IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 18 OF 2003

ALI AHMED NAJI ……..…….. APPELLANT

AND

LUTHERAN WORLD FEDERATION …… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Ang'awa, J) dated 23rd day of January, 2002

In

H. C. Suit No. 1754 of 2000)

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JUDGMENT OF THE COURT

The appeal and the cross-appeal before the Court arise from the judgment and decree of Ang'awa, J dated the 23rd January, 2002. By that judgment the learned Judge found Lutheran World Federation, the respondent herein, wholly liable to Ali Ahmed Naji, the appellant, in respect of a road traffic accident which occurred on the 24th December, 1997 between Kakuma I and Kakuma II Refugee Camps. The appellant, who is from Somalia, was a refugee in those camps. The appellant testified before the learned Judge that on the day of the accident, he and other refugees from Somalia were being transported in the respondent's motor vehicle Reg. No. KAC 951S, an Isuzu Canter, from one section of the camp to the other section and that in the course of the journey, the respondent's driver drove the vehicle at a high speed, lost control and the vehicle ended up in a ditch. The appellant told the Judge that because of the speed at which the vehicle was being driven, the passengers protested to the driver, telling him that he (driver) was carrying human beings and not goats. The driver persisted in driving fast and the accident occurred. According to the medical reports which were admitted in evidence by the consent of the parties, the injuries by the appellant were listed as

(i) fracture of the pelvis with displaced hip bones;

(ii) shortened left leg;

(iii) urinary incontinence; and

(iv) psychiatric depression.

The two medical reports before the learned Judge were made by Dr. C.O. Agunda and Dr. Betty Nderitu. Dr. Agunda examined the appellant on 7th October, 2000 while Dr. Nderitu examined him on 26th October, 2001, a year after the examination by Dr. Agunda. The appellant also produced a P3 Form dated 3rd March, 1998 and which set out various fractures which the appellant had suffered as a result of the accident. We repeat that these documents were produced in evidence by the consent of the parties and the question of their authenticity was not open to the learned Judge to deal with. We make these remarks here because in her judgment, the Judge made remarks such as "No qualifications disclosed; the doctor is not a consultant". If the learned Judge had some doubts about the competence of the two doctors, it was clearly her duty to summon them so that they could explain to her the basis upon which they claimed to be doctors. For our part, it is sufficient to point out that all the medical reports produced by the consent of the parties supported the appellant's claim as to the nature of the injuries he had sustained as a result of the accident.

In its defence to the claim lodged against it by the appellant, the respondent had contented itself to merely denying the allegations made by the appellant in its plaint. In paragraph three of the defence, the respondent had denied that it was a registered society as had been claimed by the appellant in paragraph two of the plaint; the appellant asserted that it was a company limited by guarantee and the appellant had duly amended his plaint to incorporate that assertion. Then the respondent went on to deny that its driver had been negligent, careless or reckless; that the appellant had sustained any injuries or that the principle of ***res ipsa loquitur*** applied to the circumstances of the accident. But nowhere in its defence did the respondent give its version as to how the accident had occurred. It was only when the respondent's driver came to testify before the Judge that he stated that when he arrived at the camp from which the appellant and his group were to be collected, he parked his vehicle and proceeded to a kiosk to buy cigarettes and it was on his way back that he saw a large number of people enter the stationary vehicle and because of the weight of people the vehicle over-turned and the appellant was hurt. He was not driving the vehicle at the time it overturned.

The learned Judge accepted the version given by the appellant and rejected that of the respondent. She did so for two reasons, first that the version was totally new and was nowhere in the defence and secondly that even if the respondent's version had been true, it was still the duty of the driver Stephen Ekuttan to supervise the boarding by the passengers and Stephen's act of leaving the vehicle to go and buy cigarettes leaving the passengers to board as they liked was itself negligent. The Judge held that the respondent was wholly liable for the occurrence of the accident. We are satisfied the Judge in fact found as proved the version by the appellant that the accident occurred when Stephen was driving the vehicle and that the cause of the accident was the speed at which Stephen was driving. The Judge rejected the version of the accident given by Stephen. These findings by the Judge on liability form the basis of the cross-appeal, wherein we are asked to reverse them. We do not think we can do so. First, as the learned Judge rightly pointed out, the respondent was bound by its pleadings wherein the nature of the defence to be raised was never mentioned apart from denying the averments in the plaint. Agreed issues were apparently filed on 10th January, 2001and it appears that the cause of the accident as narrated by Stephen before the Judge was never part of those issues. But even if it had been an issue, the position would be that the appellant gave one version as to the cause of the accident and Stephen the driver gave a different version. The learned Judge who had the opportunity to see and hear the two of them testify before her, accepted one version and rejected the other and it was not alleged before us that there was absolutely no evidence before her to warrant her conclusions. The appeal before us is, of course, a first appeal and is therefore, by way of a rehearing, but it would be a very strong thing indeed for the Court to reverse the Judge on purely issues of fact, unless of course the Court is convinced that her decision on those issues are perverse as not being supported by any evidence or that they are unsupportable on the evidence available on the record. We are satisfied that there was sufficient evidence to support the Judge's conclusions on the issue of liability and in any case, the respondent's claims as stated by Stephen were not part of their pleadings. We accordingly confirm the learned Judge's findings on liability with the result that the cross-appeal must inevitably fail.

The appellant's appeal concerns the quantum of damages, i.e. Shs.200,000/- awarded to him on the ground of pain, suffering and loss of amenities, and the refusal by the Judge to award any damages on the issue of loss of future income.

On the issue of quantum, we must warn ourselves that we are only entitled to interfere with an award of damages where we are satisfied that the sum awarded is either so inordinately low or so inordinately high that it must represent an erroneous estimate of damages or must be indicative of an error of principle by the trial court – see for example, **KEMFRO AFRICA LTD. t/a MERU EXPRESS SERVICE GATHOGO KANINI VS. A. M. LUBIA & OLIVE LUBIA (1982 – 1988) 1 KAR 727**. We must also bear in mind that similar injuries ought to receive similar awards as Mr. Nzamba Kitonga, learned counsel for the appellant, submitted before us. The injuries suffered by the appellant were really not in dispute and for some reason which is not quite apparent to us, the learned Judge picked upon only one injury, namely the fracture of the pelvis. Dr. Betty Nderitu was apparently commissioned by the respondent to examine the appellant and as we have said she did so on 26th October, 2001. Her findings upon examination were:-

"***(i) Unable to bear weight on the left lower limb;***

(ii) Walks with the aid of crutches;

(iii) Length of both lower limbs equal;

(iv) X-rays taken on 4th October, 2000 indicate united fractures of the left half of the pelvis with superior displacement of the pelvis bone.

(v) Other systems are normal."

Earlier on 4th October, 2000 Dr. Imalingat (Radiologist) had reported that:-

"There are old adequately united fractures involving the left half of the pelvis with displacement superiorly and resultant shortening of the left leg."

Again on 7th October, 2000, Dr. Agunda, upon physical examination, stated:-

"(a) When he was examined was using crutches;

(b) General condition is within normal limits;

(c) There is evidence of depression on psychiatric evaluation;

(d) Locally both lower limbs appear normal and of the same length when measured but in anatomical position the left lower limb is shortened by the upwards displacement of the left side of the pelvic bone due to malunion of the pelvic bone."

In the opinion of Dr. Agunda:-

"(a) Ahmed sustained serious pelvic injuries following the accident on 24/12/97.

(b) The management of the injuries was not adequately done.

(c) He now has a malunited fracture of the pelvis with anatomical deformity which does not allow him to use his left leg without crutches.

(d) In his current status he is totally unable to use his left leg for the purpose of his previous work as a fork-lifter.

(e) His percentage of incapacitation as a result of the injury is between 75% and 80%."

We have found it necessary to set out these medical reports because the learned Judge does not appear to have correctly appreciated the gravity of the appellant's injuries and it may also be argued that the Judge doubted the reliability of the Doctors' qualifications to make the reports. It appears from the Judge's record that Mr. A.T. Njoroge represented the respondent before the learned Judge. He cited to the Judge the case of **JAMES WAMBUGU VS. WAMBUA MUTISO**, HCCC No. 192 of 1997 which was decided by the same Judge on 3rd February, 1999 and which involved similar injuries to those suffered by the appellant. The Judge had awarded Shs.250,000/- as damages for pain, suffering and loss of amenities. That was nearly three years before the appellant's judgment on 23rd January, 2002. We agree with Mr. Nzamba Kitonga that the award of Shs.200,000/- made to the appellant was so inordinately low that it represented an entirely erroneous estimate of the damage suffered by the appellant due to the nature of the injuries he sustained. We allow the appeal on this point, set aside the Shs.200,000/- and substitute therefor the sum of Shs.500,000/- as general damages for pain suffering and loss of amenities.

We must now deal with the issue of whether the learned Judge was right in refusing to award to the appellant any damages on the issue of loss of earning capacity. On this head, the respondent's advocate had submitted as follows:-

"The plaintiff has claimed loss of earning capacity of K.shs.4000/- per month. The plaintiff has not adduced any evidence concerning this. The same not awardable. He is a refugee and has no earning capacity.

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Moses Kipkolum Kogo

-vs-

David Malakwen.

Where no evidence adduced the claim should be disallowed. It is very sad that the plaintiff was injured in this matter."

Was it correct that the appellant had given no evidence with regard to the issue of loss of earning capacity? We can do no better than to quote from his evidence:-

"I used to work in Somalia as a forklift driver. I worked in many companys (sic). I last worked with UN at Kimaja Unilever II. I was paid US$ 600 about 40,000/-. I had worked elsewhere and paid K.Shs.4000/- Kenya money.

I was getting 48,000/-. I had a certificate. I was given the letter in Somalia. It is from there. The letter MFI P4 was written in Somalia. I am not working. I am not able to work due to my injury."

When cross-examined on this point, the appellant stated:-

"Loss of earning capacity. I am a refugee and I am not allowed to work in Kenya. I know this. I never worked in Kenya. I did voluntary service."

We do not know if the learned Judge rejected this claim on the ground that the appellant, being a refugee in Kenya, was, by law, not allowed to engage in employment or on the ground that there was no sufficient evidence to prove that he had previously worked in Somalia. On the latter issue we have set out the appellant's evidence. He had worked as a forklift operator and he gave the names of his previous employers. He had sought to produce documents to support that claim but unfortunately for him, he was not allowed to produce them because "he was not the maker of the documents." But the learned Judge

did not specifically say she disbelieved his oral evidence with regard to his previous employment. The Judge actually accepted the submission of the respondent's counsel that the appellant being a refugee had no earning capacity in Kenya.

We think the appellant had lost some earning capacity as a result of the accident. Dr. Agunda specifically stated in his report that:-

> ***"In his current status he is totally unable to use his left leg for the purpose of his previous work as a fork-lifter."***

and the Doctor put the percentage of his incapacity at between 75% and 80%. Of course there has been improvement in his condition as shown by later reports, but there can be no doubt that the appellant lost some earning capacity. True he could not be employed in Kenya, but there was no evidence that he will always remain a refugee in Kenya; he could at some future date return to his native country or go to some other country where he could be employed. The loss of earning capacity will always remain with him and it is unreasonable to hold that he can only be compensated for that loss if he was employable in Kenya. We think the approach adopted by the learned Judge was not fair to the appellant. But it is clear that one cannot tell when the appellant would be able to return to his country where he would be employable. While we agree he has suffered some loss which he himself put at Shs.4000/- per month, we think it would not be right to give him many years of a working life, seeing that it is uncertain when and if he will be able to be employable again. Accordingly we would give to him five working years and at the rate of Shs.4000/- per month we award to him a sum of K.shs.4000 x 5 x 12 = Shs.240,000/- on the head of loss off earning capacity.

The final orders we shall make in the appeal and the cross-appeal are as follows:-

1. We order that the cross appeal be and is hereby dismissed with costs.

2. We allow the appellant's appeal and:-

(a) award to the appellant the sum of Shs.500,000/- instead of the

Shs.200,000/- awarded by the Judge on the head of pain, suffering

and loss of amenities,

(b) award to the appellant the sum of Shs.240,000/- on the head of loss of

earning capacity.

We award to the appellant interest at court rates on (a) and (b) above with effect from the date of the High Court judgment. We also award the costs of the appeal to the appellant .

Those shall be the orders of the Court.

Dated & delivered at Nairobi this 19th day of November, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR