



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Potter & Kneller. JJ A And Chesoni Ag J A) CIVIL APPEAL NO 9 OF 1983

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BETWEEN

ANISA ALI (suing through her mother

Fatuma Abdulla Salim as next friend..... APPELLANT AND

1. JOHN MUHOZOZO RESPONDENTS

2. EDWARD SENDAULLA

(Appeal from a judgement and decree of the High Court of Kenya at Mombasa

(Bhandari J) dated 6th September, 1982

In

Civil Case No 726 of 1980)

KNELLER JA

Anisa Ali, the appellant, was about 8 years old on September 4, 1979 when she was crossing the Jomo Kenyatta Avenue in this seaside town at about 5 pm. She was one pace from the centre island when John Muhozozo, the first respondent, riding a motorcycle KJS 944 when he was the servant or agent of Edward Sendaulla, the second respondent, knocked her down and so she sustained some injuries and her parents incurred some expenses.

She sued both respondents for damages alleging they were negligent. The first entered an appearance and filed a written statement of defence denying he was negligent and alleging if he were found to be so, then she was too. The second did neither so judgment was entered for the appellant against him in default of appearance of some date for which there is no minute in the High Court file if the record of it for this appeal is correct.

The first respondent was served with a hearing notice of the hearing on the issue of damages but he did not attend it and was not represented at it.

One of Mombasa's High Court judges (Bhandari J) recorded on September 2, 1982 the unsworn

statement of the appellant, who was by then about 11 years old, her mother, Mrs Fatuma Abdalla Salim and an eyewitness, Mr Nuru Ali.

Her mother produced receipts for the expenses she had met as a consequence of this accident and the report dated May 28, 1980 of Mr Anjarwalla, one of Mombasa's surgeons.

He saw her on April 9, that year and he collated the history of the medical treatment she had had before reaching him.

She was scooped up and taken to the Coast General Hospital where she was discovered to be irritable, as well she might be for she had a fractured right leg, a swelling on her left forehead and the upper part of her left eye but her blood pressure and pulse were all right. Her forehead wound was dressed, her right leg set and plastered. Eight days later she left the hospital and about two months after the accident the plaster was removed.

She told Mr Anjarwalla on April 9, 1980 she had no trouble with her leg but sometimes she had headaches and pains in her chest.

He examined her and found the wound on her left forehead had healed leaving a scar about 2 x 2 inches. He does not mention the upper part of her left eye. He saw a wound on the front of her right ankle had healed leaving a 3 inch scar.

He read an x-ray and an accompanying report about her fractured right leg which said: "The previous fracture in the proximal third of the fibula shaft and the middle of the tibial shaft have completely united. Bone alignment is satisfactory and no significant shortening."

He found she had no shortening of her right leg so she did not limp and her gait was normal. She had no difficulty in squatting (which is usually said to be significantly distressing for those who do not use pedestal lavatories) and in all she had no residual permanent disability from the fracture of the bones in her right leg. He recorded that the scars occasioned her no functional disability.

The judge believed the appellant, her mother and the bystander in whose evidence he discerned corroboration of the allegations the appellant made unsworn. He did not believe the respondent's unsupported written defence. This led him to find the first respondent was negligent and solely to blame for the appellant's misfortunes.

One decision of the High Court in Mombasa was cited to him: Dedan Kamau v George Mungai Mombasa HCCC 339 of 1978 in which on June 24, 1981 I awarded the plaintiff Kshs 40,000 general damages. He was 17, a secondary school pupil, who was knocked off his pedal-cycle and sustained a fracture of his right thigh which after reduction and immobilisation had healed. He had been in some pain for ten months but suffered no loss of amenities.

Sheridan J in Athman Mbwana v Kantilal Hirji Mombasa HCCS 293 of 1973 on November 12, 1974 would have awarded the 13-year old plaintiff Kshs 10,000 general damages, had he found either defendant negligent, for a fracture of the right femur and other minor injuries.

The same learned judge, who had a wealth of experience in such cases in Uganda and then right here in Mombasa, awarded an adult male plaintiff Kshs 10,000 general damages on May 3, 1976 for a single fracture of his left tibia and fibula and bruises on his scalp and forehead. Special damages were agreed at Kshs 500. He was 40 at the time, employed as a casual labourer to chip paint off ships at Kshs 7.20 a day. The fracture had healed leaving him with no permanent disability. Kitila Chengo v Panju & Bros Ltd and Ysongo Mutu Mombasa HCCS 137 of 1972.

Here in this suit the learned judge (Bhandari J) found the special damages were proved to be Kshs 900 and awarded the appellant Kshs 10,000 general damages.

He misread the evidence in Dedan Kamau (ibid) when he wrote that Dedan had a few months of pain to endure after the trial because, in fact, by that date he was free from pain in the right thigh. This apart, there was no error of fact in the judge's approach to the case before him.

Bearing in mind, however, the award of Kshs 10,000 general damages at the beginning of May 1976 by Sheridan J in Chengo (ibid) to which the judge was not referred, this award in late 1982 in the circumstances of this case so manifestly inadequate it must have been based on an error of principle in determining the appropriate award of damages, namely, the effect of inflation which was not mentioned in his judgment.

Accordingly in my judgment, this award of general damages should be increased to Kshs 20,000 and the appeal allowed with costs.

JUDGEMENT OF CHESONI, AG JA

The appellant was, on or about September 4, 1979, injured in an accident when she collided with a motorcycle registration No KJE 944 driven by the first respondent John Muhozozo. The second respondent Edward Sendaulla was sued as John's employer, for it was alleged that when the accident occurred John was acting as servant or agent of Edward. The appellant was about eight years at the time of accident. She sued the respondents through her mother Fatuma Abdulla Salim as next friend. The appellant sustained the following injuries as a result of the accident.

- (a) Severe cuts on the forehead and right eye:
- (b) Abrasions and bruises;
- (c) Wounds on the right ankle
- (d) Fracture of the right leg.

She stayed in hospital for nine days, but continued treatment at home. The leg was put in a plaster. The total period for which she was under treatment was two months. When Dr Anjarwalla examined her on April 9, 1980 he reported that the injuries had healed satisfactorily with no permanent disability apart from a scar at the right ankle and a scar on the left forehead, but the doctor did not think these scars caused any functional disability.

On September 2, 1982 when the case was heard Mr Jiwaji who appeared for the appellant told the court that judgement had already been entered against Edward. The first respondent, John, who had entered appearance and filed a defence did not appear in court on September 2, 1982, though he had been served with a Hearing Notice. The case therefore proceeded ex-parte and Bhandari J awarded the appellant General Damaged of Kshs 10,000 and Kshs 900 special damages. This appeal is against the quantum of damages.

Assessment of damages in motor accident cases in this country still poses a great problem because there is hardly any well maintained record of what the courts have done in such cases in the past. Indeed no one case is the same as another on all facts and circumstances but previous decisions are of guidance.

In this case a medical examination 7 months after the accident showed that the appellant had fully recovered from all her injuries except the residual scars at the right ankle and left forehead. There was no danger of any later deterioration. Taking into account the injuries suffered despite the degree of recovery and unlikelihood of any later deterioration I agree with Kneller JA that the award of Kshs 10,000 (500) was in all the circumstances manifestly inadequate and there is need for this court to interfere.

I would accordingly allow the appeal, set aside Bhandari J's award of general damages and substitute it with one of Kshs 20,000. I would agree with the order of costs proposed by Kneller JA.

Delivered at Mombasa this 22nd day of July 1983.

Z R CHESONI

AG JUDGE OF APPEAL

KNELLER JA

Before commencing his submissions Mr Talati for the appellant made an informal application under rule 76(1) the proviso thereto for a direction that notice of this appeal need not be served on the second respondent because he did not enter an appearance or attend the proceedings in the High Court. This application was granted.

I agree that the appropriate award of general damages in this case is Kshs 20,000. These damages are for pain and suffering. I do not accept Mr Talati's submission that the residual scar to the forehead should be taken into account as a cosmetic injury. The medical report refers to abrasions to the forehead. Those wounds were dressed. There is now a scar which the learned judge said might be there for a long time to come. We have been shown no photographs or other evidence of permanent cosmetic injury.

As Kneller JA and Chesoni Ag JA agree, the appeal is allowed, the award of Kshs 10,000 is set aside and an award of Kshs 20,000 is substituted and the costs of the appeal are awarded to the appellant.