IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Hancox, Nyarangi and Platt, JJ A)

CIVIL APPEAL NO 49 OF 1984

BETWEEN

ABDALLA HUSSEIN KILO…….…….. APPELLANT

AND

KOMBO KASSIM OMAR

IDA-SA-GODANA RANCHING CO-OP SOCIETY…....……..…RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Mombasa (Bhandari, J)

dated October 13, 1983

In
High Court Civil Case No 26 of 1983)

JUDGMENT OF HANCOX, J A

I have had the advantage of reading in draft the judgment of Platt, Ag J A. I entirely agree that the learned judge's award of Kshs 10,000 by way of general damages was manifestly too low.

Save that I would not subscribe to the sentiment that the term "formal proof", which is, and has been, in general use for many years, is obsolete. I am in complete agreement with all that Platt Ag JA has said. For the reasons he gives the award of general damages could be increased to Kshs 80,000. For the sake of clarity the figure is made up as to Kshs 60,000 for pain and suffering and loss of amenities of life, (present and future), as to Kshs 20,000 for the cost of the suggested further operation, which Mr Ghalia did not, in the end, oppose, to include Kshs 6,000 for the further pain and suffering entailed.

As Nyarangi, J A also agrees the orders of the court are as proposed by Platt, Ag J A.

The appeal is accordingly allowed to the extent indicated by him, with costs.

Platt JA This appeal has been brought from an assessment of damages in *ex parte* proceedings, due to the default of appearance of the second respondent. The appellant, a passenger in the vehicle owned by the second respondent Co-operative Society, and driven by the society's employee, Mr Kombo Kassim

Omar, the first respondent, was injured in a collision involving the society's vehicle. The society alone was served with the summons to enter appearance and the plaint; Mr Kombo Kassim Omar has not been served. But the society did not enter an appearance. Accordingly, the suit being one solely for damages, the appellant applied for interlocutory judgement which was granted on February 26, 1983. The suit was set down for the assessment of damages in effect, though the order was for formal proof. There is no such thing as "formal proof" in the Civil Procedure Rules at present. It is an anachronism lingering on from a previous set of rules, and should not be used, as it tends to blur the issues before the court. Either interlocutory judgment has been entered and damages remain to be assessed, or there is an ex parte hearing of all the issues on liability and damages. The learned judge did appreciate the procedural steps to be taken, as he has set them out in his "judgment". But no mention was made of the case against Mr Kombo Kassim Omar. It remains unlikely to be pursued. Perhaps counsel will indicate that he will not pursue the matter, so that no confusion will arise out of a possible contradictory decision in the future. It is likely that counsel for the respondents will assist, as he gallantly sought to represent both respondents, despite non-service in the case of Mr Kombo Kassim Omar.

The appeal, concerns the assessment of general damages of Kshs 30,000; special damages of Kshs 1,010 not being disputed.

As a result of the accident, the appellant sustained a fracture and dislocation of the right upper arm and elbow respectively. The accident occurred on May 27, 1982. He stayed in the Coast General Hospital for about two weeks during which time the fracture was reduced and the right arm immobilised above the elbow plaster. The appellant informed the court that he was to have a further operation, but that his doctor left for England. The appellant was then examined by Mr Hemant Patel on June 23, 1982. Mr Patel had the benefit of an X-ray report which showed that there was non-union and significant displacement of the humeral end fragments with persisting medial subluxation. The lateral fragment was much more displaced so that joint movement would be definitely impaired. Mr Hemant Patel was of the opinion that the position of the fracture bone and its relation to the elbow joint was totally unsatisfactory. The appellant needed urgent surgical treatment to reduce the present state of the elbow. That would entail two weeks hospitalisation and prolonged physiotherapy. In view of the treatment needed, it was too early to say what the resultant disability would be.

How the appellant reached to this unfortunate state of affairs is not clear from the record. All that is known is that he must have decided not to have the suggested operation either in the Coast General Hospital or in a private hospital which Mr Patel estimated would have cost Kshs 14,000. Mr Patel examined the appellant again on August 17, 1983. He now found that the right elbow was ankylosed in flexed position. He had very little movement of pronation or supination, and the right hand grip was poor, which was unfortunate for a right-handed person. No further treatment had been undertaken since the first examination. The situation was that the elbow joint was grossly disorganised. The radius had no corresponding humerous bone to articulate, and part of the fractured bone projected in front of the elbow, thus restricting the movements of the elbow. As the joint was ankylosed, the full use of the right arm was not possible, and that weakened the muscles of the arm and reduced the power of the hand to grip.

Surgical treatment was still recommended. It would not be so effective now as it would have been in 1982, but still it would help arm movement. It would not prevent osteo-arthritis which was already setting in. That would cause greater pain and even less movement. The appellant certainly could not continue to drive a vehicle.

Luckily for the appellant, the Game Department continued to employ him at the same salary although in a different job. The appellant was 50 years of age with five years to go until retirement. Whilst he remained in the Game Department he suffered no loss of wages, and therefore it seems that no claim for loss of wages in the future was made. His salary was not even given in evidence.

In these circumstances, the learned judge made several crucial findings which are the subject of this appeal. He considered that the appellant as a man of 50 years old was fast reaching the age of retirement. The appellant had been in hospital for a fortnight and was left with a deformity of his right arm which only permitted the arm to be partially functional. Osteoarthritis was setting in and could get worse in

future. However, the appellant had not lost his job. The appellant was partially to blame for not having undergone an operation. The operation would have cost him nothing at Coast General Hospital; otherwise he would have paid Kshs 14,000. Therefore Kshs. 30,000 would be fair and adequate compensation for pain and suffering and loss of amenities.

With the special damages of Kshs 1,010 the total of damages was Kshs 31,010.

Mr Jiwaji sought to persuade the court that the learned judge had both misdirected himself on these findings and made an award which so low that it indicated a wholly erroneous appeal. Mr Ghalia, on the other hand sought to support the award, because the learned judge had made none of these errors. At least the duty of this court is agreed. It is common ground that these errors must be present, it not being a case where merely because the court would have made a somewhat higher award, it should therefore interfere. The court was grateful for the reference to *Henry H Ilanga v M M Anyoka* [1961] E A 705 at p 713 where the proper approach is set out, derived from several celebrated English cases.

Mr Ghalia also reminded the court of two more considerations; the first that the learned judge who saw the appellant and Mr Patel give evidence was much more likely to have gained a better impression of the weight to be attached to the evidence, than judging the matter by the record itself. Allied to this is the idea that the appellant is unlikely to have a farepaying passenger. People in this area, like the appellant, rely upon lifts for transport. It would therefore be in keeping with the type of evidence adduced to bear in mind that damages ought not to penalise the society which was no doubt helping the appellant. Mr Ghalia thought that the learned judge may have had this in mind when judging the weight to be ascribed to the appellant's misfortunes. The other aspect is the very awkward aspect in this case, that a plaintiff must prove the facts on which he claims damages. That principle is of such ancient vintage that it is always surprising to see that it has not been adhered to. But the distressing fact remains that much that could have been said for, and possibly against the appellant, was not put by counsel or elicited by the court. This is the fundamental problem in this appeal; the record is sketchy and unsatisfactory, leading the learned judge into making assumptions in place of hard evidence. Yet there is no doubt that the proposition of law advanced by Mr Ghalia must all be respected; the attitude towards the trial court seeing the witnesses must be respected; but qualified by the lack of clear evidence.

The various headings which must be explored as far as possible are-

(1) the general situation of the appellant;

(2) his attitude to another operation; and

(3) the general level of conventional damages awarded for elbow injuries

On the first general topic, the question is whether the learned judge was entitled to consider that the end of the appellant's working life was his retirement from the Game Department at the age of 55 years. The court was referred to decisions of the High Court allowing for valuable remunerated employment after retirement from the Civil Service, and the courts would do well to consider that situation whenever it arises. If a civil servant has prospects of further employment which he would lose, no doubt account should be taken to that. In the present case for some reason that was not put forward. His civil service salary was not given, his new type of work was not given; and while it might be inferred that as a driver, the appellant could have gained valuable employment after 55 years of age, that is no longer open to him. What he might do instead is not stated and therefore the court is unable to say whether there would be any differential loss after retirement because the appellant cannot drive. Thus, while Mr Jiwaji may well be right that it is too bald a summary of the appellant's situation to say that he had not lost his job, Mr Jiwaji must, I fear, be reminded that he led no evidence as to the appellant's real position, as far as future work is concerned. When all this was pointed out to him, he felt obliged to leave aside his arguments on this aspect of the case; though it is with some regret perhaps that this should be so.

