



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 373 of 2005

CHARLES MUSAU MUNGUTI.....APPELLANT

VERSUS

DOSHI & CO. (H) LTD.....RESPONDENT

JUDGMENT

The background facts are that on 23.8.2004 a consent order was made in the proceedings in the lower court where liability was agreed upon; Special damages were also agreed upon. The matter was then deferred to another date to agree on future medical expenses and general damages. On 29.4.2005 another consent was entered into by the parties whereby the medical reports of Dr. Kuria Kamau dated 22.10.2003 and of Dr. R.B. Barad dated 20.6.2004 were to be admitted in evidence without calling the makers for the court to award general damages and future medical expenses payable to the plaintiff.

In a brief judgment the learned trial magistrate made the following observation:-

“The plaintiff will benefit from corrective surgical operation (ORIF) to restore functional integrity of the limb. The operation is estimated to cost Kshs 80,000.00 to Kshs 100,000.00.

Dr. R.B. Barad stated that plaintiff suffered a fracture of left forearm which was treated on conservative line of treatment resulting into mal union of fracture leading to the present complaints and that plaintiff will need corrective surgery for the same.”

Despite the above observations the learned trial magistrate went ahead and awarded Kshs 300,000.00 as general damages and Kshs 1,500.00 as special damages. No provision was made for future medical care.

The appellant became aggrieved by those orders and has appealed to this court citing 6 grounds namely that the learned trial magistrate erred in law and in fact:

- (1) In failing to make any findings and assess the future medical expenses payable to the appellant when she had been invited by the parties to do so.
- (2) In failing to make a finding that the appellant was entitled to an award for future medical expenses.
- (3) In failing to consider the evidence before her which would have assisted her in making findings and assessing the future medical expenses payable to the appellant.

- (4) Ignoring the evidence before her regarding the future medical expenses payable to the appellant.
- (5) In failing to consider the appellant's submissions on future medical expenses.
- (6) In failing to award the appellant medical expenses.

The sum total of the appellants Counsels submissions is that future medical expenses was pleaded in paragraphs 5 of the plaint, a consent was entered into by both parties where by the lower Court magistrate was authorized to use the medical reports admitted by consent in assessing both future medical expenses as well as general damages. Instead of doing so for no apparent reason the learned trial magistrate failed to make an award for future medical expenses. Further that all medical reports recommended corrective surgery and that requires provision for money to cover expenses. From the authorities relied upon future medical expenses is usually awarded separately.

On the basis of the foregoing submissions Counsel urged the Court to allow Kshs 80,000.00 under this head.

In opposition Counsel for the Respondent submitted that the lower court exercised its discretion in declining to award future medical expenses, that future medical expenses was not properly pleaded and this was fatal and hence justification for exclusion. It is their stand that if there is any error committed, the appellant should have applied for review and not an appeal.

Alternatively if the court is inclined to allow the amount then the lowest figure should be awarded.

In reply Counsel for the appellant maintained that future medical expenses is properly pleaded as it is specified in paragraph 5 and then in the prayers it is stated prays for damages as prayed for in paragraph 5 of the plaint. That they did not seek review because there is no error or mistake on the face of the record as the learned trial magistrate just did not make a finding on this need of damages. That awarding damages under the head is not a matter of the Courts discretion as the discretion affects only the amount forming the award. Lastly that failure to seek review does not disentitle them to costs.

On the courts assessment herein it is clear that the only complaint raised is that of the lower courts failure to make provision for future medical expenses for the appellant. A perusal of the plaint in paragraph 5 thereof reveals that this head of damages is claimed in and paragraph 5 of the plaint under special damages where it is indicated that the plaintiff was seeking Kshs 100,000.00 as cost for corrective surgery. In prayer (b) of the prayers it is pleaded that the plaintiff was praying for special damages as pleaded in paragraph 5 of the plaint. The Respondents Counsel has urged the court not to allow the claim because it was not properly pleaded. This court takes judicial notice of the fact that it is trite law that a special claim must be specifically pleaded and proved. On pleading the court makes finding that the claim is specifically pleaded in paragraph 5 of the plaint. The prayer I (b) specifically maintains the pleading in paragraph five. The court finds nothing wrong with that pleading. The Court finds that the claim was properly pleaded.

As for proof the fact that the claim was included in the consent of 29.4.2005 is sufficient proof that the same was to be provided for. The medical reports were admitted by consent. Dr. M. Kuria Kamau state that the appellant would benefit from corrective surgical operation (ORIF) to restore functional integrity of the limb which would cost between 80,000 – 100,000.00. DR. R.B. Barad notes that the injury has healed with mal union which would benefit from further corrective surgery for the same. There is no contrary medical evidence and this means that there was no justification for ignoring that recommendation. It is evident that the learned trial magistrate duly mentioned this in her observation in the judgment but does not mentioned whether it is included in the general damages figure or not.

In the case cited to the court of **FREDRICK KUBAI KINYANJUI VERSUS PETER NJENGA NGOMBE NAIROBI HCCC NO. 747 of 1999** the head was pleaded separately and the same was awarded separately. In the circumstances herein since it had been pleaded separately the learned trial magistrates should have made a pronouncement on it as a separate head. Her failure to mention it in the

judgment does not rule out inadvertence to make a pronouncement on it. It is this courts finding that it was wrong not to make a pronouncement on it.

Issue was raised by the Respondents Counsel as to whether the appellant should have availed himself of review procedure as opposed to filing an appeal. Order 44 rule 1(1) (b) allows review to a party aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred. It has not been suggested that failure to award or make provision for future medical expenses is not appealable. That being the case it means that the appellant had an election either to seek review if ingredients for review are present or file an appeal. There is nothing to show that the appellant's exercise of electing to file an appeal as opposed to review has been faulted. It is further the finding of this court that review would not make provision for the omitted award. It is an appeal which can empower the appellate Court to exercise its powers under Section 78 Civil Procedure Act, assume the role of the lower court and make an award of damages.

Issue was also raised by the Respondents that the learned trial magistrate exercised her discretion properly and the same should not be interfered with. However, as submitted by the appellants' Counsel issue of a discretion arises where an amount is involved. It doesn't arise where there is failure to make a pronouncement.

The net result of the foregoing assessment is that having been included in the consent as one of the heads of damages to be awarded, having been recommended for by medical reports and having taken cognizance of the same in her judgment, it was wrong to fail to make a pronouncement on the same. It had been pleaded as a special claim and so it should have been pronounced upon as such. Failure to do so invites interference and intervention by this court to rectify the error which can only be done by an appellate court. The estimates were given and as suggested by the appellants counsel and advised by the respondent, counsel that the lower figure to be adopted if the court is inclined to award the same, this Court make a finding that a figure of Kshs 80,000.00 would be appropriate.

The appeal is therefore allowed. The lower courts failure to make a pronouncement on the same is quashed and set aside. It is substituted with a pronouncement that there be an award of Kshs 80,000.00 made for cost of future medical expenses. The appellant will have costs both on appeal and the lower court. The amount awarded will carry interest at court rates from the date of judgment in the lower court.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2007.

R. NAMBUYE

JUDGE