



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Appellate Side)

(Coram: Odunga, J)

CIVIL APPEAL NO. 263 OF 2014

BASH HAULIERS LIMITED.....APPELLANT

-VERSUS-

PETER MULWA NGULU.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Machakos Hon. C K Kisiangani delivered on 10th December, 2014 in Machakos CMCC No. 477 of 2012)

BETWEEN

PETER MULWA NGULU.....PLAINTIFF

=VERSUS=

BASH HAULIERS LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 6th June, 2012, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 16,580/- General Damages for pain, suffering and loss of amenities, Costs of the suit and interests.
2. The Respondent's suit was premised on the fact that on 15th, September, 2010, the Respondent was travelling in motor vehicle registration no. KBE 513B, along Nairobi-Mombasa Road, when near Devki Steel Mills, the Appellant's driver, servant and/or agent drove, controlled and/or managed motor vehicle registration no. KBH 651U/ZD 0009 owned by the Appellant that he caused the said vehicle to remain on the lane of motor vehicle reg. KBE 513E and collided with it. The particulars of negligence were pleaded in the plaint and the Respondent relied on the doctrine of *res ipsa loquitur*. He also particularised the injuries sustained as well as the special damages suffered.
3. The Respondent pleaded that he required further surgery to remove the metal plates which were in situ at the cost of Kshs 150,000.00.
4. On the part of the Appellant, the occurrence of the said accident was denied but was pleaded in the alternative that if the same occurred, it was caused by the negligence of the driver of motor vehicle reg. no. KBE 513B in which the Respondent was travelling. Particulars of the said negligence was pleaded. It was however denied that the Respondent suffered loss and damage as a result thereof.
5. In support of his case, the Respondent testified that on 15th September, 2010, he was on his way from Machakos where he had bought stock. At 3pm he got into a small vehicle KBE 513B at Kaani in Machakos and was going to Nairobi. It was 3 pm. However, along the way they got involved in an accident. According to him, they met a lorry on Mombasa road at Mtu wa Mawe near Devki coming from the opposite direction and another lorry KBH 651U which was behind it tried to overtake the said oncoming as a result of which the vehicle he was traveling in and the overtaking lorry collided. As a result of the said accident he sustained a cut on the right side of his face and his leg and his right my thigh was fitted with a metal plate and my leg. After the accident he was taken to Shalom Hospital and he exhibited his treatment notes, receipt for Kshs 2,000/=. He was later referred to Kenyatta National Hospital by Athi River Hospital and he produced the referral letter and discharge summary. He also produced the treatment notes at Kenyatta National Hospital and receipts amounting to Kshs 13,380/= from the said Hospital.
6. According to the Respondent, the said accident was reported at the police station and he was given police abstract which he exhibited. He

was also issued with a given P3 form which he similarly exhibited. It was his evidence that his advocate did a search on the lorry belonging to defendant and he produced the copy of the records for motor vehicle reg. No. KBH 651U and ZD 009 and the receipts for the same. According to the Respondent, he was examined by **Dr. Kimuyu** who prepared a medical report for him which he exhibited.

7. It was the Respondent's case that though his head had healed, the metal plate was still in place he sought to be paid the costs of the removal of the said plate. His case was that lorry KBH 651U was to blame for the said accident since it was the one which came onto their lane.

8. After the Respondent closed his case, no evidence was adduced on behalf of the Appellant and after considering the submissions, the learned trial magistrate found the Appellant 100% liable. On quantum, she found that the claim for future medical expenses was not proved and decline d to award the same. She however awarded that Respondent Kshs 350,000.00 as general damages and Kshs 14,380.00 being proved special damages plus costs and interests.

9. This appeal was filed on 17th December, 2014. However, on 17th July, 2019 the said appeal was withdrawn. By then the Respondent had filed a cross-appeal which is the subject of this judgement.

10. According to the Respondent/Cross-Appellant, being dissatisfied with the judgment, specifically on the award for further medical expenses he filed the instant cross-appeal on 28th January, 2015 based on the following grounds:

a) THAT the learned magistrate erred in law and in fact failing to award the costs of Future Medical Expenses to a tune of Kshs. 150,000/= (one hundred and fifty thousand shillings only) which had been pleaded and evidence adduced in support thereof.

b) THAT the learned magistrate erred in law by failing to give reasons for her failure to award the cost for Future Medical Expenses.

11. It was submitted that this being a first appeal, this court is obliged to consider the evidence adduced before the trial court, evaluate and draw its own conclusion based on the decision in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] E.A 123.**

12. It was submitted the Respondent in his plaint filed pleaded for future Medical Expenses and that at the hearing, he testified as to the circumstance that led to the accident and the nature of the injuries sustained and it was his evidence that he has a metal plate inserted in his right thigh following the accident and that he requires the metal plate to be removed through surgery and prayed for the costs for the removal. Further, the medical report prepared by **Doctor Kimuyu of West-End Medical Solutions** indicated that the patient had an inserted metal implant that will require removal and opined that the removal of the implant will require a surgery at an estimated cost of Kshs. 150,000/=.

13. It was submitted that the Cross-Appellants evidence and the doctor's opinion was not controverted or challenged during cross-examination and the defence did not call any witness to challenge the doctor's opinion on Further Medical Expenses. In support of his submissions the Respondent relied on the case of **Peter Ngugi Kimani vs. Joseph Kariuki [2018] eKLR** which cited the case of **Thomas K Ngaruiya & 2 Others vs. David Chepsiror [2012] eKLR** where it was held that:-

14. To the Respondent, the Magistrate did not give reasons for failing to award the Cross-Appellant under Future Medical Expenses despite the same being pleaded and also being proved and was never controverted. It was his case that the magistrate erred in law and in fact by not awarding the same and it is in the interest in justice that the same should be awarded. This Court was therefore urged to find this Cross-Appeal merited, allow the same as prayed by awarding the Cross-Appellant the claim for Future Medical Expenses to a tune of Kshs. 150,000/= (one hundred and fifty thousand shillings only) together with the costs for the Cross-Appeal.

15. In opposing the Cross-Appeal, the Appellant herein submitted that though the Respondent/Cross-appellant filed his cross- appeal on 28th January, 2015, the same was not served upon the Appellant until 26th September, 2019, when the Appellant got to see it as it was annexed to the record of appeal. It was submitted that the Appellant paid the sum of Kenya Shillings Three Hundred and Sixty Four Thousand Three Hundred and Eighty only (Kshs. 364,380/=) being the decretal amount to the Respondent/Cross-appellant on 22nd October, 2015 and a further Kenya Shillings One Hundred, Sixty Four Thousand and Six Hundred and Twenty Eight (Kshs. 164,628/=) on 7th April, 2016 being costs, interests, further costs and collection fee. The same day, it also paid a sum of Kenya Shillings Twenty Five Thousand, One Hundred and Seventy Five (Kshs.25, 175/=) being Auctioneers fee.

16. According to the Appellant, it was after making the said payment that it withdrew the appeal since the parties had settled the matter in the lower court. It was then that the Respondent/Cross-appellant informed court about his cross-appeal and requested for a mention for directions. By then, the Appellant had not been served with the said cross-appeal.

17. According to the Appellant, the cross-appeal has been brought under wrong and/or non-existent provisions of the law since the ***Civil Procedure Act*** and the Rules thereunder do not provide for the procedure for filing cross appeal in the High Court. However, despite the absence of an elaborate procedure, the courts have established the procure through previous decisions as was determined in **George Kianda & Another vs. Judith Katumbi Kathenge & Another [2018] KLR.** Based on the said decision, it was submitted that the Respondent/Cross-appellant ought to have filed a separate appeal and apply for consolidation with the Appellant's appeal hence the Respondent/Cross-appellant's cross-appeal should be dismissed with costs to the Appellant as it is bad in law.

