



Kitavi v Cosatal Bottlers Limited

Court of Appeal, at Mombasa September 10, 1985

Kneller, Hancox & Nyarangi JJA

Civil Appeal No 69 of 1984

(Appeal from the High Court at Mombasa, Bhandari J)

Cases

1. Paris v Stephey Borough Council (No 2) [1951] 1 AER 42
2. Channan Singh v Chanan Singh and Handa [1955] 22 EACA 120
3. Singh v Toong Fong Omnibus Co Ltd [1964] 3 AER 925
4. Amin v Posts & Telecommunications [1971] EA 203
5. Kimothia v Bhamra Tyre Retreaders [1971] EA 408
6. Njara v Njenga, Mombasa High Court Civil Case 495 of 1976
7. Butt v Khan, Civil Appeal 20 of [1977]
8. Kitwai v Davinder Singh and Others, Mombasa High Court Civil Case 942 of 1978
9. Juma v Kenya Glassworks Ltd, Civil Appeal 1 of 1980
10. Marube v Nyamuro [1983] 1 KCA 96
11. Oratach v Otieno, Nakuru High Court Civil Case 109 of 1983
12. Southern Engineering Co Ltd v Musinge Mutia Civil Appeal 46 of 1983
13. Zablon Mariga v Morris Wambua Musila 1983/84 2 KCA 204
14. Wright v British Railways Board [1983] 2 AC 773
15. Kemfro Africa v Olive Lubia Civil Appeal 21 of 1984
16. Chan Wai Tong v Li Ping Sum [1985] 2 WLR 396

Advocates

Satish Gautama and K M Pandya for the appellant

I T Inamdar for the respondent

September 10, 1985, Kneller JA delivered the following Judgment.

The only question raised in this appeal was whether the general damages for pain, suffering and loss of amenities awarded to Robert Msioki Kitavi, the appellant, should be increased. The appellant sued his employer, Coastal Bottlers Limited, the respondent, for damages for his injuries incurred in an accident at their premises which he claimed were the consequence of its negligence and or breach of contract.

Mr Justice Bhandari gave judgment and made these awards in the High Court at Mombasa on April 30, 1984:

Kshs

Net special damages 13,150

Loss of future earnings 63,000

General damages 250,000

Total 326,150

The appellant has come to this court because (in the words of his memorandum of appeal of June 5, 1984.

- 1) The learned judge erred in awarding Kshs 250,000 by way of general damages for pain and suffering and loss of the amenities of life for the injuries he sustained.
- 2) The learned judge's award of Kshs 250,000 for general damages is so inordinately low that it must be a wholly erroneous estimate of the loss and damage sustained by him.
- 3) The learned judge erred in relying on or giving undue regard to the statement by Munkman that:
"the conventional figure for total blindness is about ?9000, that is thrice the loss of one eye."
- 4) The learned judge in assessing general damages failed to appreciate or to consider the fact that although the loss of one eye by itself would not be regarded as so serious an injury as the loss of one hand or one leg or the loss of hearing in one ear, the loss of sight in both eyes would be a lot more serious than the loss of two legs or two hands or the total loss of hearing, and he should have awarded damages in the light of awards for such injuries.

So Mr Gautama, with Mr Pandya for the appellant, asks this court to set aside the award of Kshs 250,000 for pain, suffering and loss of amenities and reassess it at something like Kshs 750,000 to Kshs 600,000. The respondent has not cross-appealed but, instead, instructed Mr Inamdar to submit, at first, that, all in all, Kshs 250,000 was an appropriate award, but later, to offer Kshs 360,000 to Kshs 400,000 which the appellant's advocates refused.

The appellant was employed by the respondent as a casual labourer at its bottling plant in Liwatoni, Mombasa. He loaded bottles on to a machine and later he mixed sugar and water in a tank, heated it, added chemicals and filtered it until it became a syrup. He did all this with one blind and one seeing eye for Kshs 17.50 per day.

On March 4, 1981 when he was levering out staples with a metal file from a carton of concentrated syrup one sprang out and perforated his right eye which was his remaining good eye.

He had several operations on it. The first and the second were in 1981, the same year as the accident, and at the Coast General Hospital on March 6 and at Kenyatta National Hospital in October respectively. The

third was in 1982 at Machakos Hospital on April 6. He was discharged on April 18 that year, and, despite all that medical care and attention for 13 days in hospitals, he was and is, virtually sightless. He can just discern the shadow of a moving hand from 8 feet away.

