had attracted less awards. He contended that in his view an award of Kshs. 250,000 to 300,000/- would be reasonable. He abandoned ground 3 which relates to proof of special damages of Kshs.136,437/-. Counsel then argued grounds no. 4, 5 and 6 together. In his contention the award of Kshs. 266,000/= does not pass the test of authorities no. 1 and 4 in appellants list of authorities. **Coast Bus Services Ltd v Sisco Murunga & 2 others, Civil Appeal No. 1992 of 1992 and David Bagine v Martin Bundi C.A. 283 OF 1996.** He referred to exhibit No. 5 where the amount guaranteed had not been paid to date. Future medical expenses of Kshs. 100,000/= was plucked from the air. Counsel submitted that a sum of Kshs. 50,000/= would be reasonable. He prayed that the appeal be allowed with costs. The respondent walks with a permanent limp. The prognosis of Dr. Gaya and Dr. Lelei was not challenged. Respondent was likely to suffer early post traumatic osteoarthritis. Appellants have not shown the irrelevant factors taken into account to show error. Counsel referred to the case of **High Court Civil Appeal No. 49 of 20005 Sister Margaret W Chege & anor v Margaret W. Gichimu.** He also referred to the case of **Sosphinaf Company Ltd & anor. V Daniel Ng'ang'a Kanyi, civil Appeal No. 315 of 2001 (Court of Appeal).** Counsel submitted that special damages were proved and there was basis for future medication costs of Kshs.100,000/=. Counsel accused the appellants of not prosecuting the appeal with diligence and urged that the appeal be dismissed.

I have considered the submissions of counsel and the evidence on record. It is the duty of this court as a court of appeal of first instance to reconsider the evidence and reach its own conclusions giving allowance to the fact that it did not see the demeanor of witnesses. However, facts are not seriously in issue. The question raised in the appeal is the quantum of damages awarded for the injuries sustained. Secondly whether special damages had been pleaded and strictly proved. On the first issue counsel for the appellant submits that an award of Kshs. 250,000- 300,000 would have been reasonable taking into account the nature of injuries. In arriving at the sum of Kshs. 600,000/= the trial magistrate expressed herself as follows:

**“Dr Gaya states in his report made almost one year after the accident that the plaintiff ‘s leg shortened slightly and lost power to grade two as it continued to heal. He has a long surgical scar measuring 58cms. Dr. Gaya goes on to say that plaintiff will continue on clutches until the facture heals completely. Thereafter he will walk with a permanent limb due to the shortened leg and is likely to develop early post traumatic osteoarthritis of both hip joints. The plaintiff prays for general; damages of Kshs. 800,000/= and the defendant urges the court to give Kshs. 100,000 only. Each of the parties relies on authorities. The authorities cited by the plaintiff reflect more serious injuries where general damages were well over Shs. 1,000,000. The defendant on the other hand relies on authorities where the injuries were less serious and took a short time to heal. All considered I award the plaintiff general damages of Kshs. 600,000/= for pain and suffering and loss of amenities.”**

The Trial Mgristrate stated that the authorities relied upon by the appellant were of less serious injuries and had taken short time to heal. Counsel for the appellant in his submissions before the trial court relied on two decisions. **Nairobi HCCC 46 of 1990 Swabah Mafudh (A minor) v. Mini Bakeries (NBI) Ltd.** In this case the plaintiff was a minor had suffered fracture of the right femur and bruises on the face and limbs. She was hospitalized for 20 days and she fully recovered without any permanent disability. General damages for pain and suffering and loss of amenities were awarded in a judgment delivered on 24/9/91. The **case of Edward Mariga (A minor) v Nathaniel David Schulter Civil Appeal No. 23 of 1997.** The plaintiff in this case a minor aged 8 years suffered a fracture of the left femur and bruises on both hands. In a judgment delivered on 28/10/92 the court upheld an award of Kshs. 80,000/=. These authorities relied upon by counsel for the appellant were inappropriate in my view. A child is expected to heal faster than a man of 57 years. The degree of pain will thus differ. The decisions were also made in the early 1990s and were thus very unlikely to be reflective of the awards in contemporary times due to inflation. The injuries of the respondent were also very serious. The respondent underwent a second operation. Dr. Gaya stated as follows in his report:

**On 20/10/2000 he refractured the bone and also broke the late hence he was re-admitted and re-operated. The broken plate was removed and replating done. He stayed in the ward for 8 days.”**

He further stated that on examination ‘the picture is of a very obese person who walks with a lot of difficulty on the two crutches.’ Going by the evidence on record I would not fault the trial magistrate for awarding the sum of Kshs. 600,000/= as general damages for pain and suffering and loss of amenities. As stated by the Court of Appeal in **Mugambi & Another V. Gituiru [2004] eKLR:**

**“The general approach is that this Court to interfere with an award of the Superior Court it must be shown that a relevant factor was not taken into consideration or an irrelevant factor was taken into account, or that the trial judge did not appreciate the importance of some material evidence or that the award is so inordinately low or high that some such like mistake must be assessed.”**

Considering the above, I find that the Learned Magistrate did not commit any error that would justify this court to interfere. It is not sufficient that this court would have awarded a different sum in the circumstances.

The second issue concerns the sum of Kshs. 266,000/= that was allowed as special damages. The respondent produced P exhibit no. 4 an Invoice from Moi Teaching and Referral hospital and P exhibit no. 5 which was an acknowledgment from Moi Teaching and Referral Hospital that the sum of Kshs. 266,000 had been guaranteed by management. In his evidence he stated that he did not pay the sum of Kshs. 266,000. He stated as follows in examination in chief. “The hospital bill was Kshs. 464,009 for both hospitals. I paid shs. 198,009 and was left with a bill of shs. 266,000...I was allowed to leave hospital with a debt because I promised to pay latter. The former Mayor Josiah Magut signed for me and gave security. The hospital will sue me.’ There was no evidence that the sum of Kshs. 266,000/= had been paid. The case of the respondent was that he was liable to pay the debt. Was the debt a special damage claim? This I think is the question of concern to the appellant. Special damages are so called because they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of acts themselves. (**Ratcliffe V Evans (1892) 2 QB 524.** No case was cited to me to the effect that proof of special damage necessary means payment. It has been understood that special damages connote out of pocket expenses. The argument goes that it must be an expense where money has been paid to constitute special damages. I think this would be taking the construction of the term special damages to far. The respondent produced a document showing that he owes Moi Teaching Referral hospital Kshs. 266,000/=. I do not find the argument that the sum of Kshs. 266,000/= must have been paid first before the respondent could sue to be amenable to common sense and principles of justice. The appellants had caused injury to the respondent. They do not pay his bills. He is unable to pay and is released on a guarantee that he still owes the hospital Kshs. 266,000. When the appellants are sued can they successfully resist the claim on the basis that the respondent had not paid. I do not think that payment is a conditional precedent to claiming special damages. As long as they are pleaded and proof is provided they are recoverable. I do not read the Court of Appeal authorities cited as advancing the proposition that special damages cannot be recovered unless the claimant has first paid. I therefore find the ground on special damages of Kshs. 266,000/= to be without merit in the circumstances of this case.

It was also contended that the trial magistrate was in error to award future medication costs of Kshs. 100,000/= that he figure was picked from the air. Counsel however submitted that Kshs. 50,000 would have been reasonable. The respondent stated in examination in chief that Dr. Lelei recommended shs. 100,000/= for future operation in exhibit 1. On cross examination he stated that the figure of Shs. 100,000 was an estimate. It may be higher or lower. It may also depend on the hospital. In awarding future medication costs the trial magistrate stated as follows:-

**“Both Dr Gaya and Dr Aluda agree that the plaintiff requires an operation to remove the metal palate fixed on the fracture side. Dr J.K. Lelei assesses the required future medical expenses as Kshs. 100,000/=. I am satisfied that this operation and subsequent medical care is mandatory for plaintiff to attain better health. The amount estimated by Dr. Lelei is reasonable. I award shs. 100,000 for future medical expenses.”**

I have looked at P exhibit 1 and it is clear that Dr. Lelei recommended future medical costs of Kshs. 100,000/=. It is therefore unfortunate that counsel could accuse the trial magistrate of picking the figure from the air. I find no merit in ground no. 7 of the appeal. The claim for future medical costs was a general damage claim and did not have to be specifically pleaded. (see **Sosphinaf Company Ltd & anor. V Daniel Ng'ang;a Kanyi, civil Appeal No. 315 of 2001 (Court of Appeal)**).

The Learned Magistrate considered the evidence of the Respondent, medical reports and submissions of the respective Counsels. I have tested the findings of the Learned magistrate's *vis-a-vis* the evidence on record. In my view, the Learned Magistrate did not misdirect herself and this appeal must fail.

For these reasons, I dismiss the appeal with costs to the Respondent.

Dated AND Signed At Nairobi ON This 24<sup>th</sup> Day Of august 2012.

**M. K. IBRAHIM**  
**JUDGE**

DATED AND Delivered At Eldoret on This 31<sup>st</sup> Day Of October 2012.

**F. Azangalala**

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**JUDGE**

Delivered in the presence of: Mr. Martin for Applicant

Mr. Surity h/b for Mr. Kwamba for Respondent