

Republic of Kenya

High Court, at Nairobi

Civil Case No 3276 of 1982

Pattie

v

Alestairs

Cases

1. Savita Ratilal Shah vs Francis Lukonya Kiranja H C C C No 490/79
2. H C C C No 1495/1980
3. Quail vs Barnhill (Kemp-10-310/1)
4. Dukes vs Chappel (Kemp10-310/1/1)

November 28, 1985, Cockar J delivered the following

Judgment.

In this claim for damages for injuries relating to a cerebral concussion and a comminuted fracture of the upper end of right tibia suffered in a traffic accident on August 15, 1981 at 9.30 pm interlocutor judgment together with a judgment for special damages for Kshs 9,605 was entered on December 8, 1983. Evidence was thereafter heard by the late Justice Ouma on May 10, 1984 in relation to the assessment of general damages. Unfortunately before the late judge was able to write the judgment he died. The Chief Justice then directed me to write the judgement on evidence and submissions as recorded by the late judge.

The plaintiff, 65 years old when he gave evidence, said that after the accident he spent 10 days in M P Shah Hospital. He was released on crutches with his right leg in plaster as a result of a comminuted fracture of right tibia. According to the medical report of September 30, 1982 of the consultant orthopaedic surgeon Shashi Patel, after the removal of the plaster after 3 months the plaintiff was allowed gradual weight bearing on the right leg.

The plaintiff informed the court that he felt pain in cold weather at the site of injury, could not walk for a long distance and could not put full pressure on his leg. He still could not walk without crutches. He had a swelling of the right foot. His right leg was bent a little. He could not stand for a long time. When he was again sent to the surgeon Shashi Patel for a further examination the latter told him that he needed a further operation which would cost him about Kshs 15,000. He intended to undergo the operation in about 3 months time.

The two medical reports more or less confirm the evidence of the plaintiff. In the medical report of September 30, 1982 the surgeon had observed that the right leg was short by 1 cm but the movements of the knee and ankle joints were of full range and normal. There was a non-union of the fracture of the upper end of right tibia. That was the reason for pain, inability to walk without crutches and swelling of the right foot. He still could not put pressure on the right leg because of the non-union which was also the cause of deformity giving rise to bowing of right tibia and the permanent shortening of the right leg by 1 cm. The report stated that the plaintiff would definitely need another operation for plating and cancellous grafting to achieve the union of this fracture of upper end of right tibia.

The second report by the surgeon, Shashi Patel, of March 21, 1984 is an elaboration and confirmation of observations made in his earlier report. It states emphatically that unless the non-union is corrected by surgery in grafting the symptoms the plaintiff was complaining of would remain. Once the complete union of the fracture is achieved by operation, the report continues, the said symptoms complained of would disappear. The total fees of the operation are estimated in the report at Kshs 20,000. The report also states that the plaintiff had not suffered any fracture in the skull nor any localising neurology. A permanent shortening of the leg by 1.5 cm would remain despite the proposed operation and what would lead to early osteo-arthritic changes in the peripheral joints of the lower extremities and the small intervertebral joints of the lower spine.

I have perused carefully the cases cited by the plaintiff's advocate. In H C C C No 490/79 Savita Ratilal Shah vs Francis Lukonya Kiranja the plaintiff was a woman who suffered fracture of tibia of left leg and had to undergo two operations – the 2nd operation involving internal fixation and bone grafting. She used crutches for 10 months and now had slightly abnormal position. She was awarded Kshs 75,000 for pain, loss of amenities and suffering by Simpson Judge as he then was. In H C C C No 1495/1980 the injury was a close comminuted fracture of midshaft of right femur with consequential physical handicaps similar to those suffered by the plaintiff herein. The late Justice Brar awarded Kshs 80,000 for general damages.

I have also perused the English cases of Quail vs Barnhill (Kemp-10- 310/1) and Dukes vs Chappel (Kemp10-310/1/1). In both the injuries and the resulting physical handicaps were of a more serious nature. They are not a proper guide.

In this case I accept that it is necessary for an operation to be performed in order to achieve a complete union of the fracture. I also accept that the operation will cost Kshs 20,100. The plaintiff is now 66 years old. Being mindful of all the factors involved I am of the view that a sum of Kshs 90,000 will be a fair and just award by way of general damages made up of Kshs 20,000 for the proposed operation to achieve the union of the fracture and Kshs 70,000 for pain and loss of amenities and suffering. Interest on the said sum of Kshs 90,000 will be at court rates from today. A judgment for Kshs 9,605 by way of special damages was entered on December 8,1983. Costs of the suit are awarded to plaintiff against defendant.

November 28, 1985

Cockar J