REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 58 OF 2014

ABDALLA AHMED BREK.....APPELLANT

-VERSUS-

BASH HAULIERS LIMITED.....RESPONDENTS

J U D G M E N T

1. The challenge mounted by the appellant against the decision of the trial court is two pronged and fashioned that:-

    i. The failure to award the pleaded sum of Kshs.90,000 for future medical expenses was against the weight of evidence

    ii. The award of Kshs.450,000 for pains and suffering was inordinately too low as to amount to erroneous estimate of damages

2. From the grounds set out, it is clear that the challenge is neither on liability of the respondent nor its apportionment but purely on the assessment and award of damages.

3. On the first limb, the appellant asserts that the failure to award damages for future medical expenses went against the evidence led. That calls for the review of the evidence led together with the pleadings on record. In the plaint at paragraph 6 and prayer **b,** the plaintiff did plead and pray for that sum. In evidence, the plaintiff marked for identification the medical report by Dr Adede which was eventually produced by the maker. In cross examination of the appellant, no issue was raised with regard to his need for an operation to remove the implants used to immobilise the fractured bone. When the doctor gave evidence, he was explicit in the evidence that there would be need to remove the implants after three years but no challenge was mounted against that evidence. That state of evidence makes me conclude that there was pleading and accompanying evidence that the plaintiff would need future medical costs to remove the implants.

4. In the judgment now appealed from, the trial court having reviewed the evidence on record, found the respondent to be wholly liable but found that the claim for Kshs.90, 000 had not been strictly proved by way of receipts and therefore disallowed it. the words in the judgment were these:-

> **"Special damages must not only be pleaded but strictly proved. The plaintiff produced a receipt for Kshs.2000 as payment for medical report.**
>
> **The court is satisfied that only Kshs. 2,000 was proved as special damages… there was no report from the surgeon nor any evidence by the surgeon that the implants must be removed and the court will therefore not grant an award on medical grounds that are yet to be determined".**

5. With due respect to the trial court, there was no evidence by the doctor, PW3, when he gave evidence on oath that it would require a surgeons opinion in a report or evidence to recommend removal of the implants. The evidence was that the removal will be after three years, which evidence was never challenged. If not challenged, it amounted to a proof within a balance of probabilities and thus entitled the claimant to an award. In demanding that a surgeon's opinion be sought and obtained to merit the award, the trial court demanded of the appellant a standard of proof that was not his duty. For that reason that decision ought to be and is hereby set aside.

6. The other reason the decision must be set aside is the fact that the reason first advanced for the decline to make the award was that only **Kshs.2,000** had been proved by way of receipts. That is the kind of a finding that goes against the established law on proof of damages to the effect that receipts are not the only way of proof[1]. In insisting that receipt was necessary to meet the standard of proof, the court fell into an error of law and principle and calls for correction by this court.

7. On the challenge of the award of damages for pains suffering and loss of amenities, the grievance of the appellant being that the sum was

inordinately law must be viewed on the established principle of law that an appellate court ought to be slow in interfering with an assessment of damages because the task invites discretion of the trial court[2], is known to be a difficult task and the mere fact that another judge could have awarded a different sum is not a basis to disturb an a ward made by the trial court.

8. In coming to the award made, the trial court indeed gave due regard to the authorities cited to her and found as the trier of facts that the injuries in the decisions cited by the plaintiff were more severe than those in the suit before the court. The court also took into account the period the appellant was said to have been admitted in hospital, the inflationary trends and the percentage of disability and the dearth of evidence on the conditions of the plaintiff as at the date of the determination. Those are the matters the trial court was expected to take into account which it did. To that extent I do now find any error on the trial court as would entitle me to interfere in the exercise of discretion.

9. In Kemfro Africa Ltd. T/a Meru Express and another -vs- A.M. Lubia and another (No.2) [1987] KLR 30 the Court of Appeal held as follows:-

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former Court of Eastern Africa to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

10. Here, no improper approach was adopted by the trial court neither was any irrelevant matter invited nor a relevant matter ignored. In those circumstances to interfere would be to substitute by discretion for that of the trial court. I consider the law not to permit such intervention. For those reasons the award was soundly made and it is thus upheld.

11. The upshot of all the foregoing is that the judgment of the trial court is set aside to the limited extent that the decision declining to award damages for future medical expenses is set aside and in its place an award of **Kshs.90,000** is substituted. That sum shall attract interests at court rates from the date of the suit till payment in full.

12. Because the appeal has succeeded only partly, I award to the Appellant ½ of the costs in these proceeding.

Dated, **signed** and delivered at **Mombasa** this **10th** day of **February 2020**

P.J.O. OTIENO

JUDGE

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[1] Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR

[2] **Sosphinaf Company Limited & another -vs- Daniel Ngang'a Kanyi – Civil Appeal No.315 of 2001 at Nakuru**