



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 22 OF 2015

LELI CHAKA NDOROPLAINTIFF/APPELLANT

VERSUS

MAREE AHMED1ST DEFENDANT/RESPONDENT

S.M. LARDHI2ND DEFENDANT/RESPONDENT

(Being an appeal from the judgement delivered by Hon. Juma, Resident Magistrate on the 8th day of April, 2015)

JUDGEMENT

The appellant was involved in a road traffic accident on 1.4.2012. The trial court awarded him general damages of Kshs.600,000/=. Liability was agreed by consent at 90% against the respondent and 10% against the appellant. The appellant had pleaded for a claim of Kshs.627,096/= as special damages for treatment and drugs but that claim was dismissed. It is that decision which triggered this appeal.

The grounds of appeal are that: -

- a) **The learned trial magistrate erred in law and in fact in failing to appreciate the evidence on special damages on treatment and drugs and thereby arrived at the wrong conclusion in law and in fact.**
- b) **The learned trial magistrate failed to consider and adequately make a finding on the plaintiff's submissions on the point of his cover with his employer, the quoted authorities and authors and thereby failed to arrive at a just and proper decision.**
- c) **The learned trial magistrate erred in law in failing to appreciate the fact that failure to award the special damages merely because they were paid for by the plaintiff's insurer amounted to benefiting the defendant, a tortfeasor whereas such benefit should only accrue to the plaintiff and not any other party. The learned magistrate's finding thereby went against the law and public policy.**

Counsel for the appellant submitted that the trial court misapplied the law by dismissing the claim for special damages. The appellant did prove that the amount was actually incurred. Even the respondent concedes that the amount was paid to Aga Khan hospital. The dismissal of the claim was based on the allegation that the appellant would be double compensated. The evidence shows that the appellant took

an insurance policy with Resolution Health Company and it is that company which paid part of the special damages. The appellant paid the premiums to the insurer and settled part of the bills.

It is submitted that the doctrine of subrogation does not apply to accident claims. Counsel for the appellant provided several authorities on that issue before the trial court but they were not considered. The principle of subrogation applies only to contract of indemnity and personal injury claims are not contracts of indemnity. Counsel relies on the authority of three text books namely: -

1. The General Principles of Insurance Law, 6th Edition by Er Hardy Ivamy

2. Birds Modern Insurance Law, 7th Edition by John Birds.

3. The Law of Insurance, 4th edition Raoul Colinvaux 4th Edition.

It is stated in the above books that a personal injury claim is not a contract of indemnity. Counsel relies on the case of **THEOBALD V RAILWAY PASSENGERS ASSURANCE CO. (1854) 10 Exch 45 at 53** where the court observed as follows: -

“This is not a contract of Indemnity, because a person cannot be indemnified for loss of life, as he can in the case of a house or ship.”

It is also submitted that the principle of double compensation is not applicable under personal injury claims. In accident claims the plaintiff suffers physical injury which cannot be compensated like material things. The appellant paid premiums in a bid to protect himself from injuries. If the amount claimed is paid to Resolution Health Company, then that company would be double compensated for having received the premiums as well as the damages. Counsel relies on the case of **GEORGE WHITE VS JUBITZ CORPORATION Supreme Court of the State of Oregon (2009)**. In that case the court stated the following: -

“Damages cannot be reduced by an amount which the plaintiff may have received from third parties, acting independently of the defendant, though it is given to the plaintiff on account of the injury. For it is given as a pure gift, not intended by the giver to be in lieu of damages, or else it is given in performance of a contract, the consideration of which was furnished by the plaintiff. In neither case has the defendant any equitable or legal claim to share the benefit...”

Similarly, counsel relies on the case of **REINAN VS PACIFIC MOTOR TRUCKING COMPANY** which is cited in the above authority. The court in that case stated as follows: -

The term “double recovery” implies that a plaintiff has received and will retain the same remuneration from two outside sources – the defendant and a third-party benefit provider – to compensate for a single harm. However, rarely will that assumption prove entirely accurate. A plaintiff who receives life or medical insurance benefits from a third-party provider generally will have paid premiums for those benefits or will have earned them as compensation for employment. Similarly, a plaintiff who receives retirement benefits, whether from a private corporation or a government program, generally will have earned or invested those funds. In addition, there are many instances in which the third-party benefit provider retains a right of subrogation for any tort award that beneficiaries recover. As a result, the collateral benefits paid by a third party may only reimburse the plaintiff for his or her prior labor or investment or may be returned to that third party. See, e.g., ORS 742.538 (providing insurers with right to subrogate insured’s proceeds in tort actions); William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 252 (1987) (noting that plaintiff who recovers insurance benefits and damages from defendant does not receive double recovery because “the plaintiff paid for the benefit in his insurance premium”).

The trial court was of the view that the insurance company which paid the bills of the appellant’s

employer should be the one to claim the special damages. Counsel submit that that would amount to double compensation as the premiums were paid by the appellant.

Counsel for the respondent opposed the appeal. He submitted that the hospital bills were paid by Resolution Health Company. It is that company which is entitled to claim that amount under the doctrine of subrogation. The appellant did not tender any evidence to prove that he personally paid for the treatment and drugs. According to counsel for the respondent the issues raised by the appeal are whether the doctrine of subrogation is applicable to personal injury claims and whether a claim by a plaintiff against a defendant of any sums that are advanced by a third party (insurer) would amount to double compensation and or unjust enrichment. Counsel is of the view that subrogation is applicable to personal injury claims and the party that ought to claim the amount is the insurance company. Counsel relies on the case of **PITTY GATHIGIA BAARU & ANOTHER VS KENYA BUS SERVICES & ANOTHER, HCC 154 OF 1999**. In that case Ang'awa J observed as follows: -

“In the above claim, the plaintiff informed the court that she was employed as a clerk with the Kenya Power and Lighting Company. That at the time of the accident her bill was fully paid by the employer. She is therefore not permitted to come to court to claim this sum as it would amount to double enrichment. It is also noted that the defendant can only pay this claim if the employer or insurance company claims a subrogation claim in the name of the plaintiff. They therefore require to attend court as witnesses to indicate that the sum has been paid. At times, employers would deduct the sums paid from an employee’s salary.

Counsel for the respondent submit that the respondent can only settle the claim for special damages if the insurance company or the appellant’s employer files a claim for subrogation in the appellant’s name. There is no evidence that some money was deducted from the appellant’s salary by the employer. Premiums paid by a policy holder are generally not recoverable by the policy holders.

This is a first appeal and the court is required to evaluate the evidence afresh and make its own conclusion. The dispute herein is purely a legal one relating to the issue of subrogation and double compensation. The appellant testified that he works for Kwale County Government as a revenue collector. He was involved in accident and was hospitalized for six days at Aga Khan hospital. There was a hospital bill of Kshs.628,096/=. His insurance company, Resolution Health, paid that amount and a letter to that effect was produced. According to the appellant, he personally paid some monies towards the bill. It is his evidence that not all employees at his place of work have an insurance cover. The doctor who treated him also told him that he would require Kshs.300,000/= to remove implants.

PW2 HALIMA SAID MAGONGO was an accountant with Kwale County Government. She testified that the appellant was admitted at the Aga Khan hospital. There was a bill in the sum of Kshs.542,196/= that was paid by Resolution Health Insurance Company which had insured the employees. The total bill was Kshs.628,096/=. The bill was partly paid by the County Government and partly by the appellant. Resolution Health also paid the bill. It is also her evidence that premiums are paid for all staff. The premiums depend on the rank of the staff. The appellant had a maximum insurance cover of Kshs.250,000/=. Any higher amount would be deducted from his salary.

The issues being raised in this appeal are: -

- i. Whether the doctrine of subrogation applies to personal accident claims.**
- ii. Whether the appellant will be double compensated should the appeal be allowed.**

The principle of subrogation applies where there is a contract of insurance. If the “insured risk” takes effect and the insurer settles the insured’s claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the compensation is not more than what has been paid to the insured.

Subrogation therefore presupposes the existence of an insurance contract. In this case, the appellant seems to have had an accident policy with Resolution Health Insurance Company. According to his workmate, PW2, the premiums were paid by the employer and they are recovered from the salary. The appellant was entitled to a maximum compensation for Kshs.250,000/=. The compensation depends on one's rank at the place of work.

Counsel for the appellant maintains that the principle of subrogation does not apply to personal accident claims or life policy. On the other hand, counsel for the respondent contends that subrogation applies to personal accident claims. I have read the authorities provided by the appellant's counsel. It is established that subrogation does not extend to personal accident claims. I do entirely agree with this view as the opposite would be to allow negligent tortfeasors go scot free only because their victims were careful enough to take up personal accident policies.

In **“General Principles of Law”** 6th edition (E.R. Hardy Ivamy”, the author states as follows at page 493:

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“In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of “subrogation’ are entitled dot be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance.

Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity.”

In **“Bird’s Modern Insurance Law”** (7th edition) – JOHN BIRDS, the author states as follows in chapter 15 under **“subrogation”**: -

“This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer’s right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The “fundamental rule Of insurance law” is “that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified”. A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points:- subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance.

I am persuaded by the decision in **REINAN V PACIFIC MOTOR TRUCKING COMPANY (supra)**. The respondent herein should not be seen to benefit from arrangements between the appellant and 3rd parties. What would have been the case had the appellant not taken the policy. The respondent’s position is that it can pay the hospital bills but the money should be claimed by Resolution Health Insurance Company. That is not logical. I do agree that the respondent’s liability is not dependent on the appellant’s wise decision to take up an accident or medical cover. The respondents are simply liable due to the negligence on their part. The respondents cannot take the place of Resolution Health Insurance Company as they are not parties to the existing arrangement between the appellant and his insurer. It is up to Resolution Health to decide on its arrangement with the appellant. Since subrogation does not apply to personal accident claims, even Resolution Health Company cannot lodge a claim for any refund against the appellant in the event that the respondent settles the special damages. The respondents are 100% liable to the damages and loss suffered by the appellant. The arrangements between the appellant and third parties cannot benefit the respondents. If that were to happen, then any tortfeasor in an accident

claim will be sniffing around to find out whether the accident victim was insured. Resolution Health could have paid the bill but that payment was made as a result of the premiums paid by the appellant. The appellant could have as well kept quiet about the payment by his insurer as ordinarily the hospital receipt would have been issued in his name.

My finding on this issue is that personal accident claims are not affected by the doctrine of subrogation. The doctrine of subrogation applies to indemnity insurance claims. In cases of indemnity, the insured loss is premeditated and can be computed upto the last cent. In personal accident claims, one cannot compute the extent of the suffered injuries. A lost limb cannot be replaced by an artificial one irrespective of the latter's costs. If an accident victim can recover payment out of a personal accident policy, that is an added advantage which should not benefit the tortfeasor.

With regard to the issue of double payment, I am satisfied that the recovery of the special damages from the respondents would not amount to double payment. Assuming the respondents came to know about the settlement of the bills after they had paid the appellant, could the respondents claim the money from the appellant or his insurer. My answer to this is "No". This is because the respondents are not party to that arrangement between the appellant and his insurer. The respondents are simply liable to satisfy the amount of damages suffered by the appellant. This does not amount to double compensation.

In the case of **GEORGE WHITE V JUBITS CORPORATION (supra)**, it was observed: -

"The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the the tortfeasor."

"The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a "double recovery." The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits."

I do find that the trial court erred in law by not awarding the sum of Kshs.627,096/= which amount was pleaded for in the plaint. The respondents are liable to pay that amount. There is no dispute that the hospital bill amounted to the sum of Kshs.627,096/= The only issue was that it was payable to Resolution Health Insurance Company who settled the bill. I do find that that argument does not apply in personal accident claims. The doctrine of subrogation does not apply to personal accident claims.

In the end, I do find that the appeal is merited and is hereby allowed. The appellant is awarded the sum of ksh. 627,096 as special damage plus interest and costs on that amount. Each party shall meet the costs of the appeal.

Dated and delivered in Malindi this 22nd day of February, 2017.

S.J. CHITEMBWE

JUDGE