



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NYARANGI, GACHUHI & GICHERU JJ A)

CIVIL APPEAL NO 5 OF 1990

MARIAM MAGHEMA ALI APPELLANT

VERSUS

NYAMBU T/A SISERA STORE..... RESPONDENT

(From a Judgment of the High Court at Mombasa (Boisire J) dated 31st October, 1989 in Civil Case No 438 of 1989)

JUDGMENT

Mariam Maghema Ali age 28 years was a Matatu driver by trade. She was involved in road accident on 5th January, 1989 while a passenger in a matatu being driven by her employer. She received severe injuries for which she was detained in hospital for 3 1/2 months. While in hospital she underwent operations to correct crush injuries, fracture of the left femur and skin grafting. According to the doctor who treated her in hospital and who also testified in court, the plaintiff will no longer carry on with her trade as a matatu driver. Her social life will be affected considerably and it will require long dresses to cover scars on her legs. She will also undergo a further operation to remove K-nail and would continue with medication for sometime. Counsel for the defendant failed to attend the hearing and so the hearing proceeded *ex-parte*.

After hearing the plaintiff and the doctor, the trial judge delivered his judgment in which he awarded the plaintiff damages for pain, suffering and loss of amenities, loss of future earnings and special expenses which including the hospital and doctors fees total Shs.744,869/=.

The plaintiff has appealed to this Court on the following six grounds; that the special damages awarded were less than what was claimed, that the trial judge failed to award the amount claimed for house maid, that the judge failed to consider future pain and suffering for future operation, that the award of Shs 220,000/= for pain suffering and loss of amenities was too low and for costs.

The defendant who did not attend the hearing and having lost the application to recall the doctor for cross-examination, filed a cross-appeal complaining that the medical expenses incurred by the appellant and the doctor's fees were exorbitant and also that the award for loss of future earnings were manifestly high.

Mr Jiwaji for the appellant referred to paragraph 5 of the plaint. The total of special damages claimed amounted to Shs 318,860/=. Out of this figure the Judge allowed Shs 254,860/=. The difference is Shs 64,000/=. This figure represents Shs 5,000/= for traveling by the appellant during treatment, Shs.25,000/= for the estimated future operation costs and Shs 34,000/= already paid to Pandya Memorial Hospital. The

breakdown of the special claim as appears in the plaint is:

Cost of transport during treatment 5,000/=

Accident abstract 100/=

Pandya Memorial Clinic 177,260/=

Cost of future operation 25,000/=

Medical report 1,000/=

Dr A Shah 36,000/=

Dr Z A Khandwalla 134,500/=

318,860/=

There is no evidence on record to prove the claim for transport of Shs 5000/=.

The respondent in the cross-appeal challenged three items claimed for being exorbitant. They are:

Pandya Memorial Clinic 117,260/=

Dr. A. Sha 36,000/=

Dr. Z. A. Khandwalla 134,500/=

The evidence for the three items of medical expenses was given by Dr Khandwalla. In the case of Pandya Memorial Clinic, weekly statements were produced as exhibits. There was no evidence adduced to support the statements. The information that can be obtained from the statement is as under:

(a) Daily charges @ 450/= per day (94 days) Shs. 42,300/=

(b) Theatre fees Shs. 13,750/=

(c) Materials Shs. 16,270/=

(d) Laboratory fee Shs. 6,610/=

(e) Drugs Shs. 33,145/=

(f) Mrs. Esther Wagoma Shs. 3,240/=

(g) Xray Shs. 435/=

(h) Extras Shs. 1,510/=

Shs. 117,250/=

Dr A Shah is an Anaesthetist. He claimed that he administered anaesthesia 17 times at a total fee of Shs 36,000/=.

Dr Khandwalla's bill is:

Surgical toilet 17 times @ 4000/= Shs. 68,000/=

Major operation Shs. 20,000/=

Skin grafting 2 @ 6000/= Shs. 12,000/=

Management visits 105 @ 300/= Shs. 31,500/=

Out patient treatment Shs. 3,000/=

Shs. 134,500/=

Neither Dr A Shah nor Dr Khandwalla appears to have been paid any part of the claim up to the time of trial or up to the time of the hearing of the appeal. We had no evidence that the two Doctors had been paid. Mrs Adogo who appeared for the respondent submitted that the charges are exaggerated. From the statement of fees by Dr Khandwalla, he carried out three major operations. Special damages in addition to being pleaded, must be strictly proved as was stated, by Lord Goddard CJ in *Benham- Carter v Hyde Park Hotel Ltd.* (1948) TLR 177 thus:

“Plaintiffs must understand that if they bring action for damages it is for them to prove damages, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, this is what I have lost, I ask you to give me these damages! They have to prove it.”

See also the case of *Ouma v Nairobi City Council* (1976) KLR 297 at page 304.

We are now faced with a situation where the damages awarded by the trial court have been challenged. The question is whether the amount of Shs 318,860/= as claimed in the plaint is so inordinately high as to be wholly erroneous. We apply the principles laid down by the Privy Council in *Nance v British Coloumbia Electric Railways Co. Ltd.* (1951) AC 601 at page 613 and applied by this court in the case of *Henry Hidayta Ilanga v Manyema Manyoka* (1961) EA 705 and in *Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto* (1970) EA 414 which:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (*Flint v Lovell* [1935] 1 KB 354) approved by the House Lords in *Davies v Powell Duffryn Associated Collieries Ltd.* 1941 AC 601.”

We consider that the judge has taken into account irrelevant factors and as a result the award is so

inordinately high as to be a wholly erroneous estimate of the damages.

We accept the fact that the plaintiff was hospitalised and while in hospital was attended to and treated and some operations carried out on her. We will accept the following charges:-

Charges of Shs.450/= per day

And Physiotherapy charges Shs. 42,300/=

Mrs. Wagoma Shs. 3,240/=

X-ray Shs. 435/=

Extra Charges Shs. 1,510/=

Shs. 47,485/=

The rest of the charges are not supported by any invoices and so we disallow them. Then there were these other charges:

Theatre fees Shs. 13,759/=

Material fees Shs. 16,270/=

Laboratory fees Shs. 6,610/=

Drugs Shs. 33,145/=

Shs. 69,775/=

We allow 1/3 of these charges. The sum payable therefore is Shs.23,255/=. In the case of Dr. A. Shah we accept that he administered anaesthesia at the time of three major operations at Shs.2000/-; each making a total of Shs.6000/=. In the case of Dr. Khandwalla, we allow:

Fees for theater operation at Shs.32,000/=

1/3 of management visit Shs.10,500/=

Total Shs.42,500/=

We disallow the claim for 17 surgical operations. We also disallow the out-patient treatment claim as no dates were given for the treatment.

In the final analysis, we allow the claim of special damages in the sum of Shs142,100/= made up as under;

Accident abstract Shs. 100/=

Pandya Memorial Clinic Shs. 67,500/=

Cost of future operation Shs. 25,000/=

Medical report Shs. 1,000/=

Dr. Abdul Shah Shs. 6,000/=

Dr. S A Khandwalla Shs. 42,500/=

Total Shs. 142,100/=

On grounds 3 and 4, the trial judge did not award the estimated cost of future operation, which we have not included in the figure for special damages. Similarly he did not consider future pain and suffering. It is difficult to estimate this figure which might probably have been considered in the award for pain, suffering and loss of future amenities. The trial judge who saw the plaintiff in the witness box considered all aspects of the loss, inconveniences and aspects of future support. But as it has always been the case with people of her age, they manage to adjust themselves so as to fit in life in the circumstances they have been placed by the accident.

In our judgment an award of Shs 250,000/= for pain suffering and loss of amenities compares more favourably with current awards. There is a complaint that the judge failed to award damages or make provision for a maid. The evidence before the Court is that the appellant at the time of the trial was walking slowly with the aid of one stick. At the time, the appellant was not completely healed and the K-pain had not been removed.

As we have said above, the appellant will be able to adjust herself in the course of time so as to be able to support herself in which case there will be no need for a maid.

In conclusion, the damages payable by the respondent to the appellant will be as follows:-

(a) pain, suffering and loss of amenities, including the loss of marriage prospect and future pain and suffering Shs. 250,000/=

(b) Loss of future earning as awarded by the trial Judge Shs. 270,000/=

(c) Special damages allowed Shs. 142,100/=

Total 662,100/=

In the result the appellant's appeal succeeds as regards the award for general damages whose figure we have enhanced. The appeal however fails on the issue of special damages. The respondent's cross-appeal is successful on the issue of medical expenses. As a consequence each party shall bear his/her own costs.

Orders accordingly.

Dated and Delivered at Mombasa this 24th Day of July 24 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

J.E. GICHERU

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JUDGE OF APPEAL