



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 42 OF 2018

BASH HAULIERS LTD.....APPELLANT

VERSUS

CONSTANCE KEMBI CHIVATSI.....RESPONDENT

(An Appeal from the Judgement and Decree of the Hon. D.M. Ndungi, Senior

Resident Magistrate delivered in Mariakani SPMCC No. 204 of 2017 on 15th August, 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Mwangi for Mr. Mogaka for the Appellant

Mr. Binyenya for Mr. Njoroge for the Respondent

JUDGEMENT

Background

The respondent Constance Kembi Chivatsi was on 11th April, 2017 travelling as a passenger in motor vehicle registration KBC 041J along Mombasa-Nairobi Highway. A collision occurred upon reaching Bonje area involving another motor vehicle registration number KAT 811V being driven from the opposite direction. At the time of the accident motor vehicle registration KAY 811V was owned by the appellant. The respondent blames the accident on the acts of negligence on the part of the appellant, agent, servant, employee or driver as pleaded in paragraph 5 of the plaint. Consequently the respondent sustained personal injuries in which she initiated proceedings seeking compensation for loss and damages that she suffered as a result of negligence by the appellant.

The trial proceeded in earnest before Hon. Ndungi and judgement on quantum delivered on 15th August, 2018 assessed at a total of KShs.671,597 less 10% consent liability entered between the appellant and respondent.

Being aggrieved with the decision on quantum the appellant lodged an appeal challenging the award on personal injuries made at KShs.600,000 and future medicals at KShs.80,000.

In the memorandum of appeal filed in court on 13th September, 2018 the following four grounds formed the basis of the appeal:

- 1) That the learned magistrate erred in law and fact by awarding excessive damages in the circumstances.**
- 2) That the learned magistrate erred in law and in fact by awarding future medical costs without proof.**
- 3) That the learned magistrate misdirected himself on the applicable principles of law by failing to take into account and appreciate the authorities submitted to the court by the appellant.**
- 4) That the learned magistrate failed to appreciate the evidence and facts placed before him on the matter.**

Submissions by the Appellant on appeal

Learned counsel for the appellant submitted that the approach taken by learned magistrate ignored similar authorities brought to his attention at the trial of the claim. He relied on the authorities of **Agility Logistics Ltd v John Wambua Musau & another 2017 eKLR** distinguishing it with **Said Abdullahi & another v Alice Wandira (2016 eKLR** which was the basis judgement of the lower court was made.

In this case therefore learned counsel contention was that the court fell into error in using an authority with distinct injuries with that suffered by the respondent. Further, in buttressing his appeal learned court placed reliance on the principles in the cases of **Simon Kanji v Simon Kiguru 2013 eKLR** and **Jiran Nagra v Abednego Nyandusi Oigo 2018 eKLR**.

The second issue which incensed the appellant was in contention with the award of the Kshs.80,000 as future medicals for the respondent which the same was not pleaded in the plaint the point of contention as submitted by counsel was a major disparity in the medical reports by Dr. Ndegwa who opined future medicals at Kshs.80,000 whilst Dr. Seth opinion estimated the cost at Kshs.15,000.

When the learned trial magistrate assessed future medicals though not specifically pleaded he opted for the opinion of Dr. Ndegwa by awarding Kshs.80,000 for the respondent on this head of damages. Learned counsels therefore urged this court to find that the award on damages and future medicals was excessive in the circumstances of the case filed by the respondent.

Submission on Appeal by the Respondent

The respondent counsel vehemently argued and submitted against the narrative taken by the appellant counsel on these grounds of appeal. It was learned counsel submissions that in assessing damages the learned trial magistrate never erred in law and fact as proper factors were taken into account. According to learned counsel the award being challenged by the appellant was made on the basis of the authorities which supported similar injuries as those suffered by the respondent.

Learned counsel while referring to various precedents argued and submitted that there was no shift by the trial magistrate when assessing damages for the respondent. He placed reliance on the suffering authorities to disapprove the appellant's line of submissions that there was an error in fact and law in the findings of the trial court - **Agility logistics Ltd v John Musau Wambua & another 2017 eKLR, Said Abdullahi & another v Alice Wanjira eKLR 2013, Export Trading Co. Ltd v Ramadhan Shiundu 2019 eKLR**.

According to learned counsel submissions the onus was on the appellant to satisfy this court that the trial court was wrong when it assessed both general and future medicals. He took the view that the grounds of appeal addressed to attack the decision of the trial court has not borne fruits, given the well-founded reasons provided for the award in the impugned judgement.

I have considered the memorandum of appeal. The submissions made by both counsels and the trial court record.

The Law Analysis and Determination

The first appeal court discretion on whether or not to interfere with a judgement or decision of the subordinate court is now trite law. The procedure of the court on appeal is well illustrated in the principles contained in a plethora of cases i.e. **Kemfro Africa Ltd T/A Meru Express Services CA No. 21 of 1984 Azir Kamu Mudika , Lubia & another 1985 eKLR** and **Catholic Diocese of Kisumu v Tete 204 eKLR**.

The general principles that should guide the first appellate court is that it would only interfere with the findings of fact and law when an appellant shows that it was perverse or contrary to the evidence or no evidence was availed to support the decision. Additionally, the first appellate court has the duty to evaluate and examine the evidence to afresh and exhaustive scrutiny. At the stage of hearing the appeal, the appellate court is to bear in mind that the trial court had the advantage to hear viva voce evidence and the opportunity provided to assess the demeanor and credibility of witnesses. These principles form the cornerstone of an appellate jurisdiction to apply in the instant appeal.

This appeal merely turns out on assessment of general damages. The principles on assessment of general damages more so those in the category of road traffic accident claims are now well settled.

In **P.N. Mashru Ltd v Omar Mwakaro Mathenge Alias Omar Masoud HCCA No. 9 of 2017** where the court observed, while adapting a passage in **Cecilia W. Mwangi & another v Ruth Mwangi 1977 eKLR, Tayaber Kinamu 1982-88 1KAR 90** as follows:

“I state this so as to remove the misapprehension so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law, she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the defendant. The defendants are not wrong doers. They are simply people who foot the bill. See also the case of (Daniel Kosgei Ngetich v Catholic Trustee Registered diocese of Eldoret & another 2013 eKLR).”

In this appeal I would bear these principles in mind in exercising discretion as an appellate court. Indeed according to the above principles assessment of damages is purely an exercise of discretion on the evidence adduced on behalf of the claimant.

It has been quite often pointed out in various court decisions **“that awards of damages in tort must be within limits as already set in similar decided cases. This is premised on sustainability of payment of such claims as the burden bearer ultimately are the tax payers who support the underwriters of such risks.”**

It follows therefore as stated by Wooding L.J in **Cornilliac v SF Louis 1965 7 WIL 491**. The sum total that could go towards an assessment of damages was succinctly stated by this court as follows:

“(a) The nature and extent of the injuries sustained

(b) The nature and gravity of the resulting physical disability

(c) The pain and suffering which had to be endured

(d) The loss of amenities suffered and

The extent to which, consequently the claimant’s pecuniary prospects have been materially affected”

The award in this appeal of Kshs.600,000 in respect of pain, suffering and loss of amenities was based on the nature and injuries suffered by the respondent. The medical report dated 2nd May, 2017 by Dr. Ndegwa indicates that the respondent suffered compound fracture of the right humerus, deep degloving wound on the right upper arm, bruises on the forehead and right wrist. The respondent diagnosis was stated to be severe bones and soft injuries. Dr. Ndegwa also demonstrated that in view of the metal implants the respondent will require Kshs.80,000 in two years to have them removed. There was no other latest report to indicate whether the respondent suffered any permanent disability.

The second medical report dated 24th October, 2017 was by Dr. Sheth. In his medical report Dr. Sheth agreed with Dr. Ndegwa on the nature and gravity of the injuries suffered by the respondent.

It was in his opinion that the respondent will recover fully save for the wound which still requires medical attention and dressing. He opined that there would be no permanent disability. He however noted that the metal plate and screws will need to be removed at Kshs.15,000 at Coast general hospital.

The trial was disposed off by way of written submissions and filing of documentary evidence in support of the claim.

In assessing general damages learned counsel for the respondent submitted and placed reliance on the authorities of **Agility Logistics Ltd** (supra). He proposed an award of Kshs.850 with future medicals of Kshs.80,000.

The appellant counsel on behalf of the appellant submitted and asked this court to be guided by the principles and awards in the following cases **Ouru Super Stores Ltd v Jackson Keragon, Obure 2018 eKLR, Said Abdullahi & another v Alice Wanjara 2016 eKLR and Jetah Nagra v Abednego Nyandusi Oigo 2018 eKLR.**

The question I ask myself is whether in assessing damages for pain and suffering the learned trial magistrate misapprehended the evidence and other aspects of the claim and gave an excessive award. It is the position of this court as held in the case of **West (H) & Sons Ltd v Shephard 1964 AC 326** where Lord Denning stated inter alia that **“money cannot renew a physical fracture that has been battered and shattered.**

All that Judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process there must be the endeavor to secure uniformity in the general method of approach”.....

On my part exercising appellate jurisdiction as boldly restated in the case of **Mbogo v Shah 1968 EA 93** I have reconsidered the judgement, and submissions by both counsels on the proposals supporting that respective positions.

In the appeal before me the evidence from the medical reports is illustrative of the fact that the respondent suffered compound fracture of the humerus with no permanent disability. The choice of method of assessment being a matter of the trial court was to be guided by the medical reports in view that the respondent never testified as a witness. The medical evidence acted as a guide together with individual authorities referred to by both counsels at the hearing of the suit. The trial magistrate found the respondent’s situation similar and within the principles in **Agility** case (supra).

I have reviewed the facts and entire decision in which the trial magistrate placed reliance to make an award of Kshs.600,00 for pain and suffering. I take the view that the claimant in **Agility** case sustained serious injuries of two fractures of the ribs, the wounds on the face and leg, fracture of the left arm. I accept that the trial magistrate erred in awarding Kshs.600,000 from the fact that the case was decided on 20th April, 2017. There can be no doubt that from the evidence available before him the learned magistrate was wrong in holding that the compound fracture of the humerus with no permanent disability to attract an award of which was at higher variance from an award of similar cases.

I am of the view as urged by the appellant’s counsel that appellate jurisdiction can be exercised to interfere with the award on general damages for being excessive compared to the injuries suffered. Taking into account all the injuries suffered by the respondent keeping in mind the principles of assessment I reassess general damages for pain and suffering loss of amenities at Kshs.480,000.

Damages under Future Medicals

This category of damages are awards to compensate the claimant for the loss of medical included or the estimated cost of medical care which may be needed in the future associated with the accident. Generally the claim for future medicals not yet to be performed are considered payable in the context of an accident injury claims if they can be ascertained. The approach taken by court is to have the claimant specifically plead so that they can be strictly proved as will be confirmed in the cases of **Kenya Bus Services Ltd v Mayende 1991 2 KAR, Ali Nyambu T/A Sibera Slove CA No. 5 of 1990 Shabani v City Council of Nairobi 1985 1 KAR 681**, courts have agreed and taken the

view that special damages to be payable must be specifically pleaded and strictly proved under this principle:

“Plaintiffs must understand that is they who bring actions for damages; it is for them to prove damage. It is not enough to write down particulars and so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages.”

As the law stands today all courts argue that suffering on future medical expenses can be recovered from the tort feisor but the yardstick is that they must be pleaded and proved on a balance of probabilities. The respondent in this claim specifically pleaded for a need in payment of future medicals but in respect of how much it was not pleaded. It was therefore left for the court to assess the amount of compensation attributable to future medical expenses.

From the evidence both counsels put in alongside their submissions, medical report by Dr. Ndegwa who assessed the cost of future medicals at Kshs.80,000 where Dr. Sheth set it all Kshs.15,000. However, looking at the two medical reports there are no reasons given for the variance of cost for the future medical care of removing the metal implants.

From the learned trial magistrate judgement on award of Kshs.80,000 was chosen as recommended by Dr. Ndegwa in contrast with Dr. Sheth’s – medical cost of Kshs.15,000. I am afraid with greatest respect to the learned trial magistrate. I am unable to find the reasons attached which entitled him to apply the opinion of Dr. Ndegwa against that of Dr. Sheth of Kshs.15,000.

What is clear from the record is the fact that the claim on future medical expenses remain unresolved by the end of the trial. In any case no amendment was occasioned to the plaint to include a specific claim payable by the defendant/appellant.

In the instant appeal the issue of future medical care was never pleaded as far as I am concerned. It would be awarded based on the divergence opinions of the Doctors medical reports. There is fault of principle exhibited by the learned trial magistrate and the exercise of discretion is involved to warrant this court to interfere by setting aside an award of Shs.80,000.

This appeal therefore in all the circumstances partially succeeds with the following order attended to it:

- 1) General damages of Kshs.600,000 be varied and substituted with Kshs.480,000.
- 2) The claim for future medicals of Kshs.80,000 set aside and allowed.
- 3) Specials of Kshs.51,597 affirmed.
- 4) The quantum be subjected to 10% consent liability.
- 5) The costs of this appeal be borne by the appellant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JULY, 2019

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R. NYAKUNDI

JUDGE