That is not all. His right eye cannot tolerate sunshine, and every two or three days it throbs with pain.

The Machakos Training Centre for the blind has been or is teaching him Braille and simple carpentry and joinery. He intends to return to his home in Bomani location, Kitui where, with his new skills, he will try to find employment but he thinks his prospects are dim.

Gone are the recreations he enjoyed; the cinema, reading and watching football matches. Someone must do his shopping, fetch and carry for him and even lead him to and from the outside lavatory. He is now about 28 years old and of standard VII education.

Liability was admitted when the appellant's claims against the respondent came to trial at the end of June 1982. The only issue was the quantum of damages, special and general, the respondent should pay the appellant.

The learned judge recorded evidence from the appellant and his eye specialist Dr Ved, the respondent's accountant, Andabwa and Aggarwal, another accountant, who has been analyzing data for the local cost of living index. He then wrote his judgment in which he reviewed the facts in full.

There has been no complaint about his awards for special damages and future earning. He referred to the *Juma v Kenya Glasswork*, Uganda and the English awards brought to his attention. He took as a guide Madan, JA's approach in *Juma's* appeal to the foreign awards and the general principles for assessing awards for general damages for personal injuries. The Ugandan ones from *Quantum of Damages* by Michael Wilkinson, 1973, 3rd Edition, he characterised as being

'very old, the oldest ones being of [the] early sixties and the latest ones of [the] early seventies.'

but went on to note they were nearly the same as they were in England at the same time for the loss of one eye.

He adopted one principle from an English authority which was that the usual award for total blindness should be the same whether the victim lost his sight in both eyes or in the only good eye. *Paris v Stephey Borough Council* (No.2) [1951], 101 LJ 77 (CA). Paris a garage hand aged 30, who was already a one eyed man, was blinded in the other and the English Court of Appeal increased his general damages from ? 5000 to ?9000 on June 18, 1951.

He kept in view the particular circumstances of the appellant, especially the three operations, and the incidence of inflation, before he settled on an award of Kshs 250,000.

Here, in this court, it was agreed all round there is disfigurement, discomfort, a considerable loss of amenities and much mental anguish for the appellant but the respondent's advocate doubted that the appellant suffers much physical distress after the operations and the appellant's advocate harped on the throbbing pain which the appellant has to endure about thrice a week.

There are no decisions on awards for the loss of both eyes or the loss of the only good eye in this part of Africa that my researches have discovered. So, fortunately, cases of total blindness must be very rare. It means, however, that no clear pattern for such awards in East Africa has emerged.

Mr Gautama professed to be able to see one in England and that it was about 4 to 5 times the sum awarded for the loss of one eye which he suggested might be applied here in Kenya. Alternatively, he submitted, since the loss of sight in both eyes, or the sight in the one remaining eye, led to a much greater loss of amenities than the loss of both upper or lower limbs the awards for the former should be nearly double those for the latter.

Mr Inamdar urged the court to avoid the use of any ratio and concentrate on keeping awards for the loss of all amenities at a sensible level, bearing in mind the local figures for inflation, and testing each award by relating it to the appellant's gross annual earnings and or by what the annual interest on it would be if it were invested in say, a housing development bond, which is tax free up to a maximum of Kshs 500,000 at 12% per annum a year?

Local awards for the loss of sight in one eye include:

Kshs 55,000 for a 22 year old mechanic who lost his right eye in an accident and for whom there was a slight risk of sympathetic disease in the left eye.

Amin v Posts and Telecommunications, [1971] EA 203 (U) Youds J

Kshs 50,000 for a turnboy paid Kshs 300 a month for the loss of his left eye.

Nyara v Njenga & Ors, Mombasa Civil Suit 495 of 1976 June 31, 1977 Simpson J.

Kshs 50,000 for a 42 year old casual worker earning Kshs 14 a day in a glass factory who lost his sight in his left eye with a slight risk of ophthalmia sympathetica in the other eye.

Juma v Kenya Glassworks Ltd, Mombasa Civil Suit 598 of 1977 May 14, 1979 Kneller, J

Increased by a majority of the Court of Appeal to Kshs 70,000.

Juma v Kenya Glassworks Ltd, C A Civil Appeal 1 of 1980 Mombasa, March 3, 1980

Kshs 150,000 for a bright pretty girl of 8 who lost her right eye in an accident.

