



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

Civil Appeal 461 of 2002

THIKA NURSARIES LIMTIED :::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

MUTUA MUTUKU ::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Respondent to this appeal moved to the lower Court and filed Thika PMCC NO.1623 of 1998 seeking both special damages and general damages for injuries suffered as a result of a road traffic accident involving the appellant's tractor, the Respondent was using to transport timber in the course of duty. The cause of accident was pleaded to be due to breach of duty or negligence. Particulars of injuries suffered was shown as Fracture of the right arm.

The appellant defended the action in the lower court on the basis of an amended defence. Parties were heard by the lower court which made the following findings:-

- (1) The tractor was owned by the defendant and so the driver by virtue of his employment was an agent of the defendant.
- (2) That the driver was driving negligently and that is how the accident occurred.
- (3) The particulars of negligence attributed to the plaintiff by the defendant were not proved as the defence witness appeared not to know anything about the accident. On that account the court found that the case against the defendant had been proved to the required Standard. Judgment on liability for the Plaintiff was entered against the defendant at 100%.
- (4) That the Court had perused the evidence relating to the injuries and it appeared that the Plaintiff had made remarkable recovery and on that account awarded Kshs 120,000.00.

The appellant became aggrieved with that judgment and has appealed to this court citing 4 grounds of appeal namely that the learned trial magistrate erred in law and in fact in holding:

- (1) The defendant/appellant liable in the absence of any evidence that the plaintiff respondent was an employee of the defendant appellant.
- (2) In finding that the plaintiff/respondent had sustained injuries which are not pleaded or corroborated by the evidence adduced.

(3) In awarding Kshs 120,000.00 in general damages which is manifestly excessive in view of the injuries alleged to have been sustained by the plaintiff.

(4) In failing to consider and place reliance on the appellants submissions on liability and quantum and authorities annexed thereto together with expert evidence on record and thus arriving at a figure in general damages which is erroneous and inordinately.

In consequence thereof the appellant prayed for the appeal to be allowed with costs to the appellant. The finding on liability at 100% against the appellants be set aside and the respondent's suit be dismissed with costs for want of proof. Alternatively the award of general damages be set aside and be substituted with an award that is commensurate with the injuries allegedly sustained if the injuries are found to have been sufficiently proved. The award in costs and or special damages be set aside for want of proof.

At the time of hearing of the appeal, Counsel for the appellant abandoned ground one of the appeal which was attacking the finding on liability. That being the case it means that the only contest that is left is one dealing with quantum only. The appellants submissions on quantum are that:-

- (1) The injuries pleaded were not proved.
- (2) If any injuries were suffered, then the same were minor or soft tissue injuries.
- (3) The award of damages given was excessive and was not commensurate to the injuries sustained if any.
- (4) The learned trial magistrate paid no attention to authorities referred to the court. Had the court done so the award would not have exceeded 50,000.00.
- (5) The award given is erroneous and or inordinately high and it should be interfered with.

The respondents Counsel on the other hand urged the court not to interfere with the award as the lower court arrived at the correct assessment considering that the authorities relied upon by the appellant in the lower court were 10 years old and the learned trial magistrate was entitled to take into consideration an element of inflation.

(2) That there was sufficient proof that injuries had been suffered and had healed. She urged the court to dismiss the appeal as it had not merit.

The appeal having been confined on quantum only, the task of this court is simple. It is to determine firstly whether the injuries were suffered.

- (2) The degree of the injuries suffered.
- (3) Whether the award made by the lower Court is erroneous or inordinately high.
- (4) If the award is to be interfered with, determine the correct award which is commensurate to the injuries suffered.

In doing so this Court has to take into consideration a cardinal principle governing the exercise of discretion on the part of the appellate court in trying to determine whether the lower Courts discretion in making the award is to be interfered with or not. This principle is to the effect that an appellate court can only interfere with the assessment of an award made by the lower court if the same is:-

- (1) Inordinately too high or too low.
- (2) It is erroneous
- (3) Based on wrong principles of law.

The appellate court is also to be guided by general principles of law governing granting of awards which are:-

- (1) An award of damages should be commensurate to the injuries suffered.
- (2) An award of damages is not meant to enrich a party but to try as much as possible to restore the litigant in the position he/she was in before he suffered the injuries complained of.
- (3) An award of damages should not be inordinately too high or too low.
- (4) Awards in decided cases are mere guides and each case depends on its own circumstances.
- (5) Where possible an element of inflation or trend should be taken into consideration.

On the injuries suffered, what was pleaded was fracture of the right arm. There is an out patient card on record whose writings are not legible. In his evidence in court the Respondent testified that he was cut on the left leg and right shoulder. He was treated at Thika District Hospital confirmed by a copy of the Hospital card found at page 27 of the record. He produced two medical reports. When cross-examined the Respondent said that he was taken to Thika District Hospital treated and discharged. He was injured on the right shoulder and left leg. He confirmed that his right arm was not fractured. The first medical report by Doctor Maina Ruga is dated 15.11.97. It notes that as per the history given the plaintiff sustained Blunt left tissue injuries to the left shoulder and a laceration wound on the left leg. The Respondent's complaint's at that time were pain on the left shoulder. The findings on examination were tenderness over the left scapula bone though the shoulder joint movements are normal. There was a wound scar on the left leg on the lower third which had healed and had no pain or tenderness. In the Doctor's opinion the Respondent had suffered harm. He had sustained soft tissue injuries and a laceration wound. He suffered pain, discomfort and blood loss. He gets residual pain and required analgesic medication occasionally. He has a scar on the left leg. The first medical report was done 9 months after the accident.

The second medical report was done 3 ½ years later and it is dated 28.8.2000. The history noted was that the Respondent had fallen off the tractor and suffered soft tissue injuries to the chest wall and there was no mention of any injuries to the shoulders and he admitted that he was not given any official sick off by the Doctor. On examination the Doctor detailed no abnormality on the chest, right leg, except for a very small scar on the leg and no abnormality on the left shoulder. In the Doctors opinion the Respondent had suffered soft tissue injuries that required very simple treatment. There was only one medical consultation for that injury. The Doctor was satisfied that he attained good recovery in a few days and full and permanent cure in 1 to 2 weeks after the accident. The Doctor further observed that though injury to the left shoulder was mentioned in some medical documents it was not mentioned to him neither did the Respondent complain about that injury to him. In the Doctors opinion the Respondents temporary in capacity was only one day and his permanent in capacity is Zero percent.

The Courts assessment of the foregoing evidence is that liability having been admitted there is no need to go into reassessing evidence before the lower court. The court will go straight into assessing of the quantum.

As submitted by the appellants Counsel the learned trial magistrate referred to no authorities before arriving at the award given. However a perusal of the court record reveals that no authorities were given to the Court. What the learned trial magistrate had before him were summaries of cases included in the written submissions. These were not authorities and the learned trial magistrate, rightly declined mentioning them in his judgment. It is therefore the finding of this court that on that account no authorities were placed before the lower court as guides on assessment of damages. The only authorities traced on the lower court file is the case of **MURGIAN TRANSPORT (K) LTD VERSUS JOHN KATONGA MULOZI ALIAS RASHID MWA KATONGA NAIROBI C.A. 1929/1977** whose central theme is standard of proof of negligence. It is therefore not right for the appellants Counsel to submit that the magistrate ignored authorities placed before him as guides when none was placed before the learned

magistrate.

On appeal the court has been referred to the case of **LOICE NYAMBEKI OYUGI VERSUS OMAR HAJ HASSAN NAIROBI HCCC 4150 of 1990** decided on 7.2.2001 where the plaintiff suffered soft tissue injuries, the court awarded Kshs 20,000.00 as general damages.

In the case of **PETER KARIUKI NJUGUNA VERSUS ALEX KIGURU NGANGA NAIROBI HCCC.217/1991** decided on 11th day of July, 2003. In this case both Plaintiffs suffered soft tissue injuries the court awarded each Kshs 20,000.00 as general damages.

The Respondents on the other hand referred the Court to the case of **CYRUS MBURU NGUGI AND 4 OTHERS VERSUS KWEGA BUS SERVICES LTD NAIROBI HCCC.NO.4343 OF 1991**. In this case the first plaintiff sustained cut wounds over the scalp and face, deep abrasions on the right forearm and a sprain on the right knee, severe headaches which developed into subdural haematoma. The CT scan showed a right frontal subdural haematoma with displacement of the brain matter. He underwent a major head surgery and the haematoma was evacuated. He has a high chance of developing epilepsy. The Court awarded Kshs 200,000.00 as general damages and 85,000.00 as proved special damages.

2nd plaintiff Loice Wanjiru James sustained Multiple Contusions on the chest and back. She experienced severe chest pains. The court assessed Kshs 50,000.00 as general damages and 4,625.00 as special damages.

The 3rd plaintiff Jane Wanjiku Kiarie sustained massive major lacerations on both legs with the major one being on the left leg. Suffered a lot of pain, developed infection of the left leg. Underwent skin grafting and is left with extensive scars. General damages for pain suffering and loss of amenities assessed at Kshs 150,000.00 and Kshs 6,430/= as specials. The Judgment is dated 16.7.97.

The case of **ANDREW GICHIENDA VERSUS HARRISON THIRU AND 4 OTHERS NAIROBI HCCC.NO.3835 OF 1988** where the plaintiff suffered multiple bruises on the head, chest, left leg and lacerations on both legs general damages were assessed at Kshs 50,000.00

This Court has taken into consideration the fact that the above quoted authorities being from courts of similar jurisdiction are not binding on this Court. It is however to be noted that except those of the first plaintiff in **CYRUS MBURU NGUGI AND OTHERS VERSUS KWEGA BUS SERVICES SUPRA**, the rest are in relation to soft tissue injuries like in this case and so there is no reason to depart from them as there is nothing to show that the assessment was erroneous. All that this court has to take into consideration is that these are about 5 years older to the present time, at the time an award is being considered in this case and so the award herein will have to reflect an element of inflation.

This court has taken into consideration the fact that the injuries were minor, they healed completely with no residual disabilities. These injuries should have attracted a figure less than what was awarded. In this court's view a figure of 50,000.00 suggested by the appellants Counsel would have been adequate compensation for the injuries suffered taking into account an element of inflation. The award subject of this appeal merits interference.

While still on quantum it is noted from the record that the Respondent had pleaded special damages of Kshs 1,500.00 which he had paid for medical report produced in evidence. Although there is no cross-appeal on this from the Respondent there is no justification as to why it was not awarded. This court has power under Section 78 (2) Civil Procedure Act to assume the role of the lower court and make findings on the same. Since there was no mention on the same in the judgment this court has no alternative but to make findings that it was erroneously left out by the learned magistrate and merits correction on appeal. The appellant will suffer no prejudice as they are aware that this is a claim which should be awarded after it has been proved. There is no harm in allowing it in favour of the Respondent.

For the reasons stated above the final orders of this appeal are as follows:-

(1) There shall be an award of Special damages of 1,500/= erroneously not awarded by the lower court. The same is awarded to the Respondent on the courts own motion under the powers vested in it by Section 78(2) Civil Procedure Act.

(2) The special damages will carry interest from the date of filing till payment in full.

(3) Judgment on liability, confirmed as the appeal in respect of the same was withdrawn.

(4) Appeal on quantum allowed. The award of Kshs 120,000.00 as general damages for pain suffering and loss of amenities allowed by the lower court is quashed and set aside. It is substituted with an award of Kshs 50,000.00 as general damages for pain suffering and loss of amenities.

(5) The said substituted award will carry interest at court rates from the date of judgment in the lower court till payment in full.

(6) The appellant has succeeded half way and so he will have half costs on appeal.

(7) The Respondents will have full costs of the proceedings in the lower court since the judgment has been upset solely on the basis of the exercise of the courts discretion in the assessment of damages over which the Respondent had no control and so there is no justification for penalizing him with an order for costs.

(8) The costs awarded in the lower court will carry interest at court rates from the date of judgment in the lower court. While those on Appeal will carry interest at court rates from the date of judgment on appeal.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2007.

R.N. NAMBUYE

JUDGE