



Ngeyma v Akamba Public Service

High Court, at Mombasa February 8, 1985

Mandari J

Civil Case No 1034 of 1983

Cases

Benham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177

Firozali Noormchmed Haji v Elias Kapomba Toka C A 46/80 (unreported)

Reckless V P C Allday & Co Ltd & another, 9 – 018.

Advocates

Anjarwalla for plaintiff

Juma for defendants

February 8, 1985, Mandari J delivered the following Judgment.

The plaintiff alleges in his plaint that on or about May 20, 1982 he was a passenger for reward in an omnibus registration No KVF 957 owned by the first defendant travelling on Mombasa /Nairobi road in the direction of Mombasa when at about 10.00 pm near Maungu the bus collided with the second defendant's motor lorry reg No KQV 477 as a result of which the plaintiff suffered severe injuries. He further alleges that at the time of the accident the two vehicles were being driven by their respective drivers as the servants or agents of their respective owners in the course of their employment and/or within the scope of their authority and that the said accident was caused by the negligence of one or the other or of both the drivers. As a result of these injuries the plaintiff alleges that he was unable to attend to his business for four months, and suffered pain, loss and damage. The plaintiff therefore claims general damages plus special damages in the sum of Kshs 51,527 being medical expenses, transport charges, rent of shop, salary to staff and loss of profit. He also claims interest and costs.

Each of the two defendants filed their written statements of defence denying their liability to the plaintiff but the court need not narrate these defences because when the suit came up for hearing Mr Juma appearing for both the defendants indicated to the court that the defendants have now admitted liability and that the court should only decide the quantum of general and special damages.

With regard to the special damages as claimed in the plaint the defendants are not contesting the first two items (a) and (b) nor are they objecting to the addition of a further sum of Kshs 2,000 for obtaining medical report.

These three items amount to Kshs 3,527. The items of special damages that are still under dispute are:

(c) Rent for shops Kshs 18,000

(d) Salaries to staff Kshs 15,400

(e) Loss of profits Kshs 12,000

Total Kshs 45,400

These expenses are in respect of four months that the plaintiff was unable to attend to his business (paragraph 5 of plaint).

The plaintiff in his evidence told the court that he was thirty years old and carried on the business of dealing in second hand tyres. He had two shops one in Mwembe Tayari and the other in Jomo Kenyatta Avenue. He was sole proprietor of those shops since September 1979 when he had bought out his partner's held share for Kshs 21,000. He had four employees for repairing punctures and fitting the tyres on the rims. His business was to buy second hand tyres and tubes from hawkers, repair them and sell them to customers. He explained that his business required considerable skill at the time of buying the tyres. These tyres must be tested for what he described as 'separation' that is separation of rubber from the various plies of canvas or whatever material is used in the manufacture of the tyres. This test can be done only by holding the tyre with one hand and hitting the edge of the tyre with a hammer held in the other hand while the tyre is pushed along the floor. It is the type of sound made by the hitting of the tyre that tells the tester if it is a serviceable tyre. None of his employees knew this job and he himself could not attend to his business for three months because of his injuries and although his shops were open for business for all those months the business went down because there was no more buying of new stock. Even after returning to his business he no longer could handle big tyres for lorries, tractors, etc., because of the after effects of his injuries that is the swelling on the collar bone. He attempted to train one of his employees for this job but to no avail. He received a lot of complaints from his customers for having sold them tyres which were scrap. That was because his employee could not detect separation at the time of buying those tyres. He was no longer able to run his two shops and was forced to close one of them.

During the three months that he was unable to attend to his shops he spent Kshs 24,000 towards wages of the four employees and rent of the two shops, and he produced vouchers for these (ex 3). He thought there was no profit during those three months. His average net earning before the accident was Kshs 25,000 per month or Kshs 300,00 per annum.

After the accident his profits have fallen by 50%. He has produced a statement (ex 4) which he says is a summary of sales and purchases months by month for the year 1982. According to this statement his sales for the year amounted to about Kshs 615,00 and his purchases to Kshs 250,000 giving him a profit of Kshs 365,000 for the year. He said he did not prepare similar figures for 1983, nor, it appears for the two months of 1984.

When it was pointed out to him that in 1979 the whole business was worth only Kshs 42,000 the plaintiff said that all he paid to his retiring partner was half the value of furniture and shelves in the two shops. The plaintiff further stated that he could not afford to keep a car on an income of Kshs 25,000 per month because he used to spend all that amount to support his and his father's family. Finally he told the court that it was not possible for someone else to hold and move the tyre along the floor while he knocked it with a hammer. He did not explain why not.

A medical report dated November 19, 1984 by Mr Ambeva, Consultant Orthopaedic surgeon was produced by consent as exhibit I. According to this report Dr Ambeva examined the plaintiff on November 6, 1984 two and half years after the accident. The injuries that the plaintiff had received in that accident were:

(1) Lacerated wound of the scalp

(2) Contusion of the neck

- (3) Subluxation of right sterno-clavicular joint
- (4) Fracture of the right transverse process of 2nd lumbar vertebra
- (5) Lacerated wound of the left leg
- (6) Abrasion of the right leg

He stayed in hospital for about a week. The scalp and left leg wounds have healed leaving behind visible scars. The plaintiff complains of occasional pains of the neck and of right sternio-clavicular region, and this makes it difficult for him to lift heavy objects with the right arm. He also suffers pain in the lower back. He would have to use pain relieving drugs.

That concludes the evidence for the plaintiff. The defence offered no evidence. The court therefore now proceeds to assess general and special damages.

First the special damages. With regard to the disputed claims amounting to Kshs 45,400 the plaintiff stated in his evidence that he was unable to attend to his two shops for three months because of his injuries and that this figure represented the damages he suffered in respect of rents and wages to staff and loss of profits. It may be pointed out here that in his plaint he had alleged (para 5) that he was unable to attend to his business for four months and not three, because of those injuries, and had claimed rent, salaries and loss of profits for four months.

Quite apart from that, let us examine how genuine is his claim for loss of profits. In court he stated that before the accident his two shops were giving him a net profit of Kshs 25,000 per month. He has claimed in his plaint a sum of Kshs 12,000 being loss of profits for the four months that is Kshs 3,000 per month. The only conclusion one can draw from these figures is that according to the plaintiff he still made a net profit of Kshs 32,000 per month for those four months. If his business continued to work at profits albeit slightly reduced profit, there can be no question of his claiming rent and wages for those months because these must have been paid from the earnings of those months.

What the court has now to consider is whether the plaintiff has proved on the balance of probabilities that the profits from his shops were as substantial as he claims. All that he has produced in court is a sheet of paper showing certain monthly figures which are alleged to be cash received and cash paid during the year 1982 and the court is told that the excess of cash receipts over cash payments the plaintiff's net profit which comes to a little over Kshs 360,000 for the year that is Kshs 30,000 per month. No proper books of account or vouchers have been produced. In fact audited accounts ought to have been produced. If his business is of the scale that has an annual turnover of over Kshs 600,000 one would expect to find some reasonable system of accounts keeping, and not merely a sheet of paper with some figures down on it. As was said by Lord Gaddard C J In *Benham Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 "Plaintiffs must understand that if they bring actions for damages, it is for them to prove their 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"

The court cannot say that the plaintiff has proved that his business was earning him a profit of Kshs 25,000 or Kshs 30,000 per month or for that matter any other specific figure. Bearing in mind that the plaintiff in 1979 had bought out 50% share of his partner in these two shops for Kshs 21,000 one can visualize the size of this business. One can further assume that the business must be making some profit and that for the three months that the plaintiff was unwell there might have been some reduction in his profit. Taking an overall view of his business and doing the best I can would assess his loss of profits for these three months at Kshs 1,000 per month, that is Kshs 3,000 in all and I would allow it as special damages in place of the disputed items amounting to Kshs 45,400. The total special damages including the uncontested items therefore amount to Kshs 11,527 which is allowed.

With regard to general damages for pain, suffering and loss of amenities the plaintiff had to spend over a week in the hospital. All his injuries have healed leaving behind scars and pain in the regions where he

had received injuries, particularly at the collar bone and in the lower back. These pains according to the plaintiff do not permit him to handle large tyres of heavy vehicles.

In the case of Firozali Noormchmed Haji v Elias Kapomba Toka C A 46/ 80 (unreported) a businessman 29 years old had received amongst other injuries, compressed fractures of thoracic vertebrae No 4, 5, and 10. He made good recovery although he continued to suffer from pain and weakness and from some degrees of curvatures of the spine. Osteo-arthritis was likely to develop. He was awarded Ksh 50,000 for this injury. He had remained in hospital for five weeks. This judgment was given on February 3, 1981, that is four years ago. On the other hand, the back injury in that case was much more severe than in our case.

Mr Anjawalla, the learned counsel for the plaintiff did not quote any cases on collar bone injuries but Mr Juma appearing for the defence did. He quoted three English cases from the Quantum of Damages Kemp & Kemp Vol 2 and I will refer to one of them.

Reckless V P C Allday & Co Ltd & another, 9 – 018. A male aged 31 had received, amongst other injuries, comminuted double fracture of left clavical and this was the most serious of his injuries. The injury healed but scars and an unsightly lump at the site of the fracture remained. He would continue to suffer pain and discomfort after a heavy day's work.

He was awarded by the trial judge £ 650 for fracture, £ 300 for disfigurement and £ 700 for future trouble, making a total sum of £ 1,650 as general damages. The Court of Appeal while dismissing the appeal felt that the award was on the high side. That was in October 1978.

I will not refer to the other two cases because the injured persons in each one of them was a much older man. Having considered all these cases and keeping in mind the incidence of inflation I would award to the plaintiff in our case a sum of Kshs 50,000 each for back and shoulder injuries making a total sum of Kshs 100,000 as general damages.

I must also consider whether the plaintiff is entitled to any amount for loss of future earnings. With regard to this item the plaintiff says that the job of detecting separation in tyres is a very specialized job and that because of its complexity he has failed to train any of his employees in this art. We must accept this assertion with a pinch of salt. He himself learnt this trade on the job when he was employed at another establishment. He did not say he had any special educational or technical qualification which helped him to acquire this trade. Any labourer of a reasonable intelligence should be able to learn this art of separation. In my case the court is not prepared to accept that he himself must hold the tyre as he hammers it. Anybody else should be able to slowly roll the tyre along the floor as the plaintiff strikes it with a hammer. The court is not satisfied that the plaintiff's future earnings are in any way affected by his injuries. In the result I enter judgment for the plaintiff in the sum of Kshs 111,527 being:

General damages Kshs 100,000

Special damages Kshs 11,527

Total Kshs 111,527

The plaintiff shall have costs and interest as claimed.