



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 133 OF 2005

BETWEEN

PAUL N.NJOROGEAPPELLANT

AND

ABDUL SABUNI SABONYORESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 12th February, 2003

in

H.C.C.C NO. 1791 OF 2000)

JUDGMENT OF THE COURT

Introduction

1. The focus of the appeal before us is the assessment of damages in a road traffic accident. There was no cross appeal on liability which the trial court, (**Angawa, J.**), found at 100% against the respondent. The appellant is **Paul Njoroge** (Njoroge) who was represented before us by learned counsel Mr. E.N. Mwangi, while the respondent, **Abdul Sabuni Sabonyo** (Abdul) was represented by learned counsel Mrs. C.W. Githae. Both counsel made oral submissions before us and produced various authorities which have been of assistance, and we thank them.

The facts and Decision of the trial court

2. The facts are fairly straight forward. Seventeen years ago, on 8th November 1997, Njoroge was the police corporal on duty at Karen Police Station. He left the police station with a driver in police 999 vehicle Reg. No. GK Z 538 heading towards Dagoretti to deploy other police officers. On their way back, as they negotiated the Karen roundabout on the Dagoretti/Ngong Roads junction, they violently collided with motor vehicle Reg. No.KAC 392H, a Toyota Corolla driven by Abdul. Both Abdul and Njoroge suffered injuries and were taken to Forces Memorial Hospital for treatment. Later, after investigations,

Abdul was found to blame and was charged with the offence of dangerous driving. He was convicted and sentenced to a fine of Kshs.4,600/= or in default to serve 6 months imprisonment.

3. After his discharge from hospital, Njoroge went before the High Court on 31st October 2000 and filed suit against Abdul claiming compensation for the injuries suffered and the special damages incurred as a direct result of the accident. He listed the injuries as follows:-

- a) *Multiple comminuted fracture of the right femur causing severance of major vessels to the right leg and shortening of leg by 5 cm.*
- b) *Displaced fracture of the left shoulder blade.*
- c) *Swelling and stiffened knee.*

4. He also listed the particulars of special damages in an amended plaint filed with leave on 8th September 2001, as follows:-

- a) Police abstract.....Kshs.100/=
- b) Medical expensesKshs.353,957/=
- c) Walking crutchesKshs.2,000/=
- d) Transport expenses/hired taxi and hire of driver..... Kshs.246,300/=
- TOTAL** **Kshs.602,357/=**

5. In the end he prayed for judgment against Abdul for the following:-

- a) *The sum of Kshs.602,357/=*
- b) *General damages for pain and suffering.*
- c) *Costs of future medication.*
- d) *General damages for diminished earning capacity.*
- e) *Costs of this suit plus interest.*
- f) *Any other or further relief that this Honourable court may deem fit to grant.*

6. The trial court heard Njoroge who called 8 witnesses (including **Dr. Wokabi, PW8**) to prove not only liability but also the injuries suffered and the specials. On his part, Abdul testified and called one Medical Doctor (**Dr. Hicks, DW1**) who also examined Njoroge on instructions of the insurers. Upon evaluating the entire evidence, the trial court found that Abdul was wholly to blame for the accident and consequently the injuries suffered by Njoroge. The court examined the medical reports and the evidence of the doctors called on both sides and determined that Njoroge had indeed suffered the injuries particularised in the plaint and awarded general damages for **pain suffering and loss of amenities** at Kshs.200,000/=. The short reasoning was as follows:-

“From the two reports I am satisfied that the plaintiff in fact sustained the injuries as pleaded in the plaint. That he did suffer pain and suffering and loss of amenities.

I would award this head of damages. The fractures sustained were comminuted and the fragmental bones saw the fractures injuries being supported with metal plates.

I would award Kshs.200,000/= for pain suffering and loss of amenities.”

7. The trial court examined the claim for ***future medical treatment*** which Dr. Wokabi had estimated at Kshs.400,000/= but which Dr. Hicks found unnecessary and rejected the claim on the basis that “*an implant in the upper limbs is not normally removed since the weight bearing is not as much as in the lower limbs.*” On the third head of claims,

‘***Diminished earning capacity***’, the court dismissed it on the ground that Njoroge was still employed in the police service earning the same salary despite performing light duties.

8. As for the specials, the court examined each item of the claim and the evidence in support thereof and dealt with them in the following manner:-

i) Police Abstract report fee:- allowed at Kshs.100/= because a payment receipt for it was produced.

ii) Medical expenses claimed at Kshs.353,957/=- the whole claim was rejected on the basis that only receipts covering an expenditure for Kshs.65,000/= were produced and there were no particulars in the plaint covering the entire sum of Kshs.353,957=.

iii) Walking Crutches at Kshs.2,000/=- rejected on the ground that there was no proof of payment for it.

iv)Transport expenses at Kshs.246,300/=- rejected on the ground that the receipts produced in evidence did not comply with **Section 20** of the **Stamp Duty Act**, and also because the type of transport was not particularized in the plaint.

In the end the whole claim boiled down to Ksh.200,100= for which judgment was entered together with costs on that sum.

The appeal and submissions of counsel

9. Njoroge was aggrieved by that award and submitted nine grounds of appeal to challenge it. In submissions before us, however, the grounds were argued as four grounds covering the following heads:

i). General damages:

Mr. Mwangi submitted that the award of Kshs.200,000/= was so inordinately low as to represent an entirely erroneous estimate. In his view, the trial judge misapprehended the medical evidence. Referring to the two medical reports produced in evidence, he observed that they were in agreement that Njoroge suffered major fractures of the right femur and shoulder blade among other injuries. He referred us to a case decided by the same judge three years after this case where she awarded general damages of Kshs.900,000/= for comparable injuries- see **Pitty Gathigia**

Baaru & Another v. Kenya Bus Services Ltd & Another [2005] eKLR. Another High Court judge in 1997 awarded general damages at Kshs.950,000/= for “*fracture of right femur, fracture of ankle joint of right foot, fracture of right hip joint and pelvic bone*”—see **Ruth Lillian Nyawir Okoth v. Philip Olago Odeny HCC 1186 of 1996(ur)**; while another Judge assessed Kshs.700,000/= for “*comminuted fracture of the right femur and several injuries over various parts of the body*” in **Omar Hassan & Another v. Rashid Salim & Another HCCC 2391 of 1995 (ur)**. Mr.

Mwangi also relied on the case of **Beatrice Wairimu Wandurua v. Dorman Ltd [2009] eKLR**

where the main injuries suffered were “*compound fracture of the left tibia and a compound fracture dislocation of the left ankle*” and this Court awarded general damages for pain suffering and loss of amenities at Kshs.550,000/=. On the basis of the medical evidence and the authorities cited, Mr. Mwangi proposed a figure of Kshs.800,000/= as most reasonable.

10. In response to the submissions on that head, Mrs. Githae submitted that the general damages cannot be interfered with unless it is shown that the judge proceeded on wrong principles or misapprehended the evidence and arrived at an inordinately low or high figure, which the appellant has not shown in this case. She cited this Court’s decision in

Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v. Augustine Munyao Kioko [2006] eKLR in support of the applicable principles. In her view, the High Court decisions relied on by the appellant were distinguishable and may well have had the damages reduced on appeal. As for the **Wairimu case** (supra), in the Court of Appeal, she submitted that it was distinguishable because the injuries there were suffered by a 14 year old girl while the appellant here was a man, aged 47. As there was no support for the asking figure of Kshs.800,000/=:, she urged us to reject it.

11. (ii). **Special damages:**

Mr. Mwangi submitted under this head that all the specials on medical expenses and transport were not only pleaded but were proved through the evidence of Njoroge and the five witnesses he called. Those were the service providers who issued receipts upon payment. It was erroneous therefore for the trial court to reject them on the basis that the supporting documents lacked stamps when there was no issue of veracity of the documents or credibility of the witnesses. He referred to the evidence of each of the five witnesses to illustrate the submission.

In response, Mrs. Githae submitted that the supporting documents lacked veracity and must therefore be rejected. She referred in particular to the receipts produced in support of transport charges and submitted that they were all made by Njoroge and were not issued by the service providers. In any event, she submitted, the treatment of the appellant who was a civil servant was paid for by the Government.

12. (iii) **Future medical expenses:**

Mr. Mwangi pointed out that this head of damages was pleaded and there was evidence from Dr. Wokabi that there would be a possibility of future surgery to improve the implant whose cost he estimated at Kshs.400,000/=. He cited the case of **Sosphinaf Company Ltd & Another v. Daniel Nganga Kanyi CA No. 315 of 2001(UR)** and **Zakayo Chamwama Busakha v. Spice World Ltd HCCA No. 131 of 2003 (UR)** to support the proposition that the claim is pleaded as a general damage claim and not special damage which required strict proof.

On the other hand, Mrs. Githae submitted that the claim was a special damage one which should have been pleaded as such and proved strictly. In any event, Dr. Hicks testified that it was not necessary to remove the metal implants as the appellant could live with them. She cited the case of **Texcal House Service Station Ltd & Another v. Timo Kalevi Jappien & Another CA 134 of 1998 (UR)** for the proposition that an award under future medication is calculated on annuity basis and the relevant evidence to support the calculations should be tendered by an actuary, but there was no such evidence.

13. (iv) **Earning capacity:**

This head of claim was supported by a letter dated 15th November 1999, from Njoroge’s employer confirming that he had worked hard as a police officer in crime investigation for 25 years and would have been promoted if the injuries did not compromise his ability to work. In fact, he was likely to be retired on health grounds, thus curtailing his earning capacity. Mr. Mwangi submitted that although Njoroge eventually retired normally as a corporal upon attainment of the requisite age, he was never promoted. He thus deserves an award to compensate for this which he proposed Kshs.350,000/=:.

On the other hand Mrs. Githae observed that Njoroge was not retired on medical grounds as feared in the letter dated 15th November 1999, but went home on normal retirement. As for his promotion, she observed that Njoroge had only been promoted once from a Private to a Corporal in his 25 years of service and, in her submission, the accident had nothing to do with lack of further promotion. The claim should be denied.

Analysis and determination.

14. We have considered the grounds of appeal laid before us, the record of appeal, the submissions of counsel and the authorities cited. The principles upon which an appellate court may interfere with an award of damages by a trial court have been fairly settled and we take them from this Court's decision in the **Kimatu Mbuvi** case (supra), thus:-

“We take it from LAW JA in Butt v Khan [1981] KLR 349 at page 356.

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.’

That decision was subsequently followed in Kitavi vs. Coastal Bottlers Ltd [1985] KLR 470 where Kneller JA stated at page 477.

‘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 Chanan Singh & Handa [1955], 22 EACA 125, (CAK); Butt v Khan CA Civil Appeal 40 of 1977.’

As for finding of facts made by the superior court, this Court in discharging its duty to re-evaluate the evidence on a first appeal, will be slow to disturb them. This has been underscored in many decisions but we take it from Mwanasokoni v Kenya Bus Services Ltd [1985] KLR citing with approval Peters v Sunday Posts Ltd (1958) EA 424, thus:

‘It is a strong thing for an appellate Court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.’”

15. We must therefore examine carefully whether the findings of fact on which the assessment of damages in this case were predicated were based on no evidence, or on a misapprehension of the evidence, or the judge acted on wrong principles in making the findings. We shall consider the various heads of claim *seriatim*.

16. (i) General damages:

As we have seen above, the trial court, after a terse statement relating to this head of damages awarded Kshs.200,000/=. The basis for the award was that the two medical reports supported the pleading in the plaint that the specified injuries were suffered. Nothing was said by the court about the extent of the pain, suffering and loss of amenities which those reports unveiled.

17. We have carefully re-examined the medical reports and noted, according to Dr. Wokabi, that Njoroge underwent several surgeries over a period of two months due to complications of blood clotting over the fractured leg and the development of a large wound over the heel. There was further surgery on the dislocated shoulder blade and in both cases metallic implants were inserted. We noted the continued

pain after discharge from hospital on crutches, stiff knee and ankle joint, shortened leg which had lost sensation in the lower parts, as well as an immobile shoulder. In the opinion of Dr. Wokabi, the injuries were so major that they caused severance of a major vessel to the right leg which could have led to amputation. He did not see the possibility of full restoration of blood circulation in future and was positive that the former vitality of the leg would never be achieved. That report was made in January 1999 but Dr. Wokabi testified in court three years later in November 2002 and defended his findings and opinion when he was cross examined on it.

18. We have also examined the medical report prepared by Dr. Hicks in May 2001. The doctor testified on it and confirmed that it was in agreement with Dr. Wokabi's save for the opinion that future removal of the implants was necessary. In his opinion Njoroge

“sustained a number of serious injuries” and “must have sustained very severe pain and suffering as a result of the accident.” He was positive that osteoarthritis would develop at an earlier age than usual.

19. In our view, the trial court misapprehended the nature and extent of the injuries suffered by Njoroge and the extent of the pain, suffering and loss of amenities that he underwent. As a consequence the judge arrived at a figure which was inordinately low thus warranting interference by this Court. We have examined comparable authorities cited on both sides of the argument, some of which suggest figures in excess of Kshs.900,000/= for this head of damages. We think, however, that this Court's decision in the ***Beatrice Wairimu Wandurua case*** (supra) offers the best guidance. We re-assess the general damages for pain suffering and loss of amenities at **Kshs.500,000/=**.

20. (ii) **Special Damages.**

It is common ground that special damages must be specifically pleaded and strictly proved. In dismissing the claim, the trial court made a finding that there was no specific pleading of the various heads of the claim. With respect that cannot be so. The amended plaint, which is reproduced above, specified the particulars of the claims made under that head. This was an error of fact. There was also evidence from several witnesses called to support those pleadings but their evidence was not evaluated on the basis that either the receipts produced in evidence did not comply with the **Stamp duty Act** or payments were made by the Government. With respect again, the trial court made both errors of law and fact in its conclusions.

21. The finding is often made by lower courts that documents which do not comply with the **Stamp Duty Act, Cap 480**, Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of ***Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A*** [2007] eKLR where it stated thus:

“Mr. Mbigi submitted that the guarantee document relied on by the respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the Stamp Duty Act. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is *Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises* CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

*“The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of *Suderji Nanji Ltd. -vs- Bhaloo* (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in *Bagahat Ram -vs- Raven Chond* (2) 1930 A.I.R Lah 854 that:*

“before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty

and penalty

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/respondent and he must be given the opportunity”.

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the **Stamp Duty Act**. At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.

22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer, **Thetu Theuri Gitonga** (PW7-sic), and the consultant physiotherapist, **Paul John Mwangi** (PW7), both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs.38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof.

23. In the judgment, the trial court stated that out of Kshs.353,957/= claimed in medical expenses, only Kshs.65,000/= was proved but even this was inexplicably not awarded to the appellant. As stated earlier, the whole claim was rejected because either it was the Government which paid for it or the receipts were not stamped. There was no finding that the credibility of Njoroge or that of the two medical officers was wanting. We think for our part that the claim was rejected on insufficient grounds. While it is true that Njoroge admitted that the Government assisted in payment of the medical bills, he also testified that it was subject to a maximum of Kshs.50,000/=. There was no other evidence to rebut that assertion and we must therefore make the finding that the medical expenses were proved at Kshs.353,957/=, but a deduction of Kshs.50,000/=, which the Government was responsible for, shall be made leaving a balance of **Kshs.303,957/=** which is properly due to the appellant.

24. As for the transport claim at Kshs.246,300/=, we find no forthright proof of it. The evidence relating to this is irreversibly tainted by the admission by Njoroge that he was the one who made the receipts exhibited for payment of a driver, one **George Njoroge Njenga** (PW6) for several years when he drove Njoroge’s own car. The trial court was reluctant to accept such evidence and on our own assessment we agree with the trial court that there was no strict proof. There was, however, evidence from another driver from a taxi organization, **Joel Chege Mwaniki** (PW5) who said he provided transport services and issued the receipts produced in evidence. The receipts produced covering the period January 1998 to September 1998 amount to **Kshs.76,300/=** which is the only amount we find strictly proved and we give judgment for it.

25. (iii) ***Future medical expenses.***

We do not accept the submission by Mrs. Githae that this head of claim is in special damages. In the case of **Zakayo Busakha** (*supra*), Visram J, (as he then was) stated as follows:-

“The claim for future medical expenses was expressly pleaded in the Plaintiff (see paragraph 11) although the exact amount was not stated in the prayers. Prayer (e) of the Plaintiff states:

“Damages to cover future medical expenses in the form of surgery.”

I believe the lower court’s rejection of this claim arose out of some confusion as to whether this was a “special” damage claim or a “general” damage claim. Unfortunately, the lower court’s judgment is scanty and completely unreasoned. There is only one line dedicated to this important claim, as follows:

“Special damages were not specifically pleaded and (b) and (e) of the Plaintiff are dismissed.”

Prayer (e) related to the claim for future medical expenses. It was rejected because the court considered it to be a claim in “special damages” which needed to be specifically pleaded and proved, but was not.

Clearly, the lower court was wrong. In Sosphinaf Company Ltd & Another vs. Daniel Ng’ang’a Kanyi Civil Appeal No. 315 f 2001, the Court of Appeal, in a judgment delivered 5th April, 2006 held that the claim for future medical treatment was part of general damages which did not have to be specifically pleaded. In Kimatu Mbuvi t/a Kimatu Mbuvi & Bross vs Augustine Munyao Kioko Civil Appeal No. 203 of 2001, the Court of Appeal expressed similar sentiments, although I declined to award the claim because there was no evidence to justify the same.

26. In this case, the claim was pleaded and there was evidence from Dr. Wokabi that it would be necessary and may cost Kshs.400,000/=, while Dr. Hicks thought it was not necessary. None of the doctors support the finding made by the trial court that *“implants placed in the upper limbs need not be removed since they are not weight bearing.”* Indeed it was Dr. Hicks’ evidence that opinion on this field was divided in the medical profession. Hear him:-

“In this part of the world it is normally considered wise to remove metal after the fracture has healed even if it is not causing any trouble. However this opinion is not shared by all doctors.....

Any further trauma to that limb including surgery could be hazardous and fraught with danger of gangrene due to insufficient blood supply resulting perhaps in loss of his right toes foot or calf.

Before considering any further surgery it would be prudent to investigate further the circulation by various means – angiography temperature and other studies.

Because a procedure is possible it may not always be in the best interests of the patient to do it or attempt it.

What are Mr. Njoroge’s best interest? What are his priorities? Does he want more mobility? Relief of pain? Another operation?

Full discussion and counseling is required before proceeding further pointing out to Mr. Njoroge that not all operations are successful.”

27. In short, subject to proper professional assessment and counseling, future medical surgery was not ruled out and it is only fair that a reasonable sum be awarded for this eventuality. We award the figure of **Kshs.100,000/=**.

28. (iv) **Earning Capacity** .

We need not belabor the claim under this head since we are satisfied that it does not lie. On the evidence on record, Njoroge remained gainfully employed by the Government in the police force, at the same level for the seven years until his normal retirement.

Disposition.

29. The upshot is that this appeal is allowed to the following extent:-

(i) The assessment made by the High Court for general damages for pain, suffering and loss of amenities in the sum of Kshs.200,000/= is hereby set aside and substituted with an award of **Kshs.500,000/=**.

(ii) The assessment of special damages at Ksh.100 is hereby set aside and substituted with an award of **Kshs.380,257/=**.

(iii) The order dismissing the claim for future medical treatment is hereby set aside and substituted with an award of **Kshs.100,000/=**.

(iv) The appeal against the claim for loss of earning capacity is dismissed.

The total sum awarded to the appellant is thus **Kshs.980,257=** together with costs of the appeal.

Dated and delivered at Nairobi this 27th day of February, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

Explanatory note on delay:

This judgment was due for delivery on 24th October, 2014 but for several reasons, it was not possible to do so. First was the pressure and priority given to Election Petition judgments which had Constitutional deadlines. The attention of the parties was drawn to this possibility for delay after the hearing of the appeal. Second, in the month of November, 2014, the presiding Judge, with the authority of the Hon. The Chief Justice proceeded on annual leave and engaged in official duties as President of the Residual Special Court for Sierra Leone, which took him outside the country throughout the month. Barely two days after his return to Kenya on 30th

November, 2014, his father who had been hospitalised passed on, and he was allowed to concentrate on funeral arrangements until the end of term. The Judgment, among others, was prepared during the Christmas vacation and is delivered at the first opportunity in the new year.

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

DEPUTY REGISTRAR