



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 505 OF 2017

MARTIN MKAKA aka TOTO ILUNGA.....APPELLANT

-VERSUS-

JAMES NJOROGE NDEGWA

FLORENCE KABIRU

JOSEPH WERU.....RESPONDENTS

(Being an appeal from the judgment delivered by Honourable I.W. Gichobi (Mrs.) (Senior Resident Magistrate) on 15th September, 2017 in CMCC No. 3345 of 2015)

JUDGEMENT

1. The background of the matter is that the appellant filed the plaint dated 24th April, 2015 under CMCC No. 3345 of 2015 against the respondents herein seeking for both general and special damages plus costs of the suit and interest thereon.
2. He pleaded in his plaint that sometime on or about the 2nd of September, 2014 he was lawfully walking alongside Kariobangi Roundabout in Nairobi area when the 1st respondent, being at all material times the driver of the motor vehicle registration number KBP 688V registered in the joint names of the 2nd and 3rd respondent, negligently drove the said motor vehicle, causing it to knock down the appellant thus injuring him. The particulars of negligence and the injuries sustained were laid out in the plaint.
3. Upon entering appearance, the respondents filed their joint statement of defence dated 28th July, 2016 largely denying their involvement in the accident and the particulars of negligence laid out in the plaint. In place, the respondents pleaded that if at all the accident occurred as alleged, then the same was purely as a result of negligence on the part of the . the respondents stated the particulars of the appellant's negligence under paragraph 6 of their defence.
4. At trial, the appellant relied on the testimony of two (2) witnesses whereas the respondents did not call for any witnesses to support the defence case. Hon. I. W. Gichobi heard the matter and in the end she entered judgment in the appellant's favour as hereunder:

a)	<i>Liability</i>	<i>100%</i>
b)	<i>General damages</i>	<i>NIL</i>
c)	<i>Special damages</i>	<i>Kshs.500/</i>

d) Loss of earnings/future earnings NIL
Total Kshs.500/

e) Costs of the suit and interest at court rates from the date of judgment.

5. Being aggrieved the appellant preferred this appeal and put forward the following grounds:

i. THAT the learned trial magistrate erred by dismissing the claim for damages for pain, suffering and loss of amenities.

ii. THAT the learned trial magistrate erred by declining to award special damages.

iii. THAT the learned trial magistrate erred by declining to award damages for lost earnings.

iv. THAT the learned trial magistrate erred by misunderstanding the evidence thereby reaching erroneous conclusions.

v. THAT the learned trial magistrate erred by failing to take into account the fact that:

a) The first hospital did not take any x-rays since as stated in the referral letter, its x-ray machines were not working.

b) Dr. Wokabi relied on x-rays which confirmed the fractures he confirmed in his medical report.

c) The defence did not dispute the injuries and the medical report was produced by consent.

vi. THAT the learned trial magistrate misunderstood the role of pleadings or misapplied the cases she quoted and/or erred by deciding it on unpleaded issues.

vii. THAT the learned trial magistrate erred by deciding the case on matters not urged before her or by failing to give the parties an opportunity to be heard on the issues she identified which she had not heard the parties on.

viii. THAT the learned trial magistrate erred by allocating herself the role of a medical doctor.

ix. THAT the learned trial magistrate misunderstood the place of oral evidence in proof of loss of earnings and special damages.

x. THAT the learned trial magistrate erred by finding that the appellant had not proved his pleaded injuries.

xi. THAT the learned trial magistrate erred by awarding interest on special damages from the date of judgment.

6. The appeal was canvassed through written submissions. The appellant filed his submissions on 26th July, 2019 but going by the record, it would appear the respondents did not put in any submissions.

7. It is the submission of the appellant that the trial court erred in its analysis and conclusion that the P3 form and treatment notes adduced as evidence do not conform to the nature of injuries pleaded in the plaint, thereby finding that the injuries pleaded were not proved.

8. According to the appellant, the trial court misinterpreted and misapprehended the medical evidence placed before it in addressing the subject of quantum, hence the need for interference of the award made

on general damages.

9. The appellant contends that since the trial court indicated that it would have awarded the sum of Kshs.270,000/ in the event that the award on general damages had been satisfied under the head of pain and suffering, then it would only be fair for this court to substitute the dismissal order under this head with the award of Kshs.270,000/ as well as an order that interest on the same accrues from the date of judgment.

10. As concerns special damages which the trial court declined to grant, it is the appellant's submission that he is entitled to the amount both pleaded and proved. The appellant urged this court to order that the interest on the special damages be made to accrue from the date of filing the suit.

11. The appellant further faulted the trial court for declining to award damages for loss of earnings despite there being evidence to show that following the accident, he has been unable to continue working. As such, the appellant pleads with this court to award the sum of Kshs.100,000/ under this head.

12. I have taken into account the appellant's submissions in respect to the appeal alongside the few authorities relied upon. I have likewise re-evaluated the evidence tendered before the trial court.

13. It is apparent that the appeal is strictly on quantum. I will therefore address the 11 grounds of appeal under the three (3) limbs under which they fall.

14. The first limb concerns itself with whether the nature of injuries suffered by the appellant were both pleaded and proved. In his plaint, the appellant pleaded that he had sustained fractures of the right foot metatarsals. The P3 form adduced as evidence indicated *inter alia*, fracture injuries to the right medial malleolus and distal right fibular POP applied. According to the referral form from Mama Lucy Kibaki Hospital where the appellant was first treated to Kenyatta National Hospital, the injuries cited therein are ankle dislocation and fracture. The A & E service delivery/track sheet from Kenyatta National Hospital notes injuries similar to those recorded in the P3 form. In the medical report dated 29th September, 2014 by Dr. W.M. Wokabi, he mentioned that the appellant was diagnosed with major injuries to his right foot and that x-rays that were done revealed fractures of the right foot metatarsals.

15. In her analysis, the learned trial magistrate concluded that the injuries indicated in the initial treatment notes and P3 form do not match those pleaded, hence it is not clear how Dr. Wokabi opined that the appellant had sustained fractures of the right foot.

16. From my reading of the above-referenced medical evidence adduced before the trial court, it is clear that the same indicate major injuries to the right foot/ankle of the appellant.

17. Further to the above, in preparing his report, Dr. Wokabi mentioned that he had seen the x-rays which revealed the injuries sustained as being fractures of the right foot, similar to the injuries appearing on the referral note earlier mentioned.

18. Whereas the appellant did not avail the x-ray report to determine the findings Dr. Wokabi explained that he had viewed the x-ray findings and it would appear, he had also seen the previous medical documents in the possession of the appellant prior to making his report. In my view, the respective findings as indicated in the medical evidence relate to the particulars of injuries pleaded in the plaint. It is therefore clear that the learned Senior Resident Magistrate erred to hold that the injuries pleaded had not been proved.

19. I now turn my attention to the second limb relating to general damages sought before the trial court under the heads hereunder.

a) *Pain, suffering and loss of amenities*

20. The appellant proposed, before the trial court, to be awarded the sum of Kshs.400,000/ under this

head, citing *inter alia*, the cases of **Isaac Katambani Iminya v Firestone East Africa (1969) Limited [2015] eKLR** where this court substituted an award of Kshs.100,000/ with that of Kshs.250,000/ made to an appellant who had sustained a fracture of the 5th metacarpal and **Silphanus Kumbe Murondo v Lamek Mbaka Motegi & another [2013] eKLR** where the High Court on appeal equally substituted the award of Kshs.60,000/ with one of Kshs.220,000/ for near similar injuries as those suffered in the **Isaac Katambani Iminya** (*supra*) case.

21. On their part, the respondents urged the trial court to award the reasonable sum of Kshs.100,000/, placing reliance on **New Leather Manufacturing Factory Limited v John Mbuvi Mbiti [2010] eKLR** where the court awarded a global award of Kshs.150,000/ was made in a case of blunt trauma injuries, as well as **Isaac Mwenda Micheni v Mutegi Murango [2004] eKLR** in which case the court found the amount of Kshs.100,000/ to be fair compensation for a plaintiff who had sustained fracture injuries among other injuries.

22. The learned trial magistrate, guided by her finding that the appellant had not proved his injuries, declined to make an award under this head but instead holding that she would have awarded Kshs.270,000/ had the same been proved.

23. This court has already found that the appellant had proved the injuries pleaded contrary to the holding of the learned Senior Resident Magistrate. The appellant has submitted before this court that he is not opposed to the award which the trial court would have made. In that case, I award the appellant a sum of Kshs.270,000/ under this head.

b) Loss of earnings/future loss of earnings

24. In his testimony before the trial court, the appellant stated that he at all material times worked at Sound Africa as a drummer, earning a monthly salary of Kshs.25,000/ plus commissions; he produced as P. Exhibit 7 a copy of the performance contract to that effect. The appellant went on to assert that following his injury, he has been unable to work.

25. In his submissions, the appellant explained that he was out of work for close to one (1) year following the accident, thus suffering a loss of earnings in the sum of Kshs.100,000/ and that he has not been able to work at the same level of performance since then, therefore urging the trial court to award him the amount of Kshs.100,000/ under this head. The respondents did not offer their proposals on this head.

26. On my part, having re-evaluated the evidence on record, I have gathered that save for his oral testimony, the appellant did not provide any further evidence to support his claim that he was either unable to work or out of work or that he lost any portion of his earnings for that matter, as a result of the accident. However, the medical report prepared by Dr. Wokabi made no mention that the appellant's injuries would inhibit his ability to continue working.

27. In the circumstances, I concur with the learned trial Senior Resident magistrate's analysis that there was no basis for his entitlement to such award.

c) Special damages

28. In this regard, the appellant submitted that he is entitled to the sum of Kshs.13,105/ both pleaded and proved, whereas the respondents simply argued that the same ought to be granted as proved.

29. However, the trial court reaffirmed that since the appellant had not proved his injuries, the claim for special damages collapsed. Eventually, the trial court awarded only the sum of Kshs.500/ for procuring the copy of the motor vehicle records.

30. It is trite law that special damages must be specifically pleaded and strictly proved. In this matter, I am convinced that the learned trial magistrate fell into error and misdirected herself by assessing the special damages on the premise of whether or not the appellant had proved his injuries. The learned trial

magistrate ought to have cast her focus on establishing whether or not the special damages were proved as pleaded, but she did not.

31. That said, I have re-evaluated the evidence in its entirety and ascertained that the appellant is entitled to the sum of Kshs.13,105/ as pleaded and proved. The appellant is equally entitled to interest on the same.

32. The upshot is that the appeal succeeds as against the decision on general damages for pain, suffering and loss of amenities; and on special damages. Consequently, the trial court's finding on the above heads of damages are hereby set aside and substituted out hereunder:

a) The appellant is awarded ksh.270,000/= for General damages for pain, suffering and loss of amenities.

b) The award of kshs.500/= for special damages is set aside and is substituted by an award of kshs.13,105/=.

Total Kshs.283,105/

c) The award on the general damages to attract interest at court rate from the date of judgment until payment in full while interest on the special damages shall accrue from the date of filing the suit until payment in full.

d) The appellant shall also have the costs of the appeal and the suit.

Dated, Signed and Delivered at Nairobi this 13th day of November, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents