



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 151 OF 2019

JULIUS KIPLIMO TOO APPELLANT

VERSUS

MOMBASA MAIZE MILLERS (KISUMU) LTD..... 1ST RESPONDENT

STEPHEN KORIR 2ND RESPONDENT

[Being an Appeal from the Judgment delivered on 26th November 2019 in

NYANDO PMCC NO. 170 OF 2018]

JUDGMENT

This appeal is in relation to only one item from the Judgment of the trial court: that is the rejection of the Plaintiff's claim for the sum of Kshs 80,000/= in respect to Future Medical Treatment.

1. The Appellant's case was that on 18th March 2018, at about 6.00p.m he was travelling as a passenger in a motor vehicle Registration Number **GKB 439R**.
2. When the said vehicle reached the area near Otho Market, along the Ahero – Awasi Road, it was involved in an accident, when a lorry Registration Number **KCD 233W/ZD 6821** crushed into the vehicle in which the Plaintiff was a passenger.
3. The Plaintiff sustained injuries, including a fracture of the right lower limb plateau, and a tear of the patella ligament.
4. The fracture underwent surgery and internal fixation was done, using screws.
5. The issue of liability was resolved by consent of the parties, on 27th August 2019, when they decided that the Defendant be held 85% liable.
6. However, although the parties explored the possibility of achieving a negotiated settlement, the same was not successful. Consequently, on 22nd October 2019, the case proceeded to trial.
7. The only witness who testified is the Plaintiff.
8. As liability is not an issue in this appeal, I will not delve into the evidence on that.
9. Also the General Damages awarded are not an issue in this appeal.
10. Therefore, for the purposes of resolving the issue before me, I will focus my re-evaluation on the evidence which the Plaintiff tendered to support his claim for Special Damages.
11. The Plaintiff testified that he suffered a fracture of the lower knee. Immediately, after the accident, he was taken to the Ahero County Hospital for first-aid.
12. From that hospital, the Plaintiff was given a Referral Form, which he presented at the Nairobi Women's Hospital, Nairobi.
13. The Plaintiff exhibited both the Referral Form and the Treatment Notes from the Nairobi Women's Hospital. From the treatment notes it

is indicated that the Plaintiff was taken to theatre on 6th April 2018, where;

“..... open reduction and internal fixation done using screws.”

14. The Plaintiff also exhibited an **MRI** Report dated 3rd April 2018, from Plaza Imaging Solutions, Nairobi. The said Report is signed by Dr. A. Odhiambo, a Radiologist.

15. The report confirmed the following injuries;

- **Depressed fracture of the lateral tibial Plateau.**
- **Partial tear of the patella ligament.**
- **Lateral femoropatellar OA.**
- **Grade 1 intrasubstance mucoid degeneration of anterior horn of the lateral meniscus**”

16. The other medical report which the Plaintiff produced in court, is dated 14th August 2018. The report was signed by Dr. W. M. Wokabi, a Consultant Surgeon.

17. In his considered opinion Dr. Wokabi said, inter alia, that;

“At optimum rehabilitation, permanent disability will settle at 10% (ten percent).

Elective removal of the screws will cost Shs 80,000/= (eighty thousand shillings).

The patella ligament and the contusion to the cartilages healed well.

In future he will always be predisposed to develop arthritis as a complication of the fractures.”

18. It is on the basis of the doctor’s opinion that the Plaintiff testified that he would require Kshs 80,000/= to remove the screws.

19. Notwithstanding the evidence tendered by the Plaintiff, the learned trial magistrate did not award him the sum of Kshs 80,000/= in respect to Future Medical Expenses.

20. The issue that has to be resolved in this appeal is whether or not the trial court erred, when it rejected the claim for the said Future Medical Expenses.

21. It is common ground between the parties that the following words of the Court of Appeal, provide the guiding light to courts on how to handle claims for future medical expenses;

“And as regards future medication (physiotherapy), the law is also well established, that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages, and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof.”

22. In this case, the Amended Plaint contained a claim for Kshs 80,000/=, on account of future surgery for the purposes of the removal of the screws that had been used in the fixation of the depressed fracture of the Plaintiff’s lateral tibial plateau.

23. I find that through the evidence tendered by the Plaintiff, the claim was strictly proved.

24. It is noteworthy that the Appellant was not even cross-examined on the issue of the future medical expense.

25. And the Respondents did not adduce any alternative evidence from any medical professional or from any other witness, which could have cast doubt on the evidence adduced by the Appellant.

26. In the result, the evidence produced by the Appellant was uncontested, cogent and sufficient. I find absolutely, no reason why the learned trial court did not award the future medical expense. Therefore, the appeal is successful. I order that the Appellant be awarded the sum of Kshs 80,000/= for future medical expense.

27. The said sum shall be discounted by 15%, on account of the contributory negligence attributed to the Appellant.

28. The Appellant is also awarded the costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU

This **9th** day of **February** 2021

FRED A. OCHIENG

JUDGE