



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 147 of 1994

1. SALIM S. ZEIN t/a “EASTERN BUS SERVICE”)

**2. MUSANGO EUULE LELE.....
....APPELLANTS**

AND

**ROSE MULEE MUTUA.....
.....RESPONDENT**

(Appeal from the judgment of the High Court of Kenya at Machakos (Honourable

Justice J.L. A. Osiemo) dated 23rd February 1994

IN

CIVIL CASE NO. 3398 OF 1988)

JUDGEMENT OF THE COURT

Rose Mulee Mutua (hereinafter called “the plaintiff”) sued Salim Zein t/a “Eastern Bus Service” and Musango Lole (hereinafter called “the first defendant” and “the second defendant” respectively), in the superior court, to recover damages for personal injuries she sustained on 4th June, 1990, when a motor vehicle registration No. KAA 695 M, owned by the first defendant, but was at the material time being driven by the second defendant in the course of his employment with the first defendant, in which she was travelling as a fare-paying passenger, was involved in an accident.

There is no clear averment in the plaint how the alleged accident happened, but as liability was admitted, and no evidence was led by the plaintiff at the trial, the circumstances of the accident must remain a matter of speculation about which this Court can do nothing at this stage. In his defence, the first defendant admitted that the accident occurred along Makutano/Machakos road but did not explain how it happened either. He added, for good measure, that the said accident was caused by factors beyond the control of his driver, again, without giving any details. The injuries the plaintiff was alleged to have sustained were loss of consciousness for one hour; generalised pain on the chest; pain the right shoulder and left hip joint; muscle pain on the left thigh; headache and severe pain in the neck with bruises at the back of the neck; and concussion of the brain. Among the reliefs sought by the plaintiff were special damages in the sum of Shs.4700/-; general damages for pain, suffering and loss of amenities; future

medical expenses; and general damages for hiring domestic help.

On 2nd February, 1994 the case came up for hearing before Osiemo J and judgment was by consent entered for the plaintiff on liability, and on the claim for special damages in the sum of Shs.4500/= . Two medical reports prepared by Dr. F.J.A. Onyango and Dr. J.N.M. Mwang'ombe were admitted in evidence by consent. There was an order for written submissions on quantum of damages to be filed within 14 days. And judgment was to be delivered on 23rd February, 1994. The plaintiff did not give evidence; in fact there was no evidence at all led at the trial. The learned Judge in due course, after considering written submissions filed by counsel, awarded the plaintiff Shs.450,000/- general damages for pain, suffering and loss of amenities; Shs.50,000/- for future medical expenses; and Shs.120,000/- for hiring domestic help. The appellants in this appeal are challenging these awards on the ground that there was no evidence to support them.

The manner in which a civil trial is to be conducted is set out in great details under Order XVII of the Civil Procedure Rules. There is no room under that rule or elsewhere for the practice which has developed in the High Court called Written Submissions. Counsel are required by law to address the court. They are not required to write to the court. Written submission is a practice of dubious provenance with no practical utility in the administration of justice. It deprives a court of the opportunity to put questions to counsel or seek any clarification on points of law or evidence. It also denies the court the right to exclude inadmissible material. As a Court we deprecate this practice and we hope that it will be abandoned.

The award of Shs.450,000/- is based on two medical reports. The first, dated 19th July, 1991, by Dr. Fredrick Onyango has a bombastic title of "Medico-Legal Report on Mrs Rose Mulle Mutua". It is compiled in broken English with numerous instances of mis-spelling of simple words. We cannot believe that this report was prepared by a qualified doctor. We suspect it was fabricated and should never have been admitted in evidence by the Judge nor should he have relied on it. If the trial had been conducted according to the established rules of the game, Dr Onyango would have been called to give evidence to support his report. He grossly exaggerated the injuries sustained by the plaintiff if at all he ever examined her. He said something about future medical care but put no figure on it. For our purposes, we shall disregard this report and place no reliance on it.

The second report by Dr. Nimrod Mwang'ombe is dated 24th August, 1992. He said the plaintiff was taken to Machakos Provincial General Hospital. That she had injuries on the head, back, right upper limb and chest. She was treated and discharged. On examination the plaintiff was found to be in good physical condition. Movements at the lower back were satisfactory. Her chest and upper limb were normal and she had no significant scars. Dr. Mwang'ombe's conclusion was that the plaintiff had symptoms of headache, pain in the right arm, lower back and chest which might improve with time although the lower back pain might bother her on and off. In spite of that observation, no further medical report was filed. And as the plaintiff did not give evidence at the trial in February, 1994, there is no way of telling how her condition developed since she was last examined by Dr. Mwang'ombe. The total sum of Dr. Mwang'ombe's report was that the plaintiff sustained minor injuries from which she appeared to have achieved complete recovery.

In arriving at the figure of Shs.450,000/- general damages for pain, suffering and loss of amenities, the learned Judge relied heavily on the medical report allegedly prepared by Dr. Onyango which, as we have said, was of no probative value. We think the true picture as regards the injuries sustained by the plaintiff is to be found in the report prepared by Dr. Mwang'ombe. On the basis of that report the injuries were minor and the plaintiff achieved full recovery. Dr. Onyango's report was contrived to assist the plaintiff to recover enhanced damages by creating the impression that she had sustained far more serious injuries than was actually the case.

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly

erroneous estimate of the damage. See Ilanga v Manyoka (1961)E.A. 705; Kemfro Africa Ltd v A.M. Lubia & Another (1988) 1 KAR 727. To the extent that the Judge relied on Dr. Onyango's report and heard no evidence at all, he had nothing to go by and consequently undertook his assessment in vacuo. We would assess damages for pain suffering and loss of amenities at Shs.50,000/-.

There is no evidence at all upon which the awards of Shs.50,000/- and Shs.120,000/-, for future medical expenses and the hire of domestic help can be sustained. The plaintiff did not give evidence in support of her claim for these expenses. So the awards were based on no evidence. That is a serious transgression of principle on the part of the Judge which this Court has a duty to correct. Accordingly, these awards are set aside in their entirety.

In the end we agree with Mr. Muli, for the appellants, that the learned Judge applied the wrong principles in assessing the damages he awarded the plaintiff, and as a result arrived at a figure which was so inordinately high that it must be a wholly erroneous estimate of the damage.

That being our view of the matter, we allow this appeal, set aside the judgment and decree of the superior court and in lieu thereof enter judgment for the plaintiff for shs.50,000/- general damages for pain, suffering and loss of amenities together with interest at court rates from the date of judgment in the superior court, and costs on the subordinate court scale. We do not disturb the award for special damages as there was no appeal against it. The appellants will have the costs of the appeal as they have substantially succeeded.

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

R.O.KWACH

.....

JUDGE OF APPEAL

P.K.TUNOI

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original.

DEPUTY REGISTRAR