



Muinde v 64 Rond Carriers

High Court, at Mombasa

March 16, 1992

Wambilyangah J

Civil Case No. 455 of 1991

March 16, 1992, **Wambilyangah J** delivered the following Judgment.

In paragraph 3 of the Plaintiff it was alleged that the defendant's motor cycle KTR 738 struck and injured the Plaintiff who was at the material time standing at Kongowea Bus Stage. The defendant having been duly served with summons to enter appearance (as is explicitly indicated in the return of service) failed to enter their defence in the suit and hence no defence was subsequently filed. In consequence the Plaintiff obtained an interlocutory judgment in default. In Clearer-Humus v British Tutorial College, (1975) E.A. 323 it was held that the failure to file a defence operates as an admission of all allegations of fact in the Plaintiff except as to damages. See also the judgment of Nyarangi, J.A IN Mahala Mailu Mwende v Nyali Golf & Country, Civil appeal No.16 of 1969 where he said that where a judgment which is entered in default of appearance the issue of liability becomes already settled in favour of the Plaintiff and what is left for the court to do is only to assess damages which should be paid to that Plaintiff.

With regard to the injuries, I have on the record the evidence of the Orthopaedic Surgeon Mr. Hemant Patel and, of course that of the Plaintiff himself. The injuries were fracture of tibia and fibula of the right leg. The Plaintiff had a plaster applied on the affected area at the Coast General Hospital where she was admitted immediately after the accident. That was 26th April, 1991. she was discharged on 17th May, 1991, but had to be readmitted on 25th June, 1991 for a surgical operation of open reduction and plating. She was then discharged on 6th July, 1991 but continued treatment as an out-patient. The second plaster was removed on the 20th September, 1991. The surgeon's opinion in the report is:

“Mrs. Muinde sustained fractures of a tibia, fibula at a road accident on 26th April, 1991. She was hospitalised twice for a total period of five weeks. The fracture has healed with an angulation hence she will have stress changes in the weight bearing right ankle giving rise to moderated pain after a long walk. This is a permanent capacity.”

It is pertinent to note that the medical report was completed when the process was still taking place. That is why in the report the surgeon said:

“She is in the final stage of recover and can start light work in the next 3, 4 weeks”.

For a guide as to damages Mr. Mburu referred to me the case of Hadi Abed v Abdul Ramzan Noor Mohamed, HCCC. No.1269 of 1978 (Mombasa) which was decided by Kneller, J. (as he then was) in October 1982. (It is digested in the 1st Supplement to a Digest of I.T. Inamdar at para. 10 – 6 – 47 at page 91). Its facts are that the Plaintiff sustained a compound fracture of the tibia and fibula of the left leg, a crushed left foot and lacerations. The forepart of the left leg was amputated. The fracture of left leg healed well but there was no base or support of the left leg as it rested on the stump of the left foot. As a result, the Plaintiff was unsteady and slow in walking needing a stick for support for the rest of his life. He could have an amputation higher in the leg below the knee so as to enable him to have an artificial leg and thus improve his mobility. In the digest it is stated that the judge treated the case as equivalent to one involving a below knee amputation and that is why he awarded Shs.220,000/- as general damages on the head of pain, suffering and loss of amenities.

In my considered view the injuries described in the above mentioned case are far more catastrophic than have been shown in the instant one. That was a case which was treated largely as that of amputation of the

leg below knee which feature does not at all manifest in itself in the present case. In the same supplement to a Digest by I.T. Inamdar I find at para. 10 – 6 – 60 at page 95 the case of Abdalla Mwakamsha v Kalimunda Gerald, HCCC. 893 of 1980 (Msa) where the Plaintiff aged 40 sustained a compound fracture of the lower 1/3 of the right tibia and fibula. He was in hospital for 3 months and was off work for 7 months. The fracture healed with a slight shortening of the leg due to convex anterior angulation and as a result he walked with a limping gait and could no longer walk long distances or carry heavy loads and had difficulty climbing stairs.

The general damages awarded for pain, suffering and loss of amenities were assessed at Khs.75,000/-. In my view this case is fundamentally comparable to the present one and I treat the award given therein, though somewhat a bit low, to be a conventional one insofar as the one I should give in the present one is concerned. It is true that each case must be decided on its peculiar and particular facts. The Plaintiff in this case is 50 years. She is a farmer and with her diagnosed permanent incapacity in one of her limbs her effectiveness in her occupation will definitely be curtailed. It must also be noted that she was hospitalised two times and had to undergo an operation. The process of healing took nearly 9 months - and even when the case was heard in December she had not yet fully recovered. She has thus endured considerable pain and suffering. And, of course, the element of inflation must be taken into account. Doing the best I can, I assess general damages for pain, suffering and loss of amenities at Kshs.170,000/-. Special damages are allowed at Shs.1,100/-.

Accordingly judgment is entered for the Plaintiff for Kshs.171,100/- with costs and interest.