18. It was further submitted that the cross-appeal is an abuse of the court process because the Respondent/Cross-appellant has already enjoyed the fruits of his judgment which were paid on 22nd October, 2015 and further on 7th April, 2016. To the Appellant, prosecution of the cross-appeal by the Respondent/Cross-appellant is an afterthought as demonstrated by their laxity in filing the record of appeal on the 9th May, 2019 which was way after the Appellant indicated to court that it is withdrawing its appeal with no orders as to costs. This is also

demonstrated by the fact that though the Respondent/Cross-appellant filed his cross-appeal on 28th January, 2015, he did not serve it upon the Appellant, an action which was prejudicial to the Appellant as it gave the impression that there was no cross- appeal on record. The Appellant only got to learn about it on 27th February, 2018 when the Respondent/Cross-appellant informed court that he intended to cross-appeal. Even then, the Respondent/Cross-appellant did not bother to serve the said cross-appeal and have never served it to date. The Respondent/Cross-appellant got to serve the Appellant with the record of appeal on 26th September, 2019, that's when the Appellant got to see the contents of the cross-appeal even though there was no proper service of the Cross-appeal. The Appellant submitted that it would have been just and fair if they were served with the cross- appeal on time.

19. According to the Appellant, the cross appeal is an abuse of the court process as the Respondent/Cross-appellant has not demonstrated how the trial magistrate erred in failing to award future medical expenses as submitted above. According to the Appellant, the award made to the Respondent/Cross-appellant was fair and just in the circumstances as the Respondent/Cross- appellant has not proved that the trial court misapprehended the evidence with regards to future medical expenses as was held in the case of **Butt vs. Khan [1977] 1 KAR.**

20. **It was submitted that** the Respondent/Cross-appellant did not discharge his burden of proving the future medical expenses as outlined in sections 107, 108 and 109 of the **Evidence Act, Cap 80 of the Laws of Kenya.** In the Appellant's view, since the Respondent/Cross-appellant did not prove the future expenses, the trial magistrate did not err when finding that the Respondent/Cross-appellant had not proven the future expenses and gave her reasons for failing to award the cost for future medical expenses, the reason being that the Respondent/Cross-appellant did not prove them.

21. In support of its submissions the Appellant relied on the case of **Kenya Bus Services Ltd. vs. Gituma [2004] EA 91** and **Bonham Carter vs. Hyde Park Hotel Ltd. (1948) 64 T.R. 177.**

22. As regards the costs, it was submitted that in civil cases, it is well established that costs follow the event. In light of this, the Appellant prayed that costs and interest of the cross-appeal borne by the Respondent/Cross-appellant.

Determination

23. As properly appreciated by the parties herein, this appeal revolves around the award of or the failure to award future medical expenses.

24. Before that an issue was raised as regards the propriety of the cross-appeal. In **George Kianda & Another vs. Judith Katumbi Kathenge & Another [2018] eKLR,** this court noted that:

“...this Court is not aware of a procedure for filing of a cross-appeal in this Court as opposed to the Court of Appeal. This Court is however aware of the provisions of Order 42 Rule 32 of the Civil Procedure Rules which makes a reference to a cross-appeal but in a negative manner as follows:

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.”

25. It is therefore clear that the **Civil Procedure Act** and the Rules made thereunder do not make comprehensive provisions for cross-appeals. However, since cross-appeals are referred under Order 42 rule 32 of the said Rules, it cannot be said that cross-appeals have no place in appeals to the High Court. The **Civil Procedure Rules,** unlike the **Court of Appeal Rules,** do not prescribe the period within which the cross-appeals ought to be filed. Accordingly, I would be guided by the holding in **Musah vs. Muwonge [2007] 1 EA 212** where the Supreme Court of Uganda held that:

“Rule 86(1) of the Rules of the Supreme Court gives a respondent a right to lodge a cross-appeal. It is an appeal against the decision of the Court of Appeal. Obviously, the only prerequisite is the existence of an appeal, which enables a respondent to cross-appeal by notice. It is not material that the appeal must be a valid one so as to give rise to the institution of a cross-appeal. In terms of sub-rules (1) and (2) of rule 90, cross-appeal does not, so to speak, die with the death of an appeal. It is viable and should be determined on its merits.”

26. Therefore, as long as an appeal is in existence, the Respondent is entitled to file a cross-appeal. In this case, it is clear that the cross-appeal was filed during the pendency of the main appeal, though it may not have been served immediately. However, there is no provision that renders non-service of the cross-appeal fatal to the cross-appeal and I am not about to invent one.

27. It was again contended that it was an abuse of the court process for the Respondent to proceed with the appeal after the decretal sum had been settled. A not too dissimilar issue arose before the Court of Appeal in **Machakos District Co-Operative Ltd. vs. Nzuki Kiilu Civil Application No. Nai 17 of 1997** where it was argued that since the decretal sum had been paid, the right of appeal had been lost. The Court (Shah, JA) however had no hesitation in holding that the fact that the decretal sum has been paid does not deprive a party of the right of appeal. Waki, JA, on his part in **Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005** held that:

“Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal

being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

28. It follows that the mere fact that a party has paid or has been paid the full decretal sum does not preclude him or her from preferring an appeal where he/she is dissatisfied with the award. It may well be that he/she feels, as the Respondent herein, that the award was not sufficient. In fact, the general rule is that once judgement is made, it ought to be settled notwithstanding the fact that one may or may not have appealed since an appeal does not act as automatic stay of execution.

29. It is therefore my view that the fact of settlement of the decretal sum herein did not preclude the Respondent from proceeding with his cross-appeal and a person exercising his/her constitutional right cannot be said to be abusing the court process. The fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant. See Moses Kipkolum Kogo vs. Nyamogo & Nyamogo Advocates [2004] 1 KLR 367. As was held by Madan, J (as he then was) in Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243:

“In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.”

30. Accordingly, this court cannot deny the Respondent a right to be heard simply because he has received the award decreed to him by the trial court.

31. As regards damages for future medical expenses, authorities are agreed that an award for future medical expenses must stand on its own as a specific prayer to be specifically established. Ringera, J (as he then was) in Jackson Wanyoike vs. Kenya Bus Services Ltd & Another Nairobi (Milimani) HCCC NO. 297 of 2002 held that costs of future medical care must be pleaded, as they are special damages. Similarly, the Court of Appeal in Sheikh Omar Dahman T/A Malindi Bus vs. Denis Jones Kisumo Civil Appeal No. 154 of 1993, held that cost of future medical operation is special damages, which must be pleaded. See also Mbaka Nguru & Another vs. James George Rakwar Civil Appeal No. 133 of 1998 [1995-1998] 1 EA 246. It is therefore my view that the decision in the case of Peter Ngugi Kimani vs. Joseph Kariuki [2018] eKLR was a lone voice shouting in the wilderness.

32. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

33. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities...Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages...General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

34. Future medical expenses are therefore, though based on medical opinion, is an amount of pecuniary loss which the claimant can prove to

have followed from the particular facts set out in the pleadings. They must be specifically pleaded. In this case, the Respondent in his plaint expressly pleaded that he still had metal plates in situ which would require removal after recovery through a further surgery whose cost had been assessed by the doctor at Kshs 150,000.00. The doctor in his medical report stated that the inserted implant would require removal at an estimated cost of Kshs 150,000.00. While the cost of future medical expenses are special damages and whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

35. It was therefore held by the Court of Appeal in Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 that:

“The court is conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of.”

36. That was the position in Woodruff vs. Dupont [1964] EA 404 where it was held by the East African Court of Appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them... The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonably be considered as a rising according to the usual course of things, from the breach of the contract itself”. The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”

37. It is therefore my view that the cost of future medical expenses could properly be and was sufficiently proved by the medical report which was produced without challenge.

38. In the premises, I find merit in this appeal and set aside the order dismissing the claim for future medical expenses and substitute therefor an award of Kshs 150,000.00.

39. The Respondent Cross-Appellant will have the costs of this appeal.

40. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 6th day of February, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mbilo for Mr Muli for the Respondent

CA Geoffrey