



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 12 of 2005

SAVCO STORES LTD.....APPELLANT

AND

DAVID MWANGI KIMOTHO.....RESPONDENT

(Being an appeal from the Judgment/Order of the Honourable Chief Magistrate Manyasi Chief Magistrate delivered in CMCC No.366 of 2003 – David Mwangi Kimotho –vs- Savco Stores Ltd. on 28/01/2005).

J U D G M E N T

1. **David Mwangi Kimotho** (the respondent in this appeal) was the plaintiff in Machakos CMCC No.366 of 2003 in which he sued the appellant herein, **Savco Stores Ltd.** for both special and general damages for injuries sustained as a result of a road traffic accident which is said to have occurred on the 22/01/2002 along the Nairobi – Mombasa road after the Machakos junction at Vista Factory involving the plaintiff who was a passenger in motor vehicle registration number KAL 735R and motor vehicle registration number KWW 540. The plaintiff averred that he was traveling as a lawful passenger in the course of duty in motor vehicle registration Number KAL 735R when the accident occurred. The plaintiff averred that the accident occurred as a result of the negligence of the defendant, its duly authorized servant and/or agent in the manner in which he drove, managed and/or controlled the aforesaid motor vehicle registration number KWW 540.

2. According to the plaint, the defendant’s driver, servant and/or agent drove in a negligent and wanton manner as a result of which he caused a collision to occur between the two vehicles and as a result of which the plaintiff sustained the following injuries:?

- Fractured left tibia and left fibula
- Fractured left elbow
- Deep cut wound left forehead

and, consequently suffered a 20% permanent disability. The plaintiff also averred that he incurred special damages and follows:?

- Medical Report.....Kshs. 2000.00
- Police abstract.....Kshs. 100.00

- Medical Expenses.....Kshs.33,571.00
- Search at the Registrar of
- Motor Vehicles.....Kshs. 500.00

TOTAL Kshs.36,171.00

reasons wherefore the plaintiff prayed for judgment to be entered against the defendant for:

- (a) ***incurred special damages in the sum of Kshs.36,171/= plus future medical expenses***
- (b) ***General damages for pain suffering and loss of amenities at reduced earning capacity***
- (c) ***Costs***
- (d) ***Interest on (a), (b) and (c) above at court rates.***

3. The defendant filed defence on 27/06/2003 denying liability for the accident and also denying that the plaintiff was a loader working in the course of his employment with motor vehicle registration number KAL 735R as alleged or at all when the accident occurred. The defendant also pleaded contributory negligence by the driver of motor vehicle registration number KAL 735R who the defendant alleged drove negligently and wantonly.

4. Briefly, the facts are that at about 8.00 p.m. on the 22/01/2002, the plaintiff was seated in the driver's cabin of motor vehicle registration number KAL 735R as they drove towards Mombasa from Nairobi. That as they drove along, an oncoming vehicle registration number KWW 540 came from the opposite direction, suddenly crossed onto the side of the plaintiff's motor vehicle and caused it to collide with motor vehicle registration number KAL 735R on the plaintiff's side; that though the driver of motor vehicle registration number KAL 735R tried to avoid the accident, it was not possible to do so. It was the plaintiff's contention that the driver of motor vehicle registration number KWW 540 drove without due care and attention and gave rise to the accident.

5. The plaintiff testified and also called one witness, Number 58397 Police Constable **Caroline Majanga**, who said she received a report of the accident on 22/02/2002. That the accident involved motor vehicles registration numbers KAL 735R and KWW 540 and that after investigations, the driver of motor vehicle registration number KWW 540 was found to blame for the accident. The witness testified further that a police abstract was later issued to the plaintiff. Same was produced as PExhibit 9. The medical reports prepared by Dr. Wokabi dated 31/10/2003 and 13/11/2002 and the Medical Report by Dr. Wambugu dated 24/10/2003 were produced by consent of the parties and marked as PExhibits 5.

6. The defendant did not offer any evidence but made submissions, as did the plaintiff. After considering the evidence the submissions and the law, the learned Chief Magistrate, (J. Manyasi) entered judgment for the plaintiff against the defendant as follows:-

- (a) General Damages inclusive of cost
of Future treatmentKshs. 800,000/=
- (b) Special Damages.....Kshs. 36,171/=
- (c) Costs of the suit
- . Interest on (a), (b) and (c) above from the date of the judgment.

7. The defendant was aggrieved by the judgment and appealed. The Memorandum of Appeal, filed in

court on 24/02/2005 has two grounds of appeal:?

(i) ***THAT the learned trial Chief Magistrate erred both in law and in fact by awarding the plaintiff General damages for pain, suffering and loss of amenities of Kshs.800,000/= which were excessive in view of the injuries sustained by the plaintiff.***

(ii) ***THAT the learned Chief Magistrate erred both in law and in fact by disregarding the defendants' submissions on quantum and the cited and attached case law thus arriving at an exorbitant – award of Kshs.800,000/= as general damages for pain suffering and loss of amenities.***

8. At the hearing of this appeal, it was only the issue of general damages that was canvassed. The appellant's arguments were centred around the parties respective medical reports; which Mr. Masika submitted did not warrant an award of Kshs.800,000/= as general damages for pain, suffering and loss of amenities. It is necessary at this stage to consider the contents as regards the injuries sustained by the plaintiff of each of the reports. Dr. Wokabi's report dated 13/11/2002 noted that the plaintiff suffered major injuries as follows:?

- Fractures of the left tibia and fibula which failed to unite with conservative treatment and which had to be fixed during a major surgical operation during which time metallic plates and cancerous bone graft were applied. The doctor anticipated slow union of the fracture of up to about one year.
- Fracture of the left ulna resulting in left forearm restriction of important movements of internal and outward rotation.
- Deep laceration on the left side of the forehead which had healed by the time of the examination. The wound area was however found to be hyposensitive due to severance of sensory nerve.

9. Dr. Wokabi assessed the plaintiff at 20% permanent disability. Dr. Wokabi gave a supplementary update of the plaintiff's medical condition by his report dated 31/10/2003 and noted that the plaintiff had the following complaints on examination:?

- Weakness in left forearm. Doing strenuous work ruled out.
- Plaintiff was unable to rotate the left forearm
- Plaintiff experienced weakness on his left leg and could not walk or stand for a long time, nor could he walk fast
- The plaintiff walked with a limp in the left leg, which had moderate swelling below the knee.

10. Dr. Wokabi noted that there was very slight improvement in the plaintiff's condition between the date of this second examination (31/10/2003) and the date of the initial examination on 13/11/2002. The doctor formed the opinion that the plaintiff would require further surgery to remove the metal implant on his left tibia and estimated that such surgery would cost about Kshs.80,000 made up as follows:?

- 2 days hospital @Kshs.2500.....Kshs.10,000.00 (sic)
- Theatre chargeKshs.10,000.00
- Surgeon's fees.....Kshs.30,000.00
- Anasthetist fees.....Kshs.15,000.00
- Incidentals.....Kshs.15,000.00

Total Kshs.80,000.00

11. According to Dr. Wambugu's Report dated 24/10/2003, the plaintiff suffered the following injuries:?

Ø Fracture left tibia bone which went into non-union (oblique fracture shaft of the tibial bone)

Ø Facial cut wounds

Ø Fracture left ulna (middle third ulna bone fracture)

Dr. Wambugu also noted that at time of examination, the plaintiff complained of pains in the left forearm on exertion; occasional swelling on walking long distances and that the plaintiff also had facial scars. In his opinion, Dr. Wambugu said that the injuries suffered by the plaintiff caused him pains and prolonged morbidity and that the facial scars were of cosmetic concern to the plaintiff who was still a young man aged 39 years as at time of accident. Dr. Wambugu also said that the plaintiff would require future surgery to remove the metal implant in situ at an estimated cost of Kshs.45,000/= in a medium cost private hospital. Dr. Wambugu also said that the plaintiff would be predisposed to early onset of osteoarthritis of his left knee and ankle joints. He assessed permanent disability at 12%.

12. It is not in doubt as to what injuries the plaintiff sustained. The only point of departure between the two doctor's opinions is the cost of future surgery which varies by Kshs.35,000/= between Dr. Wokabi and Dr. Wambugu; as well as the level of permanent disability with one putting it at 20% while the other put it at 12%.

14. In their submissions before the lower court, counsel for the defendants proposed judgment as follows:?

Liability – 70% against the defendant

General damages for pain, suffering and

loss of amenities – Kshs.300,000.00

Special damages - Kshs. 38,171.00

Future medical expenses - Kshs. 45,000.00

- Kshs.383,171.00

Less 30 % liability 114,951.00

Total - **Kshs.268,219.70**

13. On his part, the plaintiff's counsel prayed for the following awards:-

Liability 100%

General Damages for pain, suffering

and loss of amenities..... Kshs.1,000,000.00

Loss of future earnings as a loader with a

Salary of Kshs.4980 per month with an annual

increment of Kshs.400 using a multiplier of 16

years (he was 39 years at time of accident)

4980x12x16x400

Kshs.962,560.00

Special Damages

Kshs. 38,171.00

Future Medical expenses

Kshs. 80,000.00

14. The question that arises is whether I should now interfere with these awards. Mr. Kibera for the appellant thought that there is no reason whatsoever to warrant the court interfering with the awards. He relied on a number of authorities among them the following authorities:?

(a) **Court of Appeal and Appeal No. 85 of 1983 Kigaragari –vs- Aya** in which the court held, *inter alia*, that “*In order for the appellate court to interfere with the High Court award on general damages (read lower court in the instant case) it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred.*”

15. Mr. Kibera submitted that the appellant herein had failed to establish any of the limbs of that holding. This is the law and it is the one that will guide this court is deciding whether or not to interfere with the lower court award of Kshs.800,000/= as general damages.

(b) **Court of Appeal Civil Appeal No. 92 of 1993 between Francis Nzioka Ngao and Silas Thiani Nkunga**. In that case, the court held that before an appellate court decides on whether or not to interfere with an award, the court must take into account the injuries sustained by the respondent and also equally apply the principle set out in the **Kigaragari case** (above). It was Mr. Kibera’s contention that the nature of the injuries sustained by the respondent herein were such that the award made by the lower court can only be said to be a fair award.

16. I have also considered the authorities cited to me by Mr. Masika for the appellant and in particular the following cases:-

· **Karanja –vs- Malele [1983] KLR 142** in which the court reiterated the **Kigaragari** case (above) principle when it said at page 152 (Potter JA).

“I agree with what Law JA said in Malde –vs- Angira Civil Appeal No. 12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle”.

17. In the instant case, I have considered the judgment of the learned trial court and I do not think that the assessment was based on no evidence. The medical evidence by doctors representing both sides was tendered by consent, and except for very minor differences in matters of opinion, the evidence confirms the seriousness of the injuries sustained by the respondent. Both doctors Wambugu and Wokabi agreed that the respondent would still have to undergo future surgery to remove metal pins in situ. Further, I do not find any merit in the appellant’s contention that there should have been an apportionment of blame at 70%:30% in favour of the plaintiff. If that were so, the appellant should have taken out third party proceedings against the driver of motor vehicle registration number KAL 735R. In this case, the respondent was a mere passenger and he could therefore not be held liable in contributory negligence.

(b) **Attorney General -vs- Waiyera [1983] KLR 97** in which the court interfered with the award of damages for the reason that the same was manifestly low.

18. On the basis of the above authorities and the evidence that was laid before the court below, I have no option but to find and hold that this appeal lacks merit. Accordingly the appeal is dismissed in its entirety with costs to the respondent.

It is so ordered.

Dated and delivered at Machakos this 29th day of May 2008.

R.N. SITATI

JUDGE

Delivered by Lenaola J in the presence of:?

Mr. Masika for Appellant

No appearance for Respondent

I. LENAOLA

JUDGE