



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 96 of 1996

RAYMOND WOLLEN MILLS.....PLAINTIFF

versus

KATE MOKI MOKI.....DEFENDANT

JUDGMENT

The respondent sued the appellant in the lower court seeking damages both special and general for injuries sustained in an accident while at his place of work with the defendant and which accident occurred as a result of the breach of contract and duty to him and also due to negligence whose particulars he gave. The defendant applicant filed a defence denying the allegations in the plaint, denied that there was breach of duty or contract between them, denied that an accident occurred as alleged, that if any accident occurred which is denied then the same was occasioned by negligence on the part of the defendant and gave particulars of negligence relied upon by them. The matter was heard in the lower court and the lower court made findings that the respondent was an employee of the defendant appellant and that he got injured while on duty as shown by the defendant's decisions to pay him, workmans compensation of Kshs 16,540,500 evidenced on record by exhibit 2. That no evidence has been adduced to support the defendant's defence that the plaintiff respondent was negligent, the defendant has not done anything to counter the plaintiffs evidence and found the plaintiffs case proved on a balance of probability. He found the defendants wholly to blame for the injury. He observed that both doctors agreed that the plaintiff suffered a corneal perforation with the resultant traumatic cataract which has rendered the plaintiff mono eyed in sighting which was a devastating injury. He assessed general damages at Kshs 270,000/- less workmans compensation of Kshs 16,540/50 leaving a balance of Kshs 253,450.00 plus costs and interest. There was an order for special damages of Kshs 1,500.00.

Being aggrieved with that order the appellant appealed to this court citing 4 grounds of appeal namely that the learned senior Resident Magistrate erred in law and in fact in failing to find that the plaintiff contributed to the said accident and thereby arrived at an erroneous decision on liability, erred in law and fact in failing to consider relevant and authoritative decision on quantum and thereby awarded a manifestly excessive and unreasonable general damages, erred in law and in fact in awarding general damages that were in the circumstances excessive, erred in law and in fact in allowing the plaintiffs claim which was time barred and which offended the provisions of the Limitations of Actions Act.

In his submission in court counsel for the appellant reiterated his grounds of appeal and stressed the following points.

(1) That since he pleaded that the plaint was filed out of time the plaintiff should have adduced evidence to show that he had obtained leave to file the suit out of time, the fact that this was not raised at the time

of trial notwithstanding.

(2) That the injury was to the left eye which had healed and he had not lost sight of that eye.

(3) The award was excessive as the learned magistrate relied on authorities cited by the plaintiff where the injuries were more serious than those sustained by the plaintiff herein as the victim in the cited cases had lost vision on one eye and so an award of 270,000/- was excessive.

Counsel for the respondent on the other hand opposed the appeal on the following grounds:

(1) That they obtained leave before filing the suit and the appellants did not by either evidence submissions or even cross examination challenge that averment.

(2) That raising the issue of limitation is a new ground which was not canvassed in the lower court and which cannot be raised on appeal.

(3) That on the issue of quantum the award should not be interfered with as the two medical reports agreed that the injury was serious and that the respondent had lost vision on that eye, that the authorities cited were relevant as they were recent and related to loss of sight in one eye. That the damages were adequate and they should not be interfered with.

In reply counsel for the appellant stated that the issue of limitation is a matter of jurisdiction which can be raised at any stage of the proceedings even on appeal.

I have re-evaluated the evidence adduced before the lower court in the light of the grounds of appeal. The first complaint relates to the issue of Limitation of Actions Act. It is alleged that the suit was filed out of time. Indeed it was pleaded by the plaintiff that the suit was filed out of time but with leave. Indeed no evidence was adduced on this at the time of trial. The appellant contends that this is a point of law which can be raised at any stage of the proceedings even on appeal. That may be so but as submitted by the respondents counsel it was pleaded in the plaint and if the appellants wanted to pursue it they should have raised it in the lower court so that the lower court can rule on it. Since it was not ruled upon and if allowed to stand it will amount to introducing new matters without leave being sought to do so as the learned magistrate never ruled on it. But being a point of law this court can rule on it. In my opinion having given the particulars of the file where leave was sought if the appellant defendant was not satisfied with that he should have sought particulars and called for evidence in cross examination. Since they did not do that it is assumed they were satisfied with the particulars given. They cannot raise it now as this court cannot call for that evidence on appeal. I find that liability was well established as found by the trial magistrate that there is no denial that the respondent was an employee of the appellant and he was injured on duty and was paid workmans compensation. I therefore find that liability was well established.

As for quantum the principles this court has to bear in mind is that an appellate court can only interfere with an award of damages if the same is inordinately too high or inordinately too low, excessive, based on erroneous principles, failed to consider relevant matters or took into account irrelevant matters. Herein the learned trial magistrate considered the two medical reports and the authorities. The first report was by Dr Odede. It was made on 2.8.94. The doctors impression was that the corneal perforation has left a permanent linear scar on his cornea. The traumatic cataract followed the injury to his lens rendering the eye blind and necessitating a need for surgery. This was done with a reasonable good result, that the victim was unable to do his duties requiring binocular single vision. The use of two eyes at the same time and ought to be restricted to duties not requiring a single visual acuity.

The 2nd report by professor HS Adala is dated 1.11.95. In his opinion the patient had perforating eye injury with subsequent post traumatic cataract. The cornea was repaired and the lens removed. Loss of lens attracts compensating of 20% and since in addition he had a corneal scar he recommended a total compensation of 21st.

The respondents counsel referred to the case of Mwan Juma Ali versus Nairobi Bus Union Nairobi HCCC

No 369/87.

Where the plaintiff sustained bruises on the head, nose, right side of the face, front left side of the chest, abdomen, lower back plus perforation of the left eye. The medical reports described the injuries as perforation of the left eye with resultant cataract and soft tissue. It was concluded that as a whole the residual factors are in form of scars with no interference with function serve for the eye that has lost visibility. Permanent disability is due to reduced vision. General damages were assessed at Kshs 300,000.00.

The case of Clara Nyaruma Oketch versus Akamba Bus Service Nairobi HCCC No 3506/85 where the plaintiff suffered soft tissue injuries and perforation of the left eye described by the doctors as severe and permanent. The scars were also described as unsightly and embarrassing to a young lady. The court assessed general damages as Kshs 250,000/-.

The defence referred to the case of Njange Mwamata versus KPA Mombasa HCCC No 383/86 where the plaintiff a retired worker with the defendants suffered injury to one of the eye sight due to entry of a foreign body. The eye started itching and swelling. He saw an eye specialist who advised for the removal of the eye ball resulting in total loss of the eye sight. The court awarded Kshs 100,000.00 as general damages.

The case of Samuel Were versus Lint Marketing Board Uganda Ltd Mombasa HCCC No 44/87 where the plaintiff who was a labourer aged about 30 years at the time of the accident suffered a blunt injury to the right eye causing damage to the muscular optic nerve and Iris leading to atrophy and formatic mydriasis. The injury resulted with almost total loss of visions in the right eye. The only visions left being head movements close to the eye, eye ball was however intact movement responded slight. There was no visible disfigurement. The court awarded general damages at Kshs 120,000.00.

Considering the authorities cited to the lower court I find that they were all relevant to this case save that those cited by the plaintiff while those had more serious injuries cited by the defence were slightly less serious injuries. Those cited by the plaintiff had some other soft tissue injuries in addition hence the higher awards. As for those cited by the defence they relate to similar injury save that they are old and the learned trial magistrate was entitled to take into consideration an element of inflation and the reduction of the value of the Kenyan shillings.

When all the relevant circumstances are taken into consideration in totality I find that the assessment was coacit considering the fact that the injury was permanent, had affected the lifestyle of the plaintiff respondent forcing him to retire prematurely on medical grounds.

The appeal is therefore dismissed on its entirety with costs to the respondent both on appeal and the court below.

Dated at Eldoret this 24th day of June 1999.

Read and delivered at Eldoret this 22nd day of June 1999.

R. NAMBUYE

JUDGE