



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 261 of 2004

1. Civil appeal
2. Subject: TORT
 - (i) Industrial accident
3. Injuries as per medical report
 - (i) Male adult aged 34 years old in 2002
 - a) Mixed superficial deep burn wounds to head neck, chest upper limbs
 - b) Total burn surface area 18%
4. Liability: As awarded by subordinate court at Thika

Agreed: 80% against defendant

20% against, plaintiff

5. Quantum: as awarded by subordinate court at Thika

I: General Damages

Pain and suffering Ksh.300,000/-

II: Special Damages Ksh. 2,500/-

Total Ksh.302,500/-

Less 20% Ksh. 60,500/-

Ksh.242,000/-

6. Appeal to High Court

- I: Grounds – the award of Ksh.300,000/- in general damages for pain and suffering is too excessive and

inconsistent with level of awards.

II: Prayer:

The judgment of 16 March 2004 be set aside

7. Case Law

a) Joseph Macharia v Tamarind Management Ltd

Hccc5585/93 (Ang'awa J) unreported.

Award of Ksh.150,000/- given.

Arguments by the defendant/respondent the hospital stay for plaintiff in above case was longer.

8. Held:

- 1) Proceedings a nullity. No trial was held by way of formal proof.
- 2) The Civil Procedure does not provide for documentary evidence alone to come up with judgment.

Plaintiff must give evidence and be cross-examined under order 17 r 2(1) Civil procedure Rules

- 3) Case law relied on must be from a text book or legal reporting under section 90 of the Evidence Act Cap.80 or if unreported judgment must be signed and dated by a judge under order 20 r 3 Civil Procedure Rules
4. The High Court is unable to determine whether injuries sustained by the plaintiff, who never appeared to court nor seen by the trial magistrat, to confirm whether the award is the same as those described in the medical report and in accordance with precedent awards given.
5. Appeal allowed on quantum only. Retrial on quantum.

BIDCO OIL REFINERIES LTDAPPELLANT

VERSUS

ANDREW OKOTH OBARERESPONDENT

JUDGMENT

I: **BACKGROUND**

1. Andrew Okoth Obare, the plaintiff original in the lower courts sues M/s Bidco Oil Refineries Ltd the defendant in the lower courts in damages for injuries sustained whilst working at the defendants factory. The relationship is that of master/servant.
2. At the lower courts the parties conceded before the trial magistrate on the issue of liability being 80% against the defendant and 20% against the plaintiff.
3. The matter should then have proceeded to a formal proof hearing. Instead parties put in a medical report by two medical doctors, filed written submissions and there after the trial magistrate proceeded to give a judgment.

4. The award given was Ksh.300,000/- subject to apportionment. Being dissatisfied with this award the defendant appealed to this High Court on the following grounds:-

“i). That the sum of Ksh.300,000/- general

damages for pain suffering and loss of amenities [was] excessive in all the circumstances and ought to be reduced.

ii) That the sum of Ksh.300,000/- [was] not consistent with the level of damages awarded to the other plaintiff in similar circumstances.

iii) That the magistrate failed to consider

the evidence of appellants’ submission and dismissed the same without reasoning.”

1. He relied on the case law of:-

Joseph Macharia v Tamarind Management Ltd unreported,

Ang’awa J.

In which a possible award for burns sustained by the plaintiff was given as Ksh.150,000/-. The defendant in reply stated that this case referred to a plaintiff who was admitted to hospital for one week only whilst the current plaintiff was in hospital for 42 days.

6. The parties wished that I reconsider the award by the trial magistrate – which was what was in contention. The plaintiff had prayed that the judgment of 16 March 2004 be set aside.

III: **FINDINGS**

7. This is an industrial accident claim. Parties had conceded on the issue of liability at 80% to 20% ratio. This was agreed to by consent and I will not interfere with this agreement by consent of the parties.

8. The issue I required to examine is that of quantum, General Damages, pain and suffering. From the trial magistrate’s file there is no EVIDENCE or hearing conducted. It is therefore my duty as the High Court to point out that there being no proceedings by the subordinate court arriving at the judgment without trial is indeed a nullity.

9. Under order 9 a r 5 Civil Procedure Rules where liability in TORT has been admitted and judgment accordingly entered, there require to be held a trial by way of formal proof. The evidence of the plaintiff is compulsory. The plaintiff would take the oath or be affirmed after the advocate for the plaintiff opens his case by way of an opening address under Order 17 r 2(1) Civil procedure Rules. The plaintiffs advocate would state his case and the case law he would be relying on (see practice rules on order 17 r 2(1) Civil Procedure Rules).

10. The plaintiff would then give his evidence. In a formal proof the advocate is permitted to lead evidence on liability. The formal proof evidence would include the name of the plaintiff, his place of residence and of course his place of work. He would then lead evidence as to the state of his injury and how he feels after the accident and how he has been able to cope since.

11. His witness would be the medical doctors who would come and tender a medico-legal report and give an opinion on the injuries sustained. The doctor should as far as possible be a specialist in the field concerned, in this case that involved burns, a specialist in burns. The plaintiff/respondent and the defendant/appellant are permitted to dispense with the presence of the doctors. Where they wish to do this, they must file a consent which states they will be, by consent, putting in the medical reports by the doctors without calling the maker thereof.

12. That consent is then recoded as an order of the court in the trial file by the executive officer in the subordinate court. If it is a case in the High Court this is recoded by the Registrar or the Deputy Registrar of the High Court under ministerial power order 48 Civil Procedure Rules.

13. Unless this is done, the documents are not part of the record of the court. The court can at the trial record the consent of the parties. In this particular case this was done by the trial magistrate. Thereafter, the plaintiff presents the medical report as exhibits in evidence and may be examined on it.

14. Once the plaintiff closes its case and the defence declares or announces it calls no evidence then the advocate for the plaintiff would give a closing submission. The advocate for the defendant would then reply. If the advocate for the defendant quotes any case law the advocate for the plaintiff would have a right of reply to answer generally to the case law. If the advocate for the defendants quotes no case law the advocate for plaintiff would have no right of reply.

15. In this case the parties agreed to put in written submissions. In so doing the Court of Appeal has always held that the parties must still address the court orally and if they wish, based on their written submission.

16. This was not the case and one of the grounds of complaint was that the appellants submission was never considered.

17. I therefore find it most irregular and contrary to the rules of procedure, justice to be accorded a fair hearing where the trial magistrate fails to put a plaintiff in the witness box to testify on a formal proof hearing. The defendant even in a full trial need not attend court nor give evidence in civil cases as he is then represented by his advocate.

18. The authorities shown at the lower courts and which were never mentioned in the submission by the advocates are extract and or brief notes. This is not an authority I quite understand in the age when these courts had no reported authorities that indeed extracts were relied on. This was only to assist the advocates access the full text of the authorities. If an advocate wishes to rely on an authority the authority must be a reported case as envisaged under section 90 of the Evidence Act. If the authority is a judgment of the court then it must be signed – see order 20 r 3 Civil Procedure Rules.

19. When the advocate now ask that I determine the issue of quantum which is excessive or otherwise it becomes very difficult where there is no evidence recorded on the issue of quantum. On what facts and basis of a formal proof did the trial magistrates come to his findings? Unless a judgment is by consent as seen by the judgment on liability the court is duty bound to hold a trial. How can an award be made on a plaintiff who does not appear to court. Is there really a plaintiff and can the plaintiff degree of injury be determined in his absence to court?

20. I find that the proceeding on formal proof is irregular. That the appeal be and is hereby allowed. The judgment of 16 March 2004 be and is hereby set aside on the issue of quantum only. I further order that there be a trial on formal proof/assessment of damages to be heard held by the same magistrate. If per chance the trial magistrate is no longer at the station the assessment of damages be heard by any other magistrate under Order 17 r 10 Civil Procedure Rules

21. In Summary

21.1. TORT – industrial accident

21.2. Injuries as per medical report

a) Mixed superficial deep burns wounds to head, neck, chest, upper limb

b) Total burn surface 18%

21.3 Quantum – as awarded by subordinate Court at Thika.

I: General Damages

a) Pain and suffering Ksh.300,000/-

II: Special damages Ksh, 2,500/-

Total Ksh.302,500/-

Less 20% Ksh. 60,500/-

Ksh.242,000/-

21.4. Liability agreed by subordinate court at Thika

80% against the defendant

20% against the plaintiff

21.5 Appeal to High Court

1) Grounds – the award of Ksh.300,000/- in general damages for pain and suffering too excessive and inconsistency with level of awards

II: Prayer judgment of 16 March 2004 be set aside

21.6 Held:

- i) Proceeding a nullity. No formal proof hearing conducted
- ii) Plaintiff must appear to court to give evidence Order 17 r 2 (1) Civil Procedure Rules applies.
- iii) Case law relied on must be from text book/legal reporting section 90 of Evidence Act Cap.80 or if unreported must be signed and dated by a judge or magistrate under order 20 r 3 Civil Procedure Rules.

21.7 The High Court unable to determine whether injuries sustained by the plaintiff who never appeared to court nor seen by the trial magistrate to confirm whether the award is the same as those described in the medical report and in accordance with present awards given.

21.8. Appeal allowed on quantum only.

22. The costs of this appeal and those in the lower court be and is hereby awarded to the appellant/defendant on the issue of quantum only.

Dated this 14th day of November 2006 at Nairobi.

M.A. ANG'AWA

JUDGE