REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI
Civil Appeal 251 of 1996

1. CECILIA W. MWANGI

2. JOSEPHAT MWANGI…….....…….APPELLANTS

AND

RUTH W. MWANGI…….....…….RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Hon. Justice J.L.A. Osiemo) dated 10th July, 1996

IN

CIVIL SUIT NO. 24 OF 1993)

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JUDGMENT OF THE COURT

This appeal arises out of a road accident which occurred on 23rd October, 1990 in which the respondent, who was then 32 years of age was injured whilst she was travelling as a passenger in motor vehicle registration number KAA 091V belonging to the first appellant and which was at the material time driven by the second appellant. Liability for the accident is not in dispute. It was agreed between the parties that the liability of the appellants was to be 80%. The learned judge did not reduce the figure of damages he awarded by 20%. At this stage nothing turns on that factor.

The injuries suffered by the respondent can be summarised as follows:

1. Head injury (cerebral concussion)

2. Cut wound over the vertex of the scalp.

3. Cut wounds over the right lower leg.

4. Injury to the pelvis resulting in fractures of the right superior and Inferior pubic rami.

Medical reports by two experts were by consent of the parties, produced before the learned judge (Osiemo, J). Although there was a certain amount of disagreement between the experts none of them was called for cross-examination. We would hope that in future the advocates will not take such shortcuts. Calling the doctors could have helped to clarify the differences in the two medical opinions; otherwise the task of a court assessing damages becomes difficult.

The learned judge awarded shs.450,000/= for pain suffering and loss of amenities and it appears that the learned judge was more influenced by the medical reports prepared by DR. N.H. Bhanji who describes himself a Consultant General Surgeon and Traumatologist and has some West German qualification. In his report dated 22nd December, 1993 Dr. Bhanji after describing the nature of her injuries says.

"Should there be compression of the nerve root, as indicated clinically, she may require a prolonged hospitalization and eventually even surgery. Such a hospitalization and/or surgery, if undertaken in a private Institution, would in my opinion cost in the region of Kshs.200,000/= (two hundred thousand) including surgery, hospitalization and anaesthetic costs as well as post-operative care".

On the other hand Dr. Claudio O. Owino a Nairobi medical practitioner in his report dated 24th June, 1994 says as follows:-

"In summary Ruth Mwangi was involved in a road Traffic Accident during which she suffered fractures to the pelvis with probable surrounding soft tissue injury. The pelvis fracture have healed well with minimal displacement and no serious complication. However, one cannot rule out early onset of osteoarthiritic changes though recent X-rays were essentially normal. The pain and the tingling sensation in the right leg should also recover with time and some physiotherapy."

Dr. Bhanji in his subsequent report date 15th May, 1996 reiterates the contents of the medical report prepared by him on 22nd December, 1993 and talks again of the same surgical treatment at the same cost of shs.200,000/=.

At this stage it becomes relevant to quote more from Dr. Bhanji's 1993 report. In that report his findings on examination are:

"On examination, the central nervous system was normal. All the cranial nerves were intact. The papillary reflexes were equal to light and convergence."

Coming to X-rays of the pelvis and the lumber spine taken on 9th December, 1993 he says:

"Pelvis: Satisfactorily healed fracture of the right

superior and inferior pubic rami are shown with minimal pelvic inlet deformity on the right side. Hips and S.I.joints are normal,

Lumber spine: No scoliosis. No collapse facture of a

Vertebral body is seen. The disc space

Are normal. Pedicle show no lesion. No

Facture of the process is shown."

Considering Dr. Bhanji's examination, findings and X-ray analysis it becomes clear to us that Dr. Owino has succinctly pointed out the nature of injuries suffered by the respondent. When Dr. Owino says in his report that "the coming of frequent headaches and loss of memory are probably a bit of an exaggeration" he is being candid. Dr. Bhanji appears to us to be bending over backwards to put the respondent in a bad light as regards her injuries. The sum total of the respondent's injuries and the sequelae could be best described as Dr. Owino put it. He put it thus:

"Ruth Wanjiru Mwangi was involved in a road accident during which she suffered injuries to the head, pelvis and right leg With regard to her complaints:-

-The complaint of frequent headaches and loss of

Memory are probably a bit of an exaggeration. Her accident having occurred more than 31/2 years ago, and there being no signs of head injury or skull fracture or any history of seizures, it is unlikely that she suffers any memory lapses. Also my examination showed a perfectly normal nervous system thus ruling out any residual injuries.

-The complaints of pain in the right inguinal area

And the positive findings on examination could

Be directly attributed to the accident. The presence

Of the pelvic fractures indicates quite severe injury to the surrounding soft tissue. These probably had healed with fibrosis and scar tissue formation that would result in pain in those areas on movement.

The presence of grossly normal sensation, reflexes, and muscle function in the lower leg implies no serious nerve injury. However the occasional numbness and tingling sensations especially on movement could be attributed to possible soar tissue pressing on nerves during muscle movement. It should regress with time but proper healing may require some physiotherapy."

It becomes quite apparent that the alleged need of an operation as suggested by Dr. Bhanji is not a must. It is also significant to note that the respondent's only complaint on oath before the learned judge, in respect of pain in the leg was "when it is cold the leg pains". Her complaint about pain whilst having sex is not borne out by medical reports.

The award of shs.450,000/= in respect of pain, suffering and loss of amenities was in our view so erroneous as to lead us to believe that the award was too high to merit interference. It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees. See Kigaragari vs. Aya (1982-88) 1 KAR 768; also see Chege v. Vesters (1982-88) 1 KAR 1197 AT PAGE 1021.

In assessing damages for pain suffering and loss of amenities the learned judge misapprehended the evidence in the crucial aspects of the sequelae of injuries and gave too much weight to Dr.. Bhanji's reports which, in our view, are somewhat suggestive of exaggerations. Injuries involving, primarily, fracture of pelvis and other minor injuries attracted an award in the region of shs.200,000/= in Kenya, during the years 1992 and 1993.

Of the cases cited to the learned judge by both counsel in the court below some were irrelevant to the injuries sustained by the respondent and it appears that the full judgments were not produced with the written submissions. What the learned judge had was extracts of injuries and damages awarded. The nearest comparative injury case quoted was that of Serah Wanjiru Njau vs. Joseph Ndungu Mwani H.C.C.C. No. 3892 of 1991. The plaintiff in that case suffered fracture of pelvis (i.e. superior and inferior rami of right pelvis) cuts on forehead, forearm, right leg and right ankle joint. She was hospitalized for two weeks after discharge followed by physiotherapy clinic and continued bed rest at home. She complained of pain at the waist when bending, pain in the chest and headaches. Pain in pelvis was permanent and so were headaches. For these injuries she was awarded a sum of shs.200,000/-. The learned judge was not told when that award was made but it would be sometime after 1991 as the suit was filed towards the end of 1991. No attempt was made before us to go into more cases involving comparable injuries although injuries involving fracture of pelvis are quite many. Cases digested in Mr. Inamdar's digest with reference to pelvic injuries could have helped. The claimant's advocates tend to rely on more serious injury cases to try and obtain larger award whereas defendant's counsel tend to rely on less serious injury awards. Such a practice is unhelpful to courts. We would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West(H) & Son Ltd.

vs. Shephard [1964] AC 326 at page 345:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Pho Choo v. Camden and Islington Aarea Heath Authority [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of Tayab v. Kinanu [1982-88] 1KAR 90.

Lord Denning MR said:

"In considering damages in personal injury claims, it is often said: "the defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration." That is a tedious way of putting the case. The accident, like this one, may have been due to a pardonable error much as my befall any of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay."

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably, the injured party but not so as to smart the defendant.

Taking into account all injuries suffered by the respondent and keeping in mind the principles of assessment of such damages and also fall in value of money we assess the damages for pain, suffering and loss of amenities at shs.300,000/=. We bear in mind that this sum will carry interest at court rates from 10th July, 1996.

In her plaint the respondent had claimed damages for loss of earnings and loss of earning capacity. Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability. The plaintiffs cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Limited vs. Mayende(1991) 2 KAR 232 at page 235 where this Court referred to the cases of Ali v. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported), and Shabani vs. City Council of Nairobi(1985) 1KAR 681 at 684 in which (Shabani Case) the statement by Lord Goddard C.J. in the case of Bonham Carter vs. Hyde Park Hotel [1948] 64 T.L.R. 177 was approved.

"Plaintiffs must understand that is they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of Court, saying, 'this is what I have lost' I ask you to give me these damages".

The respondent stated in the superior court that she used to make a net profit of shs.52,000/= per month before the accident and that as a result of the accident she lost all that. In the plaint she had stated that her profits were shs.80,000/= per month. If she was earning shs.624,000/= net per year or shs.960,000/= net per year she would have had some account books and income tax returns. She produced none of these at the trial in the lower Court. She produced several documents in Court showing that she was buying and selling maize and timber but none of these documents even remotely show what here net profit could be. This is not the way to prove loss of earnings, or loss of earning capacity. Even the bank statements she produced were for the period after the accident. Although the learned judge did

correctly point out that she did not produce any document to support her claim the learned judge proceeded to work out her loss of earning capacity at shs.10,000/= per month/ The period of 36 months, for loss of earnings was more than even what the respondent's doctor had pointed out as the respondent being out of action. Dr. Bhanji put the period at 25 months. We have, in the circumstances, no alternative but to set aside the award for loss of earning capacity in its entirety.

The respondent has not undergone any surgery as recommended by Dr. Bhanji, and although Dr. Bhanji put the cost of such surgery at shs.200,000/= (in 1993 as well as in 1996) the learned judge awarded her a sum of shs.150,000/=. There, the learned judge erred. We have pointed out that the operation suggested by Dr. Bhanji (and he suggests that the same should be carried out by a Traumatologist) is not in the contemplation of Dr. Owino. The respondent has not talked about it either. We set aside that award also but going by Dr. Owino's report we award a sum of shs.50,000/= for physiotherapy and attendant travelling costs. Mr. Njuguna did concede that one physiotherapy treatment would cost shs.500/=. We think that a sum of shs.50,000/= would cater for such treatments and transport costs.

The upshot of all this is that this appeal is allowed and damages awarded in the sum of shs.960,000/= are reduced to shs.350,000/= and further reduced by 20%, as the appellants' liability was 80%. In the end result there will be judgment for respondent was follows:

Special damages - shs. 2080/= nett.

General damages- shs.280,000/= nett.

The award of special damages will carry interest at court rate from 25th January, 1993 until date of payment and that of general damages will carry interest at court rates from 10th July, 1996 until date of payment in full.

As the appellants have had substantial measure of success in this appeal, we would order the respondent to pay two-thirds of costs of this appeal to the appellants. We would order that the appellants do pay to the respondent her costs in the superior court to be taxed on the basis of damages awarded by us.

Those are our orders.

Dated and delivered at Nairobi this 3rd day of December 1997.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL