REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 555 of 2004

YABESH OPANGA…….....…….APPELLANT

VERSUS

FRANCIS NGUNJIRI MUKOMA….....….1ST RESPONDENT

TIBBETT & BRITTEN KENYA LTD.....…2ND RESPONDENT

J U D G M E N T

1. Yabesh Opanga (hereinafter referred to as the appellant), was the plaintiff in the lower court. He had sued Francis Ngunjiri Mukoma and Tibbett & Briten Kenya Ltd, (hereinafter referred to as the 1st and 2nd respondent), seeking general and special damages for personal injuries suffered by him as a result of a road traffic accident which the appellant maintained was caused by the negligence of the 1st respondent who was an agent or servant of the 2nd respondent.

2. The respondents filed a joint statement of defence in which they admitted that an accident occurred involving the 2nd respondent 's motor vehicle but denied that the accident was caused by the negligence of the 1st or 2nd respondent. The respondents maintained that the accident was solely caused or substantially contributed to by the negligence of the appellant.

3. On 11th December, 2001 a consent letter was filed by the parties in which the parties consented to a judgment on liability being entered for the appellant against the respondents' jointly and severally at 50%. This consent was apparently not recorded by the court and is therefore not reflected in the proceedings. However, both parties referred to the consent judgment in their submissions, and the original consent letter duly signed by each counsel is in the original file. Thus the issue of liability is no longer in dispute. Indeed, the appeal is only against the quantum of damages awarded.

4. During the trial only the appellant testified and stated that as a result of the accident he suffered a fracture of his left leg. He produced a medical report prepared by Dr. Bodo and another report prepared by Dr. Prakash. As a result of the injury the appellant had a metal implant in the leg and had to be retired on medical grounds. The report of the doctor recommending the retirement was however not produced in evidence as the doctor was not called to testify.

5. The report of Dr. Bodo which was dated 22nd November, 2000 revealed that the appellant suffered a comminuted fracture of the left femur and had to be admitted at Mater Hospital for about 2 weeks. Subsequently, the appellant had a broken plate at the site of the fracture and had to be taken back to the theatre for removal and replating the bone with bone grafting.

6. The report of Dr. Prakash Heda which was dated 21st January, 2004 noted that the appellant walked with a limp with the aid of a walking stick. Dr. Heda noted generalized muscle wasting of the left lower limb with quadriceps power of 3+. He also noted that an X-ray of the left femur showed that the fracture has healed, but the appellant will need to undergo further surgery for removal of metals on his left femur and would also require physiotherapy.

7. In her submissions, counsel for the appellant urged the trial magistrate to award a sum of Kshs.800,000/= as general

damages whilst counsel for the respondent urged the court to award a sum of kshs.150,000/=.

8. The trial magistrate found an award of Kshs.350,000/= adequate and gave judgment for the appellant for the sum of Kshs.175,000/= as general damages having taken into account the agreed contribution.

9. The appellant is not impressed by this award. Consequently he has lodged this appeal raising 7 grounds as follows:

(i) That the learned magistrate erred in law and in fact in not putting enough weight and consideration to the injuries sustained by the appellant.

(ii) That the learned magistrate erred in law and in fact in not awarding the appellant according to the current judicial precedents despite heavy supportive evidence and material facts tabled during the hearing of the suit.

(iii) That the learned magistrate erred in law and in fact in not considering that the appellant still undergoes treatment of the injuries sustained six years ago from the date of accident and requires adequate restitutions.

(iv) That the learned magistrate erred in law and in fact in failing to put weight on the learned counsel's submissions and the current judicial precedents produced and supported thereby during the hearing and instead relied on the defendant's less common and the already overtaken by time judicial precedents in awarding and concluding the suit.

(v) The learned magistrate erred in law and in fact in not accepting and putting into consideration the appellant's treatment cards and receipts in awarding special damages which currently stand to over a million shillings.

(vi) That the learned magistrate erred in law and in fact in not considering the obvious facts from the doctor's medical report which dictates the percentage of disability of the appellant and went ahead to award such sum of money which cannot and or continue to pay for the recommended day to day medical checkups and treatment.

(vii) The learned magistrate erred in law and in fact in failing to consult the law and judicial precedents widely set out before coming to the final award in the appellant's suit hence awarding just one hundred and seventy six thousand and five hundred shillings which would not be adequate for specialized treatment as it required.

10. The appellant maintains that the damages he was awarded is completely inadequate given that he is still seeing a doctor and requires a further sum of Kshs.250,000/= for a further operation.

11. For the respondent, it is submitted that there was only special damages of Kshs.1,600/= which was pleaded and that there was no claim for future medical expenses. It was maintained that given the injuries sustained by the appellant as set out in the medical report, the award of Kshs.350,000/= less contribution was fair. It was submitted that the award was not so erroneously law as to warrant disturbance. The court was urged not to take into account the additional medical reports included in the record of appeal which were not tendered in evidence in the lower court.

12. The appeal herein being one taking issue with the quantum of general damages awarded, the principles upon which such an award can be disturbed are stated in the case of ***Kemfro Africa Ltd t/a Meru Express Service & another vs A.M. Lubia and another***, which was cited by the respondent's counsel. To wit, the appellate court must be satisfied that either the trial judge in assessing damages took into account an irrelevant factor, or left out of account a relevant one or that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous.

13. In this case, the trial magistrate in assessing damages took into account the two medical reports which were produced in evidence. In arguing his appeal the appellant has sought to rely on several other documents wrongly included in the record of appeal which were in fact not produced in the lower court and therefore not part of the original record. Going by the dates these were documents which were available during the hearing and there is no reason why they were not produced. In any case if for any reason, the appellant felt the need to call additional evidence during the hearing of the appeal, he could only do so in accordance with Order XLI Rule 22 & 23 of the Civil Procedure Rules.

14. With regard to the claim in respect of future medical expenses, there was none pleaded in the plaint. Nonetheless, the claim was not in respect of a special loss incurred but an anticipatory loss resulting from the need to remove the metal implants. This ought to have been taken into account in the award for general damages. I do note however that there was no evidence laid before the trial court regarding the estimated cost for removal of the metal plate. The appellant's submission that the doctor is asking for Kshs.250,000/= is not supported by any evidence on record. The court cannot therefore be faulted for having failed to make a specific award in respect of future medical costs as there was no appropriate evidence laid before the court. At best the court could only take that factor into account in assessing the quantum of general damages.

15. As regards the award for Kshs.350,000/= for the fracture of the left femur cuts and lacerations to the hands, blunt trauma to the rib and soft tissue injuries to the face, the award was based on the authorities which was cited to the trial magistrate. It is comparable with recent awards for similar injuries. I find that the award was neither based on wrong principles, nor did the trial magistrate fail to taken into account relevant factors, nor was the award so inordinately low as to justify interference by this court. For this reason, I find no merit in this appeal and do therefore dismiss it. I make no orders as to costs.

Dated and delivered this 5th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Appellant present in person

Menga for the respondent