A similar problem bedevils the approach to the second operation. The learned judge criticised the appellant for not having undertaken the second operation, and for having given a bad excuse for that

attitude, namely that he was to have had second operation but his Doctor had gone to England. The record does not disclose why the appellant lingered on without having his second operation. Was he waiting for the Doctor to return; was he afraid of the second operation, because there had been a disorganized attempt on the first operation; was he afraid of the Coast General Hospital, where he had not been treated well; was he unable to pay for treatment in a private hospital; if he gets his damages will he now consider having the second operation? All these questions are pertinent to the test whether the appellant should have mitigated his loss.

It will be recalled that the burden of proof of damages is upon the plaintiff, as the person alleging loss. But if a defendant seeks to show that the plaintiff ought to have mitigated his loss, the burden may pass to the defendant, and the normal measure of damages will not be cut down unless the defendant succeeds in showing that the plaintiff out reasonably to have taken mitigating steps. (see *Mayne & MacGregor* on *Damages* 17th Ed p 825.) There was no defendant alleging anything in this case; the court took up the point. Very well; then the court had to decide what standard of conduct this appellant must attain when assessing what steps should have been taken by him, a standard which is not too high in view of the fact that the respondent is an admitted wrongdoer. (see *Mayne & MacGregor* (*ibid*) pp 158 and 159.) In the context of this case, it is said that a plaintiff need not risk his person too far in the hands of surgeons. *Steele vs Robert George* [1942] A C 497 and *Richardson vs Redpath* [1944] A C 62 illustrate that the refusal of a physically injured plaintiff to undergo a dangerous and risky surgical operation does not constitute a failure to mitigate. On the other hand, where the operation could not be regarded by reasonable men as a risky one, then a refusal to allow it will be a failure to mitigate on the part of the plaintiff. *Marcroft vs Scruttons* [1954] 1 Lloyds Rep 395; *Mcauley vs London Transport Executive* [1957] 2 Lloyds Rep 500). Bearing these matters in mind, the learned judge had to decide whether in all the circumstances, including the advice received it was reasonable to refuse surgery. The fact that the appellant did not have a second operation is explained in the first instance by his doctor leaving. It was not shown that another doctor was available to carry on. It was not shown whether there was a time for this to be done by a well qualified person. It was not shown that the appellant could afford a private hospital. The learned judge made certain assumptions that the operation would have been carried out in the Coast General Hospital. Unfortunately the learned judge was not giving evidence, and if he intended to rely on his general knowledge it should have been put to the witnesses, and if they did not know a doctor from the Coast General Hospital should have been called. The learned judge's assumptions, possibly, might not have been entirely right, and there should clearly have been evidence that the operation could have been carried out in the Coast General Hospital and what chances of success there were. On the bases of the record, it is difficult to weigh what the risks were. Mr Patel said there was a good chance of improvement in 1962; there was less in 1963. But he did not explain what must have been uppermost in the appellant's mind, what would happen if there was again a non-union. There are cases of non – union that have been before the courts with the injured person travelling from one country to another seeking the expert who could cause bone union. One insurance agent of Nairobi whose bone could not unite in Nairobi and London, finally was cured in India. So what were the risks in this case? We do not know. Though it cannot be said what the appellant's position actually was, yet it cannot be said that he necessarily took the wrong decision. As the duty on him does not involve taking too great a risk with his person in the hands of a surgeon, I cannot think that the appellant should have been so greatly criticised by the learned judge in the absence of a clearer understanding of his circumstances.

If a second operation is desirable there is at least a degree of pain and suffering to be added. It is said there was no evidence. That is true to a certain extent. The likely pain and suffering of a second operation was not considered. But pain and suffering was compensated from the first operation, and the second operation, reducing the fracture, with prolonged physiotherapy treatment recommended thereafter must have been similar. At any rate, there cannot fail to have been some pain and discomfort over a period of time.

At length Mr Ghalia conceded that the cost of the second operation should have been added. He did not concede a further sum for pain and suffering. But that must of course be added.

The conventional figure for this type of accident, taking into account that a right handed man was injured in his right elbow, emerges from the cases cited as around Kshs 60,000. It is clear that the learned judge

awarded a sum which was entirely too low.

I would allow the appeal, vary the assessment and resulting judgment of the High Court, and assess the damages or pain and suffering and loss of amenities present and future, and for a future operation, at Kshs 80,000. The total damages will therefore be Kshs. 81,010 and I would enter judgement for this sum. I would award the appellant the costs of this appeal.

Nyarangi JA. I agree. The judgment of Platt Ag JA, supplemented by the observations of Hancox JA, covers the entire field of this appeal so fully that I need say nothing further.

Dated at Mombasa this October, 21 1986.

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

.....

AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR