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

Civil Appeal 48 of 1996

MARY MUKIRI…….....……
APPELLANT

AND

NJOROGE KIANIA…….....……
RESPONDENT

(Appeal from the judgement and Decree of the High Court of Kenya at Nairobi (Mr. Justice Joseph Butler-Sloss) dated 10th day of May, 1989

IN

H.C.C.C. NO. 61 OF 1987

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JUDGMENT OF THE COURT

This appeal arises out of the judgment and decree of the superior court (Butler-Sloss J.) by which Mary Mukiri (the appellant) was awarded a sum of Shs. 200,000/= as general damages for pain, suffering and loss of amenities for injuries she sustained as a result of a traffic accident which occurred on 18th January, 1984 involving the appellant and motor vehicle registration number KLZ 215, either owned or driven by Njoroge Kiani (the respondent).

The issue of liability in negligence did not fall to be decided by the superior court as it was agreed that the respondent was to be 80% liable.

We will set out the injuries suffered by the appellant who was at the material time a 17-year old and was in form IV. She lost consciousness as a result of the accident and according to both Consultant Neurosurgeons who examined her, that is Professor Gerishon M. Sande, and Professor Renato Ruberti, she was unconscious for seven days. Professor Sande concluded, after examining her, that she suffered a severe head injury as evidenced by a history of disturbed consciousness for about two weeks. She had demonstrable post-traumatic amnesia for over seven days. The headaches and the poor memory resulting from the injuries would last for about two year. The degree of head injury pre-disposed this young lady to a significant risk of developing post-traumatic epilepsy, that is to say, a five(5) percent risk as opposed to one(1) percent for general population of her age. Professor Sande went on to say that "should she develop this complication, (epilepsy) her lifestyle would be severely compromised:- she would need drugs for at least two years". He carried out the medico-legal examination on 27th March, 1985.

On 8th March, 1986 Professor Ruberti examined her at the instance of the respondent. Professor Ruberti confirmed Professor Sande's findings to a large extent. Professor Ruberti confirmed that she had a complete right sixth nerve paralysis and partial paralysis on the right side; also an ugly scar on the face and a scar in the mid frontal area.

We would summarise the injuries and disabilities, as follows:

(a) Unconsciousness for seven days.

(b) Permanent neurological deficit with a complete sixth nerve paralysis on the right.

(c) An incomplete right seventh nerve paralysis.

(d) Hospitalization once a week for which she takes aspirin.

(e) Scar on the right side of the face in the mid frontal area.

Two years after the accident the appellant had not suffered any fits of epilepsy. Her permanent neurological deficits could have been corrected by surgery. All this amounted to three to four percent invalidity, according to Professor Ruberti. According to Professor Sande she would have to be on expensive drugs, should she develop post-traumatic epilepsy which fortunately she appears not to have developed as there was no evidence of any epileptic fits as at the date of trial, that is, 10th April, 1989. If she had so suffered, she would have told the learned judge. She did not.

Special damages claimed by the appellant were not specified in plaint. Nor was an application made to amend the plaint to include the special damages as quantified. Special damages in addition to being pleaded must be strictly proved. As this was not done, Mr. Billing was quite right in abandoning the second ground of appeal.

Therefore the loss of earnings, or earning capacity (which was also not pleaded) does not fall for decision by us. See Kenya Bus Services vs. Mayende (1992) 2 KAR 232. Also see Idi Ayub Shabani v City Council of Nairobi (1985) 1 KAR 681 at 684; and Ouma vs Nairobi City Council [1976] KLR at 297 at page 304. In any event we do not think the appellant proved her loss of earnings or earning capacity with any certainty as to entitle her to an award under that head of damages.

Mr. Billing urged us to award a sum of Shs. 50,000/= for future medical care and treatment on the basis of what Professor Ruberti said in his medical report. But, unfortunately, no evidence was called in this regard to prove what the cost of such future medical care and treatment would be. Nor was it pleaded. We cannot therefore make any award under that head.

We revert to the injuries suffered by the appellant. She would have to live all her life with the ugly scars and a face which is not symmetrical. Unless corrected by surgery she will have a permanent neurological deficit with a complete sixth nerve paralysis on the right and an incomplete right seventh nerve paralysis.

The principles upon which this court will interfere with the award of damages are well settled. Kneller JA, as he then was, put it thus in the case of Robert Msioki Kitavi vs Coastal Bottles Limited (1985) 1 KAR 891 at 895

"The Court of Appeal in Kenya, then, should as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account, or the award is so high or so low that it amounts to an erroneous estimate. Singh v Singh & Handa (1955) 22 EACA 125, 129; Butt v Khan (1977) 1 KAR 1"

The learned judge when considering the issue of general damages for pain and suffering directed his

mind more to the scars the appellant bore as being a source of embarrassment to her, but unfortunately he overlooked considering the overall effect of the injuries suffered by her. After discounting her claim for loss of earnings the learned judge said:

"As regards the claim for general damages for pain and suffering, I accept that the scars the plaintiff bears in her face are a source of embarrassment to her. In a man, they might carry a kind of toughness or even heroism, but they can be of no advantage whatever to a young, single woman. It also expected that a further surgery will be necessary. Under this heading, damages in the sum of Shs. 200,000/= are appropriate."

What the learned judge did not take into account was facial asymmetry as a result of weakness of the right facial nerve. He also did not take into account recurrent episodes of headaches especially severe in hot sun. The learned judge made short shrift of deterioration in her school performance, which Professor Sande related to the accident. Here is where, in our view, the learned judge erred. Had he considered these aspects carefully he would have awarded a sum in excess of what he did.

Mr. Billing suggested that a figure of Shs. 250,000/= instead of Shs. 200,000/= general damages for such injuries would be appropriate. Of course what counsel suggest is not binding on us. We must make our own evaluation of damages. We think the learned judge erred in principle in not considering the facial asymmetry, recurrent episodes of headache and decline in her school performance, which are all substantial factors to be considered. We take cognisance of the fact that damages ought to compensate the injured and not punish the tort-feasor and considering the fact that damages we award now will carry interest from the date of assessment in the superior court and also that the damages were assessed in 1989, we would substitute a figure of Shs. 275,000/= in place of Shs.200,000/=. In so doing we must say we are guided by Kenyan conditions. Injuries as in this case would qualify for a much higher award in the first world jurisdictions. An award of Sh. 50,000/= in 1970 Akwiri vs Kilembe Mines Ltd. (1970) E.A.498, referred to by the defendant's counsel in the superior court, would 20 years later certainly qualify for an award of Shs. 275,000/=. But Akwiri case is not the only one we would be guided by. In the oft-quoted case of Njoroge Gakire & Another v. Abercrombie & Kent Ltd. H. C. C. C. No. 3684 of 1979 (unreported), for cerebral concussion, a large laceration of the scalp, lacerations on the face, abrasion of the right wrist, bruises on the chest and left foot, unconsciousness for four days, post-concussion syndrome including inability to hear properly, some more than 20 years ago, the award was Shs. 120,000/=. This case was cited to the superior court by the respondent's counsel.

The upshot of all this is that his appeal is allowed to the extent that the general damages for pain, suffering and loss of amenities are increased to Shs. 275,000/=. There will therefore be substituted for the superior court judgement, a judgement for the appellant, in the sum of Shs. 220,840/80 with interest thereon at twelve (12) percentum per annum from the 10th day of May, 1989 until date of payment in full. The appellant has succeeded to a certain extent and hence will have one-half the cost of this appeal. The order in the superior court remains undisturbed.

We think we ought to make some parting remarks. In the superior court Mr. Billing made oral submissions on quantum of damages. Mr. Kihara for the respondent (defendant then) put in written submissions to which Mr. Billing was not given a chance to respond. We must discourage the growing practice in the superior court of written submissions. When does a judge get the chance to ask 'questions' to "written submissions"? In many cases written submissions are filed simultaneously by both sides in total disregard of the mandatory requirements of order XVII rule 2(3) of the Civil Procedure Rules. We sincerely hope this practice will cease. After all the job of an advocated is to convince the judge of the correctness of his cause by oral arguments and not cold-print notes.

Dated and delivered at Nairobi this 30th day of April, 1997.

R.O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL