



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 192 of 1994

**MOUNT KENYA SAFARI CLUB LIMITED.....
.....APPELLANT**

AND

DONALD JENKINS.....RESPONDENT

(Appeal from a decree of the High Court of Kenya at Nairobi (The Honourable The

Chief Justice Mr. A. R. W. Hancox) dated 14th December, 1992

IN

H.C.C.C. NO. 4989 OF 1987)

JUDGMENT OF THE COURT

When this appeal came up for hearing on 9th December, 1996, out of its six grounds of appeal, the appellant abandoned ground 5 and combined grounds 1 and 2, as one set of grounds of appeal and grounds 3, 4 and 6 as the other set of the grounds of appeal. The two sets were then argued separately.

Concerning the first set of its grounds of appeal, counsel for the appellant, Mr. Billing, submitted that the award of general damages by the learned Chief Justice to the respondent of the equivalent in Kenya Shillings of 60,000 U.S. dollars for pain, suffering and loss of amenities was excessive in the circumstances of the case before him besides its being wrong in law as it was expressed in foreign currency. According to counsel, the proper award to the respondent in this regard should have been in the region of K.Shs.150,000/- considering the recent relevant local authorities.

Regarding the second set of the appellant's grounds of appeal, Mr. Billing submitted that the award to the respondent by the learned Chief Justice of the equivalent in Kenya Shillings of 96,286.30 U.S. dollars was unjustifiable considering that the dislocation of the respondent's left shoulder joint in the first accident at the appellant's swimming pool had caused him minimum disability and should have hampered him in the pursuit of his career. According to Mr. Billing, only about one per cent of the respondent's loss of earning could have been attributed to this injury the rest being attributed to his leg and spinal injuries sustained in the subsequent aircraft accident. Besides, the respondent was, in regard to the dislocation of his left shoulder joint, guilty of failure to mitigate his damages and was in any event right-

handed with the result that that injury did not appear to have had any effect on his work, Mr. Billing concluded.

In the upshot, the appellant's complaint before us was that the award of damages to the respondent by the learned trial judge was unreasonably high to merit interference on appeal by this Court.

To the appellant's appeal, the respondent cross-appealed seeking variation of the decision of the superior court by increasing the award of damages to such figures as this Court may deem fit on the grounds that:

- “1. The learned trial Judge erred in finding on the balance of probabilities that the wrist and thumb injuries, did not result from the swimming pool accident.
2. The learned trial Judge erred in finding on the balance of probabilities that none of the spinal injuries resulted from the swimming pool accident.
3. The learned trial Judge erred in not awarding General Damages for loss of future earnings.
4. The learned trial Judge erred in law by awarding special damages of U.S. dollars 96,286.30.
5. The learned Judge misdirected himself in his arithmetical calculations.”

Hence, besides opposing the appellant's appeal, counsel for the respondent, Mr. Hawkes, submitted that the respondent who was 55 years on the date of the accident-17th March 1984 -was to retire as a Management Consultation resident in Santa Fe, New Mexico, U.S.A. at the age of 65 years. For this reason, notwithstanding the award of special damages for the loss of earnings during the period between the date of the accident and the date of filing suit in the superior court – 10th March, 1987 – the respondent had about 6 years for which his loss of earnings should have been taken into account and a substantial award in the equivalent of U.S. dollars should have been made by the superior court. This, according to Mr. Hawkes, was because, from the medical evidence, the respondent's left shoulder joint dislocation was perhaps the most significant injury as the respondent claimed to have had 24 hours pain on this part of his body, 6 years after the injury, with the resultant reduction of his earning capacity. Towards this end, Mr. Hawkes concluded that the suit relating to the respondent's aircraft accident after his first accident at the appellant's swimming pool was of little help to the suit against the appellant in regard to the latter accident as the respondent's claim in the former suit was settled in 1989 before trial and had therefore no bearing in the award of damages in relation to the respondent's swimming pool accident.

The respondent, a self-employed Consultant to Accounting firms in the United States of America and Chartered Accountant firms world-wide was on 17th March, 1984 a paying visitor at the premises of the appellant at Nanyuki. At about 2.30 p.m. on that day he was at the said premises' swimming pool where he found a diving board placed about one metre above the water with a lot of spring which he thought was an excellent piece of equipment and on which he made several practice springs. He then made what he called a Jack Knife dive and hit the water vertically with his hands fully locked and straight. He hit the bottom of the swimming pool and was stunned and disorientated and was unable to move his arms and legs. He sank twice into the water while calling for help and it was only then that a 70 years old man who was at the pool side, Mr. Crossburg, jumped into the swimming pool and pulled him out of the water. According to the respondent, the swimming pool had no sign whatsoever to warn individuals that below the spring board there was only six and a half feet of water.

Having been pulled out of the water, the respondent was laid on his back by the pool side and was covered with towels. At about 4.00p.m. Dr. Samir A. Amin of Nanyuki Cottage Hospital arrived at the swimming pool and attended to the respondent. Meanwhile, a Dr. Fish who was in the same tourist group with the respondent contacted the Flying Doctor Service to ferry the respondent from Nanyuki to Nairobi Hospital.

On examining the respondent, Dr. Amin found him to be fully conscious with all observations being within the normal limits. Locally, the respondent was unable to move his left arm due to pain together with the restricted movement of the left shoulder joint. His clinical impression of the respondent's left shoulder joint was that it was dislocated with a probable tear of the shoulder joint ligaments and a fracture of the head of the humerus. Further examination of the respondent revealed no other injuries. Not even on his right hand or wrist. Dr. Amin then gave the respondent injectable analgesic to reduce the pain and immobilised his left arm to make him comfortable and advised him to be admitted at Nanyuki Cottage Hospital for X-rays with a view to making a decision if he could return the dislocated left shoulder joint or else send the respondent to a specialist if there were other injuries such as the tear of the ligaments and fracture of the head of the humerus as is indicated above. Dr. Amin also advised the respondent to postpone the rest of his tour in view of the foregoing. The respondent, however, opted to be flown to Nairobi by the Flying Doctor Service for necessary treatment. As at that point in time, the respondent appeared to have had no other injuries save the dislocation of his left shoulder joint.

The aircraft from the Flying Doctor Service was due to arrive at the appellant's Nanyuki Air strip at about 5.30p.m. and in the meantime Dr. Amin remained with and subsequently accompanied the respondent to the Air Strip. At the Air Strip, the respondent was strapped onto a fracture board which was one inch thick and was then put into the aircraft wherein the board was fixed onto the floor of the aircraft to avoid its movement. At about 6.00p.m. the aircraft took off and on reaching the end of the runway it failed to gain height and crashed into a pier. The respondent was taken out of the aircraft. He was still strapped onto the fracture board which had snapped into two. He was unstrapped and placed onto the stretcher on which he had earlier been brought to the Air Strip and was then taken to Nanyuki Cottage Hospital where he was admitted at about 8.00p.m. At all the material time, Dr. Amin was with him.

At Nanyuki Cottage Hospital, Dr. Amin examined the respondent and found that he had sustained multiple injuries in the aircraft accident which he suspected to be a fracture of the right tibia and fibula; a fracture of the right wrist joint; a fracture of the right forearm; and fractures of the vertebrae in the lower part of the back i.e. thoracic and lumbar areas above and below the waist. The dislocated left shoulder joint appeared to have reduced itself i.e. from back into the position on impact as a result of the aircraft accident. X-rays of these injuries were not taken at the Hospital but the respondent was given the necessary medication and on the following day – 18th March, 1984 – at around 9.00a.m. he was transferred to Nairobi Hospital by the Flying Doctor Service where he was to be under the care of Mr. M. A. Sheikh, a consultant Orthopaedic Surgeon at the aforesaid Hospital.

According to Dr. Amin who was with the respondent for a period of about 2 hours from 4.00 p.m. when he attended him at the appellant's pool side until his being put into the aircraft that subsequently crashed on take-off, save for the left shoulder joint injury, the respondent had sustained no other injury at the appellant's swimming pool accident. All the other injuries, according to him, were consequent to the aircraft accident including the spinal injury which in his view resulted from the fracture board on which the respondent was strapped snapping upwards thereby hyper-extending the spinal cord with the resultant impact cracking the vertebrae. Mr. M. A. Sheikh who saw and treated the respondent on his admission at Nairobi Hospital on 18th March, 1984 was of the view that in apportioning the injuries from the accident at the appellant's swimming pool and from the aircraft accident, Dr. Amin was the only medical person who had the advantage of seeing the respondent after each one of them and was therefore in a more advantageous position in this regard than any other medical authority. This view appears to have carried favour with Mr. Andrew Hicks, F.R.C.S., a Consultant Surgeon at Nairobi Hospital. Thus, following radiological appraisal on admission at Nairobi Hospital, the respondent's left shoulder joint dislocation was not evident and there appears to have been a spontaneous reduction of the same. The respondent was, however, found to have suffered multiple compression fracture of the spine (dorsal 7th, lumbar 1st, lumbar 5th); an undisplaced colles fracture of the right wrist; and a depressed lateral tibial plateau fracture of the right knee. For the latter injury, the respondent underwent an operation of surgical elevation and reconstruction and a padded cylinder knee plaster of Paris was applied. The plaster cast was changed on 31st March, 1984 and it was planned to remove it in mid - April, 1984 and mobilise the knee joint on non-weight bearing with the help of crutches. Full weight bearing was to be allowed 12

weeks following operation date. On his own request, however, the respondent was discharged from Nairobi Hospital to the United States of America on 6th April, 1984 when he was sufficiently mobile to use a wheel chair.

In the United States, the respondent saw Dr. William K. Jones on 10th April, 1984 over the injuries he had sustained in the two accidents referred to above and it would appear that the depressed lateral tibial plateau fracture of his right knee continued to give him trouble despite treatment at Nairobi Hospital. This led to his subsequent admission to Lovelace Medical Centre, Albuquerque, New Mexico, U.S.A. on 7th October, 1984 under the care of Dr. Robert S. Turner of the Centre's Department of Orthopaedic Surgery for his right knee condylar replacement which was done one day after his admission. Admission diagnosis of this knee had revealed:

1. Status post right lateral plateau fracture with open reduction, bone grafting and internal fixation – malunion.
2. Right knee lateral instability post fracture and anterolateral rotary instability due to anterior cruciate ligament insufficiency.”

The respondent was discharged from the above mentioned medical centre on 13th October, 1984 and was given a return appointment for the 23rd of the same month for suture removal which was done on the said date. Thereafter he regularly continued with physical therapy at the Santa Fe Physical Therapy Department using othotron and Cybex equipment and by 19th June, 1989 his right knee was stable with the prosthetic components remaining well positioned, well seated and with no evidence of any loosening. Of all the injuries that the respondent sustained in the two accidents referred to above, it would appear that the right knee injury was the most bothersome and therefore a source of prolonged problem to him.

The respondent's injury to his left shoulder joint does not appear to have attracted much attention after the aircraft accident. It was first mentioned as a source of problem to the respondent when Dr. William K. Jones first saw him at his surgery on 10th April, 1984. This doctor's remark in this regard was that the respondent had a very bothersome left shoulder malfunction in that he had yet to regain evidence of function of its external rotators. When he saw the respondent again on 13th July, 1984, he observed that the respondent did not have evidence of return of external rotators of his left shoulder and that that was a very aggravating and frustrating disability during simple daily activities of raising one's arm. According to this doctor therefore, there was a possibility that surgery would be necessary for the rearrangement of the musculature in the respondent's left shoulder so as to provide him with some form of adequate external rotation power.

Dr. Robert S. Turner who first saw the respondent on 14th September, 1984, medically examined him and reviewed his previous X-rays and tomogram, observed that the respondent did appear to have had the left shoulder cuff tear and had crepitation with movement. Whereas the respondent was able to reach overhead when moving his left arm forward, he was unable to do any heavy lifting with the shoulder. According to Dr. Turner, the respondent's left shoulder cuff injury was by history associated with dislocation. When he saw the respondent again on 31st January, 1985 he noted that the latter had maintained good mobility at the left shoulder but was unable to lift objects well with the upper extremity abductor at approximately 30 degrees to 40 degrees. Dr. Turner discussed with the respondent the possibility of repair of his left shoulder cuff in the future but as on 10th October, 1985 when he saw him again, the latter did not indicate any desire for reconstructive left shoulder surgery. An evaluation by Dr. Turner on 19th June, 1989 of the X-rays to the respondent's left shoulder revealed a very friable bone ossicle at the shoulder joint area that appeared to be approximately 22mm. in length and up to 15 mm in width. The humerus head rode high which was typical of a shoulder cuff tear. Eventually the respondent submitted to the surgery of his left shoulder which was performed by Dr. Turner on 6th August, 1990 and the shoulder cuff tears were repaired together with the excision of the supraspinatus region bone ossicle. Thereafter, the respondent was required to undergo extensive physical therapy in order to regain mobility and strength of this shoulder. Owing to the inability to do active outward rotation from the neutral

position with the elbow at the side or when lying supine and the impediment of having to abduct approximately 30 degrees in order to raise the left arm overhead, the respondent, according to Dr. Turner, had suffered twenty five per cent permanent physical impairment of his left shoulder.

The respondent functioned as a professional corporation providing consulting services to certified public and chartered accounting firms as earlier stated in this judgment and was the sole share holder of the corporation. According to him, the injuries he sustained from the two accidents referred to in this judgment made it impossible for him to travel to his client's locations for the periods between mid-march, 1984 through to the end of November, 1984 and thereby incurred a loss of 88,000 U.S. dollars and between December, 1984 through to 30th April, 1985 whence he incurred a loss of about 30,000 U.S. dollars in fees. The respondent was to start full consulting schedule in May, 1985 but as on 30th April, 1985 he had incurred in the aggregate a loss of about 118,000 U.S. dollars as a result of the injuries referred to above. Although he was uncertain of the long term effect of these injuries on his earning capability, he was in no doubt that they would impact on his ability to travel within the United States and abroad to work with his clients and to continue lecturing in long sessions to large groups of people once he got to the client's office when he was expected to be on his feet all the time besides A. Amin held that save for the respondent's left shoulder injury which he attributed to the accident at the appellant's swimming pool, the other injuries were attributable to the aircraft accident. The learned Chief Justice therefore proceeded to assess damages to which the respondent was entitled consequent to this injury. In assessing the respondent's claim for loss of earnings, the learned Chief Justice took the respondent's total earnings before and after tax for the years 1981, 1982 and 1983 prior to the two accidents referred to in this judgment. This amounted to 349,530 U.S. dollars and gave him an average annual income of 116,510 U.S. dollars. For the years 1984/5, 1985/6 and half of 1986/87, the latter being up to the date of filing suit on 10th March, 1987, the respondent, according to the learned Chief Justice, earned a total of 134,900 U.S. dollars giving him an average of 53,960 U.S. dollars per annum. Subtracting the latter average income from the former average annual income left the respondent with 62,550 U.S. dollars as his annual loss of earnings which when multiplied by 3 years, from 17th March, 1984 – the date of the two accidents referred to in this judgment – to 10th March, 1987 – the date of filing suit in the superior court – amounted to 187,650 U.S. dollars which according to the learned Chief Justice was the respondent's total loss of earnings for that period. Besides this claim, the respondent had incurred expenditure connected with his medical treatment amounting to 4,922.61 U.S. dollars and K.shs. 21,437/-. The total special damages due to the respondent as a result of the two accidents in the appellants swimming pool and in the aircraft therefore amounted to 192,572.61 U.S. dollars and K.shs.21,437/-. Taking into account the settlement of the suit relating to the respondent's injuries in the aircraft accident which the learned Chief Justice found to have been extensive and wherein the respondent's claim for damages was identical to the suit before him, the learned Chief Justice considered it fair to take half the above sums of money as attributable to the respondent's accident in the appellant's swimming pool on 17th March, 1984. In that regard, he awarded the respondent special damages of 96,286.30 U.S dollars and K.Shs.10,718/50 and for the left shoulder injury, having received no assistance from counsel on quantum and doing the best he could, the learned Chief Justice awarded the respondent the Kenya Shillings equivalent of 60,000 U.S. dollars as general damages for pain, suffering and loss of the amenities of life. The learned Chief Justice then ordered that the decree flowing from his judgment was to be expressed in Kenya Shillings with the date of conversation being the date of delivery of his judgment, that is to say 14th December, 1992.

There can be no doubt that from the evidence available before him, the learned Chief Justice was correct in holding that only the respondent's left shoulder joint dislocation was attributable to his first accident in the appellant's swimming pool and consequent thereto proceeded to assess what damages the respondent was entitled to on account of the injury. While assessing general damages in this regard, the learned Chief Justice said:

“What of the general damages for the shoulder, including loss of the amenities of life, pain and suffering over 6 years, a subsequent operation and 25% residual disability, which for an active and sporting man as Mr.Jenkins was, I regard as a serious interference with his enjoyment of the remainder of his existence?”

I have received no assistance from counsel on quantum, and, doing the best I can, plucking a figure from the air as Law, J.A. has said, I award Mr. Jenkins the shillings equivalent of 60,000 U.S. dollars for general damages in this case.”

Besides what the learned Chief Justice said, the respondent’s evidence in regard to this injury was that it had considerable effect on his life as he could not lift any object which was over 20 pounds and could not engage in any sport or physical work around his farm. Indeed, in his post-operation report dated 13th February, 1991 in regard to the injury in question, Dr. Robert S. Turner concluded by saying about the respondent in relation to his left arm that:

“There are times when he will hold objects in front of himself and he will have a sudden loss of strength and the object will have to be dropped. This may well change in the future, but he has still been troubled with this happening, even as recently as last week.”

and according to this doctor, the twenty five per cent permanent impairment of the respondent’s left shoulder appeared to have been related to neurologic type of injury to the muscles that occurred at the time of the original accident. With these facts before the learned Chief Justice and in the absence of assistance from counsel on quantum, the award to the respondent of the shillings equivalent of 60,000 U.S. dollars may or may not have been so inordinately high that it was a wholly erroneous estimate of the damages to merit interference by this Court.

Concerning the award to the respondent of half the total of 192,572.61 U.S. dollars and K shs. 21,437/- as special damages arising from the injuries sustained by him in the appellant’s swimming pool and in the subsequent aircraft accident, it is evident from the medical reports tendered in evidence in the superior court that the dominant injuries in regard to this head of damages were those that the respondent sustained in the aircraft accident. Indeed, the learned Chief Justice was alive to this fact for while awarding to the respondent the special damages referred to above, he brought to bear his finding that extensive injuries had been sustained by the respondent in the aircraft accident. Having this in mind, we think that the respondent’s entitlement to special damages should not have been apportioned equally in respect of the injuries sustained by him in the two separate accidents referred to in this judgment. Considering that the respondent was right-handed, the injury to his left shoulder in the appellant’s swimming pool accident should have attracted one-third of the total amount of special damages arising from the injuries he sustained in the two accidents referred mentioned above. In not taking the foregoing into account, we think that the learned Chief Justice slipped in the apportionment of special damages to the two respective accidents and for that reason we would appropriately interfere with his award of special damages to the respondent to the extent that out of 192,572.61 U.S. dollars and K.Shs.21,437/- special damages arising from the respondent’s injuries in the two accidents to above the respondent will now have one third of the same for the injury to his left shoulder in the appellant’s swimming pool accident instead of one half of the said special damages. This will now be 64,190.87 U.S. dollars instead of 96,286.30 U.S. dollars and K. Shs.7,145/65 instead of K. Shs.10,718/50.

What now remains is whether or not the learned Chief Justice was wrong in not awarding the respondent general damages for loss of future earnings as is complained of in the respondent’s cross-appeal. At the hearing of the respondent’s suit against the appellant in the superior court, no evidence was led in regard to the long term effect of the respondent’s left shoulder injury on his earning capability. Indeed, no submission was made in respect of his loss of future earnings on account of the said injury. It was therefore not to be expected that the trial judge would have awarded damages in connection therewith in vacuo. The learned Chief Justice cannot therefore be faulted for not awarding to the respondent general damages for loss of future earnings when the same was never canvassed at the hearing of the respondent’s suit against the appellant.

Consequently, save for the variation in the award of special damages as is set out above, the decision of the superior court cannot otherwise be criticised and to that limited extent only we allow the appellant’s appeal with one quarter of the costs of the said appeal and dismiss the respondent’s cross-appeal with costs to the appellant.

Dated and delivered at Nairobi this 21st day of March, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL