



Athibeta Minayo Amugoza v Robers Chelimo & another [2005] eKLR

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1. Running down Cause

2. Tort/Contract

3. Female employee aged 43 years in 1996 passenger in employers motor vehicle

4. Motor vehicle self accident in course of employment

5. Liability

100% against the defendant jointly and severally

The second defendant employer being vicariously liable

6. Quantum:

I: General Damages

a) Pain and suffering Ksh.150,000/-

II: Special damages

a) Police abstract fee Ksh. 100/- - Nil

b) Medical report fee Ksh. 1,500/- - Nil

c) Medical expenses not pleaded – Nil

III: Future medical treatment Nil

Total Ksh.150,000/-

7. Case Law

8. Obiter dictum

Doctors attendance fee

9. Advocates:-

C.W. Mugo for R. Muthiga & Co. Advocates for the plaintiff

Gichuru D.N. for Gichuru & Gichuru advocate for the defendant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 143 of 1997

ATHIBETA MINAYO AMUGOZAPLAINTIFF

VERSUS

ROBERS CHELIMO & ANOTHERDEFENDANT

JUDGMENT

1. PROCEDURE

1. The relationship between Athibeta Minayo Amugoza and Geoffrey Gatheda Muiruri is that of employee and employer. This relationship is unique in that Athibeta (herein referred as the plaintiff)

sued her employer (herein referred to as the defendant) in TORT for injuries that were sustained by her, in a road traffic self accident, in a vehicle she was travelling in as a passenger in the course of her duties. Rogers Chebio (the 1st defendant herein) was driving the vehicle in question and was also an employee of the 2nd defendnt.

2. The relationship takes on a dual character in this suit which is that of TORT and contract. The employer is under a duty of care as to the safety at work of his employee and that duty is contractual. The time limit of filing suit is therefore 6 years and not 3 years. Nonetheless the plaintiff filed this suit in good time and within 12 months of the cause of action arising. Out of this period 7 months she had been hospitalized. It is therefore unclear whether the issue of Workman's Compensation had been dealt with between the parties before filing suit.

3. This suit came for hearing on 26.2.98. There was an interlocutory judgment entered against the 2nd defendant (22.3.97) when infact memorandum to enter appearance and defence was filed on 9.4.97 and dated 3.4.97 Mbito J (as he then was) heard and finalized the hearing exparte and gave judgment for the plaintiff. The defendants applied to have the exparte judgment set aside. This was granted on 1 July 2004 (Aluoch,J).

4. The trial before me began a new on 10.11.05. The issue concerned both liability and quantum.

II: LIABILITY

5. PW1 stated in evidence that her employer had sent her and the driver to go and fetch some hay for the cows. The employer's residence was in Karen. She was travelling in the said Peugeot 504 pick up driven by the 1st defendant. They completed their task and were returning back to the residence. The 1st defendant drove negligently and at a very high speed that he had a self accident when the vehicle left the road and overturned. The plaintiff lost consciousness and was admitted to Kenyatta National Hospital whereby she had been admitted for 7 months. She sustained multiple compound fracture of the left forearm. She displayed her left forearm to court that had and appeared deformed.

6. In the defence filed, it consists of nothing but denials to the plaint. There had been given no explanation by the defendants as to the cause of the self-accident. What was their defence? Was it inevitable accident, an act of God, poor weather, tyre burst?. No explanation was given. I only have the plaintiffs story. Although it is not a must for the defendant to attend court and in evidence there must be some defence to show that the defendants were not negligent nor liable. The defendants failed to show this. The plaintiff was a passenger. All she knows the defendant No.1 was over speeding and a self accident occurred. I would in the circumstances find that the defendants are liable for this accident jointly and severally with the 2nd defendants as the employer to the 1st defendant being vicariously liable.

QUANTUM

7. General Damages

7.1. Pain and suffering

The plaintiff was examined by :-

Mr. W.M. Wokabi

MB ch.B M. Med

Consultant surgeon

Date of report 29.11.96

7.2. It is advisable that where a suit has stayed for considerable time without being heard that the latest report of a plaintiff be produced. I have only a report that is 9 years old and may not give the actual condition to date. The report indicates the injuries sustained as:-

I: Left forearm – crushed with multiple compound fractures of the forearm bone

II: Soft tissue injuries and abrasion to left leg.

7.3. The doctor was of the opinion that the injury has “severe

contractures of the forearm to a point that it is functionless. That there will be no improvement anticipated in the case. He assessed disability at 35%. He also stated that the forearm was septic. Future medical treatment may be required at Ksh.150,000/-. At the present moment he found that her bones were well knitted and healed. The future medical treatment was really to control the sepsis through antibiotics.

7.4. The advocates did not refer to me any case law. I nonetheless note from the doctors evidence that apart from the forearm (including the wrist being injured) there is indeed no other major injuries sustained by the plaintiff. I would computed general damages for pain and suffering at Ksh.150,000/-

7.5. Future medical costs. The report and the doctors evidence state that this was for antibiotics. That nothing useful could be done to the contractures of the forearm. It is functionless. I would make no award under this claim.

8. Special Damages

The plaintiff pleaded:-

a) Police abstract fee Ksh.100/-

b) Medical report Ksh.1,500/-

c) Medical expenses

“To be particularized the hearing thereof.”

I look at each of these claims.

7(a) Police abstract Ksh.100/-

The plaintiff never spoke of this claim nor submitted a receipt of Ksh.100/- from the Kenya Police department of the Kenya Government. I reject this claim and dismiss it.

7(b) Medical Report fee Ksh.1,500/-

Normally a medical doctor would charge Ksh.1,500/- for a medical report fee. He requires to submit his receipt duly affixed with a revenue stamp to prove that he infact had charged and had been paid the said sum. No evidence was led to this effect nor receipt put in. I reject this claim and dismiss the same.

7(c) Medical expenses

The words “to be particularized at the hearing hereof.” (Emphasis supplied) still remained. No amendments to the plaint was made. I hereby state that Special Damages must be pleaded and particularized. Where words such as “to be stated at the hearing” is pleaded amendments to the plaint must be made prior to the hearing date. Failure to do this means that there is no claim the court is permitted to award. As such this claim for medical expenses which was never spoken of is hereby rejected and dismissed.

8. Obiter Dictum

I have heard in many cases where plaintiffs try to introduce within the evidence of a doctor, the issue of attendance fee. In some instances they try to amend the plaint to include a claim of attendance fee. It must be noted that the doctor is not a litigant but a witness under order 12 Civil Procedure Rules. A notice to admit document is issued by either the plaintiff or the defendants/advocates. Where there is a notice of non-admission entered and filed in the court file by the other party, it is an indication to the party concerned to bring their witnesses. The party who had filed a notice of non admission of the documents bears the costs of such witnesses and indeed attendance to court whether the document is proved or not but with the courts discretion where a document is actually proved. The issue of the witnesses attendance is dealt with during taxation and dealing with the costs of the suit after the finalization of the suit and not during trial.

9. I accordingly enter judgment in this suit for the plaintiff on the proved claim.

10. In summary

10.1 TORT/Contract

10.2. Female employer aged 43 years in 1996

10.3. Motor vehicle self accident in course of employment

10.4. Liability

100% against the defendants jointly with the 2nd defendant employer being vicariously liable for the acts of its agent and or servant.

11.5. Quantum

I: General Damages

a) Pain and suffering Ksh.150,000/-

II: Special Damages

a) Police abstract fee Ksh.100/-

Nil not proved

b) Medical report for Ksh.1,500/-

Nil not proved

c) Medical expenses not pleaded – nil

III: Future medical treatment - Nil

Ksh.150,000/- nil not pleaded

Total Ksh.150,000/-

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment.

Dated this 11th day of November 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

R.K. Muthiga & Co. Advocates for the plaintiff

Mereka & Co. Advocates for the defendant