Lubia v Kemfro Africa Ltd & Kanini, Nairobi H C Civil Suit 2382 of 1979 March 29, 1982 Cockar, J.

Upheld by CA in Kemfro Africa Ltd v Lubia, Civil Appeal 21 of 1984, Nairobi February 27, 1985.

Kshs 30,000 for a schoolboy of 14 who lost his sight in the left eye when he was struck by his schoolmaster.

Marube v Nyamuro, Civil Appeal 8 of 1983, CA by a majority at Kisumu on March 29, 1983.

And those for loss of two limbs include:

Kshs 400,000 for a 28 year old turnboy who had to have both legs amputated below the knee.

Kitwai v Singh & Others, Mombasa Civil Suit 942 of 1978, Mombasa, September 28, 1981, Kneller, J

Kshs 600,000 for a 37 year old production superintendent (paid Kshs 7,778 a month) for impotence near total paralysis in left arm and leg, and stiff right knee.

Musila v Mariga, Nakuru, Civil Suit 376 of 1979, Mead, J, October 19, 1981

Upheld at Nakuru by a majority of the CA on May 18, 1984

Kshs 1,000,000 for a boy aged 3 whose legs were amputated above knees.

Oratach v Otieno & Anr, Nakuru Civil Suit 109 of 1983, Masime, J, October 1, 1984

Now it seems to me that awards in the 1970's, anywhere, for any pain, suffering or loss of amenities are of insignificant help without taking into account the contemporary value of money, for it is vital to keep

abreast of current awards which increase to reflect past inflation. Future inflation should be discontinued for it is assumed that the damages awarded and paid will be invested at once so as to provide about 5% income a year and or capital appreciation. The loss of an eye, or the vision in it, does not usually affect earning capacity in most occupations that do not require excellent vision though for those with no work it closes many opportunities for finding one. It makes the victim liable to total blindness if the remaining eye should be injured. Thus the most that can be said about local awards for the loss of one eye is that the loss of two or the loss of the remaining one, or the vision in it, should be substantially greater.

I would eschew ratios, which smack of a rigid mathematical approach, though it is plainly right for the Court of Appeal to try to provide guidelines for the standard range of damages for particular injuries, just as in England the House of Lords has suggested its Court of Appeal should. *Wright v British Railways Board*, [1983] 2 AC 773. For fairness between one plaintiff and another, it has been said, requires some degree of uniformity. *Singh v Toong Fong Omnibus Co Ltd*, [1964] 3 All ER 925 (PC).

It is now settled law that what the appellant was entitled to was fair or reasonable compensation assessed with moderation and in conformity with the general method of approach local courts have taken. Guidelines and brackets for various injuries are useful aids to some hope of consistency but awards will very much depend on the facts of each case and any attempt to standardize or rigidly classify them will be in vain and wrong.

And it is right that when paying due regard to the range of awards in comparable cases trial judges should confine themselves to local ones or those neighbouring countries if the social and economic conditions are roughly similar. *Kimothia v Bhamra Tyre Retreaders and Another*, [1971] East African Community (CA-K) Law, JA.

It is, however, permissible, and useful, to study, and if need be, apply, the factors which must be taken into account in assessing such damages which exercise the English courts for in general the law here is the same. The same is the correct for the approach of this appellate court when asked to raise or lower awards, and for the same reason. See the advice of the Privy Council in *Singh (an infant) v Toong Fong Omnibus Co Ltd*, [1964] 3 All ER 925 and *Chan Wai Tong & Anr Li Ping Sum*, [1985] 2 WLR 396.

The Court of Appeal of Kenya, then should, as its fore-runners did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought to have taken into account or the award is so high or so low that it amounts to an erroneous estimate. *Chanan Singh v Vhanan Singh & Handa* [1955], 22 EACA 125, 129 (CA-K); *Butt v Khan* CA Civil Appeal 40 of 1977.

Returning now to the award in this appeal, it is significant that the learned judge to some extent, relied, first on the English award of ?9000 general damages for the garage hand who was blinded through the loss of his remaining good eye *Paris v Stephey Borough Council* (ibid), and, secondly, insufficient recent local awards. The Paris award was a foreign one and about 33 years out of date. The local ones should have been cited to him by the advocates for the parties in trial. Thirdly, and finally, Kshs 250,000 in 1984 for the injuries the appellant suffered was, in my respectful view, so inordinately low an award for general damages that it was a wholly erroneous estimate and it cries out for an increase. He should have been awarded Kshs 475,000 under this heading.

I propose therefore, that this appeal be allowed with costs and that the award of Mr Justice Bhandari of Kshs 250,000 for the appellant's pain and suffering and loss of amenities be increased to Kshs 475,000.

Hancox JA and Nyarangi JA agree so the order of the court is that the appeal is allowed with costs and the award of Kshs 250,000 as general damages for pain, suffering and loss of amenities made by the learned judge is set aside and one of Kshs 475,000 substituted.

Hancox JA. The injury to the appellant's only good eye in this case resulted in the catastrophe of his being, to all intents and purposes, totally blind at the age of only twenty four. True he has some perception of hand movements, and of light and dark, but it is minimal.

It may be, as Mr Inamdar, for the respondent, submitted, on the basis of Munkman's Personal Injuries for Damages and Death, 6th Edition, that total blindness is regarded as less severe than the paraplegic or quadriplegic cases, but it is, nevertheless, in my judgment, an injury of the utmost severity.

I consider, without doing any violence to the principal this court has enunciated in *Southern Engineering Co Ltd v Musingi Mutia*, Civil Appeal of 1983, with regard to reliance on English authorities, that it is proper for us to pay regard to the fact that those authorities show that the loss of both eyes, or of the second eye where the sight of one is already lost, is regarded as four to five times more serious as the loss of only one eye. I would regard it as more serious than even the loss of both legs for which Kshs 400,000 was awarded by Kneller J (as he then was) in *Kitwai v Davinder Singh and Others*, High Court (Mombasa) Civil Case 942 of 1978, in September, 1981. In most of those cases artificial limbs can be fitted and a degree of mobility and lack of dependence on others achieved. This is almost impossible in the case of a blind person. As Mr Gautama, for the appellant, submitted, it involves the loss of virtually all the joys and pleasures of life.

Bearing in mind that, unlike some of the blindness cases to which we were referred, the respondents did not cause the loss of both his eyes, and are to that extent unfortunate in being saddled with the enormity of the appellant's loss, I nevertheless agree with the judgment of Kneller JA, which I have had the advantage of reading in draft, that the Kshs 250,000 awarded by the learned judge in this case for total blindness, was an entirely inadequate and erroneous estimate. I agree that Kshs 475,000 is the right figure to be substituted for it, remembering that no money award can ever compensate the appellant for his tragic disability. I would therefore, allow the appeal to the extent proposed by Kneller JA and I agree with the order he proposes as regards costs.

Nyarangi JA. Total blindness may not only have a devastating effect on earning capacity, but may also place in perpetual period the physical well-being of the blinded person. A feature writer in the 'Sunday Nation' July 28, 1985 said the following about eyes, "Eyes have often been called the windows of the mind. They have also been described as the mirror of the heart The vital organ has more value than just sight". The injury as a result of which the respondent, then oneeyed, was blinded through the loss of other eye was catastrophic, surpassed only by the rare paralysis cases.

Decisions of English courts, to which it is necessary to refer because this is the first case ever on total blindness to be argued before this court and therefore there is no general run of local assessments made over the years in comparable cases, show that total blindness, either through loss of other eye or loss of both eyes is treated as at least 4 times the loss of one eye. In *Peter Kitwai v Davinder Singh & Others*, HCCC No 942 of 1978 Mombasa, Kneller, J (as he then was) awarded the plaintiff with Kshs 400,000 for the severe injuries, loss and damage, shock, pain, discomfort, loss of amenities, including the loss of both legs. There is inter-relationship, on a commonsense basis, between loss of both legs and loss of both eyes. It is necessary to guard against a sentimental approach. Yet even on a cool and dispassionate approach, loss of both eyes is far worse than loss of both legs. In this case the award of Kshs 250,000 which is less than Kshs 400,000 for loss of both legs etc. is quite clearly an erroneous one warranting interference. Bearing in mind the age of the appellant, his expertise, and his income at the material time, moderation in assessment of damages and the fortunate rare incident of this type of injury, I would respectfully agree with Kneller, JA whose judgment I have had the advantage of reading in draft, that a sum of Kshs 475,000 paid in a lump sum, and sensibly invested to earn interest, is about adequate as an award. I agree with the order proposed by Kneller JA on costs.