



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 102 OF 2014

DOMITILAR MUENI MULIAPPELLANT

-VERSUS-

PAN AFRICA CHEMICALS LTD.....RESPONDENT

(An Appeal from the judgment/Decree of Honourable Mungai chief Magistrate delivered on 24th June 2014 in Nakuru CMCC No.1193 of 2012 Domitilar Mueni Muli -vs- Pan African Chemicals.

JUDGMENT

1. The appellant Domitilar Mueni Kasyoka was on the 13th November 2009 seriously injured when the vehicle she was travelling in was involved in an accident along the Nakuru-Eldoret road. She sustained severe chemical burns as more particularly stated in the pleadings and in the medical documents prepared by Doctors W.K. Kiamba and Stanley Ominde Khainga. She had pleaded in her plaint in the primary suit special and general damages as well as future medical expenses.

2. In his judgment dated the 25th June 2014, the trial magistrate awarded the appellant general and special damages, and Kshs.500,000/= for future medical expenses.

3. The appellant (then plaintiff) was aggrieved by the award under **future medical expenses as being too low and contrary to expert opinion tendered in court**. This is the only ground in this appeal.

The appellant seeks an order of enhancement to Kshs.1,000,000/=.

Parties filed written submissions and highlighted the same.

4. The duty of an appellate court is well defined. It is to reconsider and re-evaluate the totality of evidence adduced before the trial court and come up with its own findings and conclusion – **Kenya Ports Authority -vs- Kuston (Kenya) Ltd (2009)EA 212**.

5. On the matter of awards, the court shall be slow in disturbing an award by the trial court unless it is satisfied that the court took into account irrelevant factors or failed to consider a relevant factor, or that in its opinion, the award is inordinately low or high as to be erroneous – **Kemfro Africa Ltd t/a Meru Express Services and Another -vs- A.M. Lubia & Another (1989) e KLR**.

6. **Dr. Stanley Omondi Khaiga**, a Consultant Plastic and Reconstructive surgeon examined the appellant and prepared a report on the 22nd June 2012 three years after the injuries.

7. In his very detailed medical report and which was produced and admitted by the trial court, it was his conclusion:

“That the patient suffered serious burn injuries to her body that have resulted into permanent deformities to various sites.

The hair loss and scars have resulted into lack of melanin protection against ultraviolet sun rays to the scalp which has and almost 100% chance to change into a cancerous state.

She requires staged reconstruction using tissue expanders in order to provide hair bearing scalp to this alopecic and scarred arrears. The facial, neck and lower limb scars and contractures need stage revisions and releases. All these procedures will only improve on her appearance but will not cure the permanent damage suffered, which has been forever plastered on her body.

The permanent incapacity suffered is estimated at 80%. The total cost of staged reconstructive surgical treatment to improve

her deformities is approximately Kshs.5 Million.

However psychological damage suffered has no monetary equivalent since it is total and incurable.”

8. There was also another medical report dated 25th August 2012 and prepared by **Dr. Wellington Kiamba**. He too recommended plastic and reconstructive surgery and gave an approximate cost of at least Kshs.4 Million.

The appellant submits that the trial magistrate erred by awarding the sum of Kshs.500,000/= despite his findings that the appellants degree of permanent incapacitation was 80% and that inflation had risen from 2009.

9. Looking at the two medical reports, there is no doubt that the appellant needs reconstructive surgery to improve on her appearance and also the injuries.

The estimated cost by both doctors was between Kshs.4 to 6 Million. It is urged by the appellant that the trial magistrate, not being an expert in medical issues erred by rubbishing the expert opinion and stating that the two doctors did not indicate which hospitals their estimated cost referred to, whether private or public.

10. On the other hand, the respondent submits that the award of Kshs.500,000/= was adequate having been comparable to a similar award in similar circumstances in 2009.

So what's the place of expert opinion in courts?

11. In **Shah & Another -vs- Shah & Others (2003) I EA 290**, the court held:

“The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---”

12. It further went on to state that:

“---if there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion.”

13. In **Dhalay -vs- Republic (1997) KLR**, the Court of Appeal rendered that:

“It is now trite law that while the courts must give proper respect to the opinion of experts, not, as it were such opinions are binding in the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”

See also **John Mutoro Njuguna t/a Topkins Maternity & Clinic V. ZWG (2017) e KLR**.

14. Having carefully considered the rival submissions and that, a court of law is not bound by expert opinion, and having taken the totality of all the evidence including the expert evidence, and being mindful that I cannot interfere with the trial courts assessment of damages without good reasons being advanced. I now turn to interrogate the injuries for which the expert opinions by the two doctors was based.

15. I agree with the Respondent that the doctors did not show or demonstrate how they arrived at their estimates on surgery costs. It would have been of great assistance to the court had they obtained, say, an invoice or advice from a public hospital and a private hospital. Having failed to do so, it is then an uphill task to assess what is appropriate cost for the procedures. Neither counsel have been of much help.

16. The appellant stated that Kshs.500,000/= is insufficient.

It is unfortunate that the respondent's Doctor Malik's medical report, who re-examined the appellant was not produced in court, so was a medical report of Dr. Aref.

17. The two Medical doctors estimated the costs of the procedures to be between Kshs. **4,000,000/=** and 5,000,000/= considering the severity of the injuries, the 80% incapacitation and the permanent scars and deformities for which the two doctors recommended reconstructive plastic surgery, I am of the opinion that the sum of Kshs.500,000/= was grossly and inordinately low.

18. The trial magistrate had no reason at all to ignore the expert evidence which, though not binding has valuable information and ought to be respected. While awarding the said sum, the trial magistrate stated

“I appreciate in this case the degree(of incapacitation was 80%, and the issue of inflation from 2009 must be considered in the award. Doing the best in the circumstances I am satisfied that Kshs.500,000/= for future medical expenses would be reasonable and adequate.”

19. From the court's view though without a medical mind, the type of plastic and reconstructive surgeries recommended would require more than just the Kshs.500,000/=.

Taking all the circumstances, past and present complaints, of the appellant, I am persuaded to enhance the future medical costs to Kshs.2,500,000/=.

20. For the above reasons I allow the appeal, but due to the peculiar circumstances and upon my discretion make an order that each party bears own costs of the appeal.

Dated, signed and delivered this 4th day of October 2018.

J.N.MULWA

JUDGE