



REPUBLIC OF KENYA

Hassan v Jaswinder Enterprises & Another

High Court, at Mombasa

10/3/92

Wambilyangah J

Civil Case No. 384 of 1989

10/3/92 **Wambilyangah J** delivered the following Judgment.

The plaintiff Mohamed Ali Hassan was born in 1935 – and so his age is now 57. Since 1958 he had worked as a driver employed by Nairobi Bus Union and in 1988 when his age was 54 years his wages per month were Shs.3,700/=.

It is not in dispute that on 5th May 1988 he was driving his employer's bus No. KSY 182 from Nairobi to Mombasa. At about 7.15 p.m. while he was driving at a speed of 65 k.p.h. his vehicle rammed the defendant's trailer which, having already collided with another vehicle at Maji ya Chumvi, was at the time stationary across the highway. He was injured and only discovered himself in a ward at the Coast General Hospital on 6th day when he regained his consciousness. It is the plaintiff's contention that the trailer had been negligently left unattended to and hence the accident. This allegation in the plaintiff's evidence passed uncontroverted as the defence did not at all offer any evidence at the conclusion of the trial. After carefully reflecting on the evidence of the plaintiff I find that it was negligent on the part of the defendant to have failed to warn other road users of the obstructing presence of the trailer on the road. These vehicles were at a road bent and it should have been easily foreseeable to the defendant that other vehicles would collide with the trailer if no precautionary measure against that eventuality was taken. I do not understand why warning marks were not placed on the road. In those circumstances I assess the defendant's liability to pay damages to the plaintiff at 100%.

The plaintiff's injuries and nature of treatment which he received are catalogued in the 2 medical reports of orthopaedic surgeons Mr. Khandwalla and Mr. Rasik Patel. They are:-

1. Fracture of the middle of the shaft of right femur.
2. Comminuted fracture of the middle of left femur.
3. On the right of leg alone:
 - (a) Comminuted fractures of the upper ends of both tibia and fibula with gross displacements of fragments .
 - (b) Fractures of the lower $\frac{1}{4}$ of both tibia and fibula
4. On the left leg alone
 - (a) Severe comminuted fractures of both tibia and fibula at the lower $\frac{1}{4}$ with gross displacement of

fragments.

(b) Fracture of fibula

5. He also had cuts and bruises.

When he was admitted in Coast General Hospital he was in shocked condition and urgent measures were taken to resuscitate him with blood transfusions and medicines. When he had recovered from shock and the X-rays had been taken showing the fractures listed above, surgical toilet of the wounds were done, both legs were immobilized in plaster after manipulation and both lower extremities were put on traction to keep the femoral fragment in alignment. After 2 weeks, open reduction was done on the femur for introduction of intra-medullary K-nail and after 4 weeks a similar operation was done on the left femur.

Later check X-rays which were done both showed both the femoral fragments were in good alignment, but that of the upper end of the right tibia and fibula and that of the lower ends of left fibula were showing gross displacements, and very slow and poor union.

In early January 1989 he was allowed on crutches and on 30th January he was discharged from hospital after having stayed there for 8 ¼ months. He continued to go to hospital for treatment as an out-patient. In May 1989 the plaster on the left leg was removed. It had been there for one year.

On 6th April 1990 the X-rays which were taken revealed the following developments:-

In the left femur: the fracture of the shaft was nearly fully united and its alignment was adequate.

In the right femur: there was complete union of the femoral shaft with good alignment:

In the right leg: The X-rays showed mal-union of the multiple comminuted fractures of the upper-ends of tibia – fibula. There was also medial tilt of the joint. The fractures of the lower ends of the tibia-fibula had also united with a medial tilt and severe osteo-arthritic changes in the ankle and sub-talar joint were taking place.

In the left leg: there was a gross deformity of lower tibia, with multiple fragments lying closer to each other and with others having united with posterior angulation. Fibular fragments show over-riding. There were post traumatic stress and secondary osteo-arthritic changes.

In the right knee: there was gross deformity of tibial condyles which were depressed with loss of joint space and severe secondary osteo-arthritic changes in the joint.

In the left knee: the fibular head has united with slight deformity. The knee indicated signs of osteoarthritis. In March 1990 he was readmitted for removal of K-nail in the right femur. But the one in the left femur had not been removed by the time the medical report (Exh.3) was completed.

In concluding his report (Exh.3) Dr. Rasik Patel said:-

“There is little further that can be done now. Mr. Hassan can only walk slowly with the aid of crutches. Both knees have osteoarthritic changes with painful limitation of movements and as such he can not squat on the ground. There is established non union of the fracture of the lower part of the left leg and as such painful. There is a swelling of both legs. The ankle joints show arthritic changes and limitation of movements. All these shall be permanent disabilities”.

This is a case of severe and multiple fracture injuries on both limbs of the plaintiff.

For a guide as to general damages Mr. Pandya referred to me several cases; but I will only consider one of them which appears to me to have clear comparable features to the instant. In George Aganda Wardama v Samwel K. Mutiha H.C.C.C. 786/81 in which Shs.400,000/= was awarded to a 37 years old welder who

suffered fractures on tibia and fibula; pott's fracture on the right clavicle and cut wounds on the forehead and on the right thigh. It is relevant to observe that the plaster was removed from the left leg after 3 months while the one on the right leg was removed after 7 months. He also had to be readmitted at a later stage for the surgical removal of sequestra (dead bone pieces). For that operation he was hospitalised for 3 weeks and had a plaster applied which was only removed after six months period. He resumed light duties 2 years after the accident. Fracture of the left tibia and fibula united with no disabilities but the fractures of tibia and fibula united with over-riding and angulation. The malleoli united with a slight deformity leading to osteoarthritic changes in the ankle. Fracture of clavicle had not unite in gross deformity, pain and limitation of abduction (90 degrees). He was unable to carry anything heavy with the right hand. Also was left with noticeable scars on the face, right thigh and front of the right leg. He was awarded Shs.400,000/= on 4th August 1989 as general damages for pain, suffering and loss of amenities.

Because the severity of injuries and the post traumatic effects described in this cited case are to a considerable extent very comparable to the ones in the present case, I will treat the award therein as one providing conventional significance to the one which should be given in the present case. I will obviously have to give an adequate allowance for inflation owing to the present prevailing reduced value of money. It will also be pertinent to bear in mind that each case must ultimately be decided on its particular and peculiar facts.

Mr. Khanna admits the facts that serious injuries which were sustained have resulted to some gruesome permanent disability to the plaintiff. Yet, he thought that the award should be like the one in Shee Nasoro Swaleh v Associated Sugar Co. Ltd. H.C.C.C. 826 of 1985 (Mombasa) (digested at para 10 – 4 – 50 in the Second Supplement to A digested by I.T. Inamdar). In that case the plaintiff sustained a fracture of the shafts of both femurs and ruptured spleen. After he was treated the result was:

“Fracture of right femur healed in malposition with outward angulation and rotation and right leg was 1 ½ (inches) shorter than the left leg. Knee flexion was restricted by 20 degrees. Left femur had healed in fair alignment with 1” (inch) overlap. Movements of joints were normal and the plaintiff could squat but with a slight restriction in the right knee. He walked with a slight restriction in the right knee. He walked with a marked limps but could overcome by 1” raised hell on the right leg. Malunion of femoral shafts had left no serious functional disabilities”.

He was awarded Shs.200,000/= as general damages for pain, suffering and loss of amenities. It is relevant to note that the fracture injuries in this cited case were restricted to the shafts of the femurs. But in the present case not only the femurs but also the tibia and fibula of both legs suffered various fractures as has been already highlighted. Moreover, the plaintiff in the Shee Nasoro Swaleh case had the very high prospects of walking normally if only he were a shoe with a raised hell. Such positive prospects are completely denied to this plaintiff. And so it follows that the amount of general damages in the present case must necessarily be much more substantial than what was awarded in the Shee Nasoro Swaleh case. And that is why I do not find Mr. Khanna's second case of Eunice Musinga Mwacha H.C.C.C. 26/88 where the paltry award of Shs.160,000/= was given as general damages to deserve no consideration in this case. It is totally irrelevant. With regard to pain and suffering endured by the plaintiff in this case it is important to remember that he was admitted in hospital and remained there for a period of 8½ months. Throughout this period he was immobilised, for his first attempt at walking with help of crutches came on the 8th month of hospitalization. During the period of when he was admitted he underwent surgical operation for the fixing of the K-nails in both limbs. There were further operations for their removal. The second category of pain and suffering is essentially that of that of the posttraumatic effects. Most of the fractures did not heal well. There are not only painful restrictions of the knee joints and ankle joints, but also, the secondary osteoarthritic changes which have been diagnosed in the various parts of affected limbs. The plaintiff who was still agile and diligent enough to drive a bus for nearly 500 kilo metres in ½ day is now evidently reduced to a human wreck. He can not any longer perform any work which entails movements of his limbs. It means that he is now consigned to a stage in his life where he will invariably always be preoccupied with his pain, discomfort, and misery. Taking all the relevant factors into account I award Shs.570,000/= as general damages for pain, suffering and loss of amenities. Special damages have been proved and also agreed at Shs.178,050/60.

With regard to future earnings attention must be given to the fact that at 54 when he sustained the injury he was on the brink of being retired from formal employment. I venture to say that that fate might have already been visited on him by now owing to his permanent infirmity. There was no clear evidence on the dimension which his employment has taken. But it can not be denied that at the time when he met with this tragic accident he was still quite energetic and healthy given the fact (as already adverted to) that his employment entailed cruising long distances daily. I agree that he might have continued to be in lucrative employment until the age of 60 years. This statement ought, however, to be viewed in the light of the fact that his employment was in the arduous and hazardous category. It was not an easily predictable one. Or else he could have died earlier of natural causes. Giving an allowance for those vicissitudes of life (which includes working life), I fix the multiplier at 3 years from 1992. To it, I apply the monthly wages of shs.3,700/= to work out to Shs.133,200/=.

In the upshot the figures which I have given in this judgment are as follows:-

General damages	Shs.570,000/=
Special damages	Shs.178,050/=
Lost income	Shs.133,200/=
Total	Shs.881,250/=

According judgment is entered for the plaintiff against the defendants jointly and severally for Shs.881,250/60. I order that interest on the special damages of Shs.178,050/60 be calculated from the date when the plaint was filed in court but interest on the balance of Shs.703,200/= to be computed from the date of this judgment. Cost of the suit to the plaintiff.