



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 96 OF 2009

KIMILILI HAULIERS APPELLANT

VERSUS

SAMWEL KANGOGO RESPONDENT

**(Being an Appeal from the Judgment/Sentence of Hon. Mbogo C. G. (Chief Magistrate) in Eldoret
CMCC. No. 942 of 1998 delivered on the 21st October 2009)**

JUDGMENT

In a Plaintiff dated 26th June 1998 filed at the Senior Principal Magistrate at Eldoret in Civil Case No. 942 of 1998, the Plaintiff **SAMWEL KANGOGO** (herein the respondent) sued the defendant **KIMILILI HAULIERS LIMITED** (herein the appellant) for general and special damages arising from a road traffic accident which occurred on the 10th March 1998 along the Iten-Kipteren Road involving motor vehicle registration No. KVE 699 in which the plaintiff was travelling and motor vehicle registration No. KAH 588Y belonging to the defendant. There was an amended plaintiff dated 20th September 2007. It was averred by the plaintiff that the defendant's motor vehicle was so carelessly and/or negligently driven such that it collided with motor vehicle registration No. KVE 699 and caused severe injuries to the plaintiff including blunt trauma to the pelvis, blunt trauma to both hips and a fracture of the pelvis. The plaintiff therefore prayed for Judgment against the defendant as prayed in the plaintiff.

The defendant in its statement of defence dated 24th July 1998 denied ownership of the motor vehicle registration No. KAH 588Y, the presence of the plaintiff in motor vehicle registration No. KVE 699 and the occurrence of the accident. There was an amended defence dated 20th November 2007. It was the defendant's contention that if the accident occurred as alleged, then it was caused by the sole negligence of the driver and/or owner of motor vehicle registration No. KVE 699.

The defendant also denied that the plaintiff suffered injuries as pleaded in the plaintiff and was therefore not entitled to special and general damages as pleaded.

During the trial before the learned Chief Magistrate, the Judgment on liability of the defendant in Eldoret CMCC. 943/98 was adopted in this case. The defendant was therefore found 100% liable. Consequently, the issue which fell for determination by the learned Chief Magistrate was the

quantum of damages awardable to the plaintiff.

In that regard, the learned Chief Magistrate considered the medical reports compiled by Dr. L. K. Lelei and Dr. Sirma and noted that the plaintiff suffered serious injuries which left him with a permanent disability in that his left leg became shorter than the right leg. Consequently, an award of Kshs. 600,000/= was made for pain and suffering. In addition, a sum of Kshs. 300,000/= was awarded for future medical treatment, Kshs. 1,500/= for the medical report and Kshs. 100/= for the police abstract. The total award came to the sum of Kshs. 901,600/=. The defendant was aggrieved by the award and preferred this appeal which is essentially on quantum of damages.

The grounds of appeal are that:-

- 1. The learned trial Magistrate erred in law and in fact in using the wrong principles in the assessment of damages such that the amount awarded was excessive and does not reflect the extent of the injuries sustained.**
- 2. The learned trial Magistrate erred in law and in fact in arriving at a Judgment against the weight of the evidence adduced.**
- 3. The learned trial Magistrate erred in law and fact in failing at all to consider the evidence tendered by the defendant/appellant.**
- 4. The learned trial Magistrate erred in law and in fact in awarding Kshs. 300,000/= as costs for future treatment when the said claim was barred by the Limitation of Actions Act.**

Learned Counsel, **M/s. Khayo**, argued the grounds on behalf of the appellant by submitting that the plaintiff admitted that he gave a medical report which did not refer to the injuries indicated in the treatment notes and that he had healed from the injuries suffered. He however failed to offer evidence with regard to costs of future treatment. M/s. Khayo, submitted that the learned trial Magistrate relied on the medical report by Dr. Lelei to award costs for future treatment yet the report was never tendered or relied upon by the plaintiff other than being used as an annexure in support of the plaintiff's application to amend the pleadings. Therefore, the learned trial Magistrate erred by awarding costs for future treatment.

It was further submitted by M/s. Khayo, that the award of Kshs. 600,000/= for pain and suffering was excessive for the injuries sustained by the plaintiff. That, there was no evidence to show that the plaintiff's right leg was shorter than the left.

M/s. Khayo, contended that since the plaintiff confirmed that he had healed, a sum of Kshs. 300,000/= would have been sufficient.

On behalf of the respondent, learned Counsel, **Mr. Karira**, submitted that there was no averment by the plaintiff that the claim for future treatment costs was time barred and that it is herein alleged for the first time that there was no evidence to support the claim. Therefore, the appellant cannot be heard on ground four of the memorandum of appeal without leave of the Court. Mr. Karira, went on to submit that the defendant did not canvas on any issue pertaining to lack of evidence with regard to the costs of future treatment and that it was only the plaintiff who testified, the issue of liability having been settled. Further, the injuries suffered by the plaintiff and any residual effects could only be determined by a doctor and in that regard, three medical reports were compiled including that of the appellant's doctor i.e. Dr. Gaya which showed that the plaintiff was in hospital for three (3) months and that he suffered permanent disability placed at 40%.

It was submitted by Mr. Karira, that the plaintiff suffered serious injuries and needed a total knee replacement at an estimated cost of Kshs. 300,000/= as per the medical report by Dr. Lelei which was not

challenged by the defendant.

Mr. Karira, contended that the suggestion that an award of Kshs. 300,000/= should have been awarded for pain and suffering is baseless. Therefore, there is no reason for the reduction of Kshs. 600,000/= awarded by the learned trial Magistrate for pain and suffering.

Having heard both sides, this Court's role is to re-consider the evidence adduced at the trial Court and draw its own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses.

Liability was settled. Therefore, the evidence for consideration is that which pertains to the plaintiff's injuries and resultant effects.

In his testimony, the plaintiff, **SAMWEL KIPKURUI KANGOGO (PW.1)** stated that as a result of a collision between the vehicle he was travelling in (i.e. matatu) and a lorry he sustained injuries to his ankle and toes of the right leg. He was treated for a fracture and was in hospital for three months. The plaintiff produced the appropriate treatment notes and a discharge summary (P.Ex.1). He also produced a P3 form (P.Ex.2) and a medical report by Dr. Sirma (P.Ex.4).

A further medical report by Dr. Gaya was produced by Counsel on behalf of the defendant (i.e. D.Ex.1).

The medical report by Dr. Sirma, dated 18th May 2002 showed that the plaintiff suffered injuries to both the right and left legs including a compound fracture of the distal end of the left femur at the knee joint, dislocation of the left ankle joint and blunt trauma to the pelvis and both hips.

As regards the compound fracture, open reduction was done in a major operation and astainman's pin was inserted. The leg was later put on traction.

The findings on examination of the plaintiff revealed, tenderness on the right knee, right foot, left thigh, left knee, left leg, left ankle, left foot, both hips and pelvis. Scars on the right knee, right foot, left thigh, left knee, left ankle and left foot. Fracture of the left femur at the left knee joint, deformity of the left ankle joint and the left leg was shorter than the right.

According to Dr. Sirma, the scars were expected to remain a permanent feature, the deformity in the left ankle joint was also expected to remain a permanent feature and disability. A total knee replacement and arthrodesis of ankle was required to improve gait and relief pain. The estimated cost of the two operations was Kshs. 300,000/=.

In his report, Dr. Gaya, more or less confirmed the injuries noted by Dr. Sirma including the compound Fracture of the left femur and ankle. He (Dr. Gaya) opined that the plaintiff sustained severe injuries which healed with permanent deformity of the left knee and left ankle joint. He placed permanent disability at 40%.

In his Judgment, the learned trial Magistrate considered both medical reports in addition to another report by Dr. Lelei dated 20th May 2003 and concluded that the plaintiff sustained serious injuries which left him with a permanent disability where the left leg is shorter than the right leg. Consequently, an award of Kshs. 600,000/= was made for pain and suffering. A further award of Kshs. 300,000/= was made for future medical treatment.

Basically, the principles to be observed by an appellate Court is deciding whether it is justified in disturbing the quantum of damages awarded by a trial Court are that the Court must be satisfied that either that the trial Court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (**See, KEMFRO AFRICA LIMITED T/A NEW EXPRESS SERVICE VS. A. M. LUBIA AND ANOTHER [1982-88] 1 KAR 777**).

This Court, guided by the aforementioned principles and having re-considered the medical evidence availed in the trial Court is not persuaded that there is good cause to interfere with the award of Kshs. 600,000/= made by the learned trial Magistrate for pain and suffering. The amount was reasonably sufficient considering the seriousness of the plaintiff's injuries and the residual effect to wit, permanent deformity of the left knee and left ankle joint and the shortening of the left leg.

With regard to the award of Kshs. 300,000/= for future medical treatment, it was erroneous for the learned trial Magistrate to put reliance on the medical report by Dr. Lelei which was not tendered in evidence. However, the learned trial Magistrate also relied on the medical report by Dr. Sirma who gave the estimated cost of Kshs. 300,000/= for two operations.

The reliance on or non-reliance on the medical report by Dr. Lelei did not make any difference as the figure of Kshs. 300,000/= was initially proposed by Dr. Sirma. This is what prompted the learned trial Magistrate to award the sum.

It was contended in the appellant's amended defence that the plaintiff's claim for Kshs. 300,000/= was time barred. Ground four of the Memorandum of appeal emanates from that contention. However, this issue was neither canvassed in the trial nor in this appeal. In any event, if the suit was not time barred, would an additional prayer be time-barred? This Court does not think so. The claim for Kshs. 300,000/= was merely an additional prayer of the main suit. In the circumstances, it was not time-barred and was rightly awarded by the learned trial Magistrate.

In sum, this appeal is devoid of merit. It is hereby dismissed with costs to the respondent.

J. R. KARANJA
JUDGE

[Delivered and signed this 8th day of March 2011]
[In the presence of Mr. Khayo for appellant]