



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 255 OF 2013

BETWEEN

DANIEL KOSGEI NGELECHEI..... APPELLANT

AND

CATHOLIC DIOCESE REGISTERED

TRUSTEES OF ELDORET..... 1ST RESPONDENT

SIMON MONYARI ORACHI..... 2ND RESPONDENT

(An Appeal from the decision of the High Court of Kenya at Eldoret, (Ngenye-Macharia, J.) dated 26th June, 2013

in

H.C.C.C. NO. 111 OF 2006)

JUDGMENT OF THE COURT

1. In a judgment delivered on 26th June 2013, the High Court at Eldoret (G. W. Ngenye-Macharia, J.) awarded the appellant general damages and proved special damages but dismissed the appellant's claim for future medical expenses and for loss of earnings and loss of future earnings. The appellant has appealed to this Court from that part of the judgment dismissing his claim for future medical expenses and for loss of earnings as well as loss of future earnings.

Background

2. The appellant sustained severe injuries in a road traffic accident on 24th September 2005 that resulted in a traumatic amputation of his left lower limb above the knee. Liability was apportioned between the parties by consent. The respondents agreed to shoulder 80% liability while the appellant conceded contributory negligence at 20%. The trial then proceeded on the issue of quantum of damages following which the High Court delivered the partially impugned judgment on 26th June 2013. The court awarded the appellant Kshs. 2,100,000.00 general damages for pain, suffering and loss of amenities; Kshs. 441,845.00 as expended special damages; and Kshs.

254,200.00 special damages for future replacement of prosthetic limb. The court then reduced the total award by 20%, the conceded contributory negligence, with the result that the net award was Kshs.2, 236,836.00.

3. The court declined to award the appellant damages for future medical expenses, for loss of earnings and for loss of future earnings. The court held that damages for future medical expenses, loss of earnings and for loss of future earnings are in the nature of special damages that must be specifically pleaded and proved and that in this case the appellant did not plead or prove the same.

Submissions by counsel

4. Referring us to the memorandum of appeal, Ms. Joyce Chumba, learned counsel for the appellant, drew our attention to paragraph 6A of the appellant's amended plaint where the appellant pleaded that he was fitted with an artificial leg as a result of the injuries he sustained and that he required replacement of the artificial leg every three years and "as such the [appellant] pleads for future medical expenditure." Counsel submitted that while the Judge awarded the appellant the cost of one replacement, she should have also awarded him the cost for subsequent replacements.
5. On loss of income, counsel for the appellant drew our attention to paragraph 7A of the amended plaint where the appellant pleaded that he "suffered total disability and is unable to perform his duties as a driver and a businessman and as such ...pleads for loss of future earnings." According to counsel, the claim for loss of future earnings was not only pleaded but was also proved. Counsel complained that in light of Article 159 of the Constitution, the Judge should not have based her decision on technicalities to deprive the appellant of an award for the cost of future replacements of prosthesis and loss of future earnings.
6. Opposing the appeal, Mr. Kamau Langat, learned counsel for the respondents, submitted that there was absolutely no evidence before the trial court to support the claim for future replacement of the prosthesis; that none of the medical reports produced before the trial court recommended replacement of the prosthesis every 3 years as the appellant claimed; that the claim for loss of future earnings was neither specifically pleaded nor proved and there was no basis for the trial court to make an award under that head. According to counsel, Article 159 of the Constitution on which the appellant relied does not apply as the requirement that special damages should be pleaded and proved is not a 'technicality'.

Analysis and determination

7. We have considered the appeal and submissions by counsel. There are two issues in this appeal. The first is whether the learned Judge erred in dismissing the appellant's claims for future medical expenses in relation to the claim for the cost of replacement of the prosthesis in the future. The second is whether the Judge erred in rejecting the appellant's claim for loss of earnings and for loss of future earnings.
8. As regards the claim for future medical expenses relating to the cost replacement of the prosthesis in the future, the appellant's pleading in his amended plaint under item (e) of particulars of special damages, listed future medical expenses but no amount was set out. Under paragraph 6A of the amended plaint, the appellant pleaded:

"As a result of the injuries suffered by the Plaintiff an artificial leg was fitted which requires replacement after every three years as such the Plaintiff pleads for future medical expenditure."

9. No specific amounts were however stated in the pleading. In his testimony before the trial court, the appellant stated that he uses an artificial leg that was first fixed in 2006 and subsequently changed in 2008 at a cost of Kshs.250, 000.00; and that the artificial leg should be

replaced every 3 years. He produced, as evidence, letter dated 13th November 2012 from Moi Teaching and Referral Hospital, Eldoret, in which Andrew Munialo, a prosthesis and Senior Orthopedic Technologist, stated that the prosthesis the appellant then had was completely worn out and required immediate replacement at a cost of Kshs. 205,000.00 in addition to a professional fee of 24% of that cost. (Total cost Kshs. 254,200.00). There was no mention in that letter or in the medical report produced that the prosthesis required replacement every 3 years, or at all. We therefore agree with the learned trial Judge when she stated in her judgment:

“I have carefully looked at Dr Munialo’s medical report. It has not made any reference to the requirement of the artificial limb replacement every three (3) years. He noted as follows;-

He ’s been on the above knee left prosthesis – modular (artificial limb) for three (3) years now. His artificial limb currently is completely worn out and therefore requires immediate replacement.

I also note that, neither the medical report of Dr. V. V. Lodhia (D.Exhibit 1) nor of Doctor L. K. Lelei (P. Exhibit 6) recommend replacement of the artificial limb every three (3) years.

I do accordingly find that the Plaintiff ’s submissions and his evidence that he requires the replacement of the prosthetic limb every three (3) years as based on no evidence or proven history. And as rightly submitted by counsel of the defence, he probably changed the first limb so soon because it did not suit him. This court is not an expert in this field of medicine and would only be guided by expert evidence in arriving at a finding in favour of the Plaintiff.

Such expert evidence is not available. I will therefore only award the Plaintiff such a sum as is equivalent to a single replacement. And such sum is Kshs.254,200/= as tabulated herein above.”

10. The appellant was no doubt entitled to damages for the medical expenses that he had reasonably incurred as a result of the injury sustained in the accident. He was awarded those.
11. As the Judge correctly pointed out, the rules of procedure require expenses already incurred and paid to be pleaded as special damages. We do not think that requirement is a ‘procedural technicality’ for purposes of Article 159(2)(d) of the Constitution. The requirement that special damages should be pleaded serves the useful purpose of warning the other party of the nature or type of claim and evidence that he will be confronted with at the trial. As Bowen L. J. said in Ratcliffe v Evans [1892] 2 Q.B. 524:

" Special damage means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the claimant's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

12. Lord Donovan in Perestrello Paint United Paint Co. [1969] 1WLR 570 said that:

"if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular the case.”

13. And that:

"If the claim is one which cannot with justice be sprung upon the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed."

14.As Harvey McGregor, the author of **McGregor on Damages**, Sweet & Maxwell, 18th edition notes (see paras 44-007-024) stated, where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.

15.Although prospective medical expenses that have not crystallized as disbursements may be claimed as general damages, [see **McGregor on Damages** at para 35-185] the same cannot be awarded without evidence. In this case, beyond the statement by the appellant in his testimony that the prosthesis would require replacement every three years, no other evidence was tendered to that effect. We are therefore unable to fault the learned Judge in that regard.

16.On the claim for loss of earnings and loss of future earnings, the learned Judge declined to make any award for the same for two reasons. The first reason was that the claim was not pleaded. The second reason was that the claim was not proved.

17.Under paragraph 7A of the amended plaint, the appellant pleaded that:

“As a result of the accident the Plaintiff suffered total disability and is unable to perform his duties as a driver and a businessman and as such the Plaintiff pleads for loss of future earnings.”

18.The appellant tendered in his evidence, Daily Worksheets, showing the income and expenses with respect to a matatu that he was operating prior to the accident. He also testified that after the accident giving rise to the suit, he employed a driver who continued to operate the matatu for six month before he decided to sell the matatu, as “the income was poor” and took up farming and the business of buying and selling livestock. However,the appellant did not plead, as he should have, the income he was earning prior to the accident, which was obviously known to him at the time he filed suit. He also did not produce any evidence of the income the matatu was generating whilst being operated by the hired driver and neither did he produce any evidence of the income he was generating from his new enterprise so as to demonstrate the loss of income that he claimed under the heads of loss of income and loss of future income.We are therefore in agreement with the learned trial Judge that there was no basis for making an award for loss of earnings or for loss of future earnings.

19.The result is that the appeal fails and is hereby dismissed. We think the appropriate order as regards costs is for each party to bear their own costs.

Orders accordingly.

Dated and delivered at Eldoret this 14th day of June 2016.

D. K. MARAGA

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

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

DEPUTY REGISTRAR