



IN THE COURT OF APPEAL

AT NYERI

Civil Appeal 152 of 2005

FAKIR MOHAMMED APPELLANT

AND

JOSEPH MUGAMBI KIARA 1ST RESPONDENT

WILSON MWONGERA MUKINDIA 2ND RESPONDENT

HENRY STEPHANO KITHINJI 3RD RESPONDENT

(Appeal from the decree of the High Court of Kenya at Meru (Kasanga Mulwa, J.) dated 2nd day of October, 2003

in

H.C.C.C. NO. 73 OF 1989)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Kasanga Mulwa, J.) delivered at Meru on 2nd October, 2003. The appeal is basically on assessment of damages since liability was conceded.

The genesis of this appeal is *High Court Civil Case No. 73 of 1989* filed at Meru in which the plaintiff *Joseph Mugambi Kiara* (1st respondent in this appeal), sued *Wilson Mwongera Mukindia* as the 1st Defendant and *Henry Stephano Kithinji* as the 2nd Defendant, as a result of a road accident which occurred on 2nd January, 1988. In the plaint, it was pleaded that the plaintiff was a paying passenger in a vehicle being driven by the 2nd defendant and owned by the 1st defendant when the said 2nd defendant drove the vehicle so negligently that it caused an accident in which the plaintiff sustained serious injuries. Pertinent paragraphs of the plaint were as follows:-

“11. That as a result of the said 2nd defendant’s negligence or recklessness or omissions, the plaintiff suffered serious bodily (sic) injuries:-

The particulars of injuries

-
- (a) He sustained fracture of the left middle femur.
 - (b) He sustained a cut on the left cheek.
 - (c) He sustained a fracture of the crown of (sic) his teeth – as follows:-

- (i) Lower – right molar
- (ii) Lower – right 2nd pre-molar.
- (iii) Upper – left 1st molar.
- (d) He also sustained bruises all over the body.

12. That as a result of the said accident and injuries, the plaintiff was confined in the hospital for about 3^{1/2} months and also stayed at home under crutches for about 5 more months.

13. The plaintiff has further greatly reduced his capacity to work and particularly, his ability to drive his motor vehicle in the course of his conveyancing of foodstuff’s business.

14. The plaintiff has further reduced his capacity to work as his leg is now shorter than the other resulting to his walking in a tilted position or movements.

15. *The plaintiff will therefore claim general and special damages as follows:-*

A. General Damages

- (a) Damages for pains and suffering.
- (b) Damages for loss of amenities of life.
- (c) Damages for loss of future capacity to work and therefore future earnings.
- (d) Damages for loss of work and income during the time he was confined in the hospital and during the time of recuperation at home.

B. Particulars of special damages

- (a) Charges for the vehicle which carried the plaintiff from the scene of accident to the hospital = **Shs.100/=.**
- (b) Transport of the plaintiff's wife and/or relatives from Kibirichia to Meru hospital to carry food to the plaintiff during the 3^{1/2} months that the plaintiff stayed in the hospital - @ 40/= per day for 103 days = **Shs.4,120/=.**
- (c) Loss of work for the plaintiff's wife and/or other relatives sent by the plaintiff's wife on this sessions to the hospital @ Shs.50/= per day for 103 days = **Shs.5,150/=.**
- (d) Expenses towards purchase of medicines and other dressing items by the plaintiff @ **Shs.3,000/=.**
- (e) Transport in his vehicle No. KTU 036 during the 10 days he used to travel to Meru Hospital for clinical check-up from the plaintiff's home at Kimbo sub-location, in Kibirichia which is 50 kilometres return journey @ 5/= per kilometer = 250/= for 10 days = **Shs.2,500/=.**
- (f) Drivers salary for 6 months during the period of plaintiff's recuperation @ - Shs.1,200/= per month – Total **Shs.7,200/=.**
- (g) Hospital fees = **Shs.40/=.**
- (h) Police Asbstract fees = **Shs.100/=.**

16. *The cause of action arose in Meru within jurisdiction of this court.”*

The defendants sought leave to serve Fakir Mohammed with a third party notice and leave was granted culminating into the said Fakir Mohammed being made a party (3rd party) to the suit. The hearing of the suit commenced on 17th October, 2002 before Kasanga Mulwa, J. when the plaintiff gave evidence in a bid to prove his case.

The learned Judge considered the evidence placed before him for the purposes of assessing general and special damages. In concluding his judgment the learned Judge said:-

“The upshot of all these is that there will be judgment for the plaintiff against the defendants and the 3rd party as follows:-

(a) General damages for pain, suffering and loss of amenities	Kshs.600,000/=
(b) General damages for loss of earnings during the time of hospitalization	Kshs. 96,000/=
(c) Special damages	Kshs. 12,940/=
Net total	Kshs. 708,940

The plaintiff shall also have the cost of the suit and interest. Orders accordingly.”

It is the foregoing that has given rise to this appeal in which the appellant, through his advocates, filed a Memorandum of Appeal setting out the following grounds of appeal:-

- “1. The award of general damages is excessive.**
- 2. The learned Judge failed to give any consideration to the appellant's submissions.**
- 3. The learned Judge erred in awarding damages for loss of income which had not been properly proved.**
- 4. The learned Judge erred in awarding special damages which had not been properly proved.**

This is the appeal that came up for hearing before us on 28th October, 2010 when Mr. M. Kariuki appeared for the appellant, while Mr. K. Kioga appeared for the 1st respondent (Joseph Mugambi Kiara). There was no appearance for the 2nd and 3rd respondents although duly served with the hearing notice!

In his submissions Mr. Kariuki stated that the award of general damages was excessive and that the learned Judge took into account authorities which were not relevant to the circumstances of the case. Mr. Kariuki complained that the learned Judge failed to consider the authorities submitted on behalf of the appellant. It was Mr. Kariuki's contention that an appropriate award should have been between Shs.80,000/= and Shs.200,000/= so that the award of Shs.600,000/= was excessive in the circumstances of this case. The foregoing submissions are in respect of the first and second grounds of appeal.

As regards the third and fourth ground of appeal, Mr. Kariuki submitted that these related to special damages which, in his view, were not proved as no documentary evidence was presented to the learned Judge.

In view of the foregoing, Mr. Kariuki asked us to allow this appeal by reducing the award in general damages and set aside the award in respect of special damages. He also asked for the costs of the appeal.

On his part, Mr. Kioga submitted that the award of **K.Shs.600,000/=** as general damages was adequate in the circumstances of the case. As regards special damages, Mr. Kioga pointed out that as the 1st respondent was a businessman who was involved in buying and selling potatoes, the special damages were in respect of 30 days. In his view, the appeal lacked merit and ought to be dismissed.

As already stated, this appeal is basically on assessment of damages only but being a first appeal, we are duty bound to re-evaluate the evidence, assess it and make our own conclusion remembering that we have neither seen nor heard the witnesses and due allowance must be made for that – See **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] E.A. 123** and **WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A. 1.**

In **ARROW CAR LIMITED V. BIMOMO & 2 OTHERS [2004] 2 KLR 101 at p. 107** this Court said:-

*“In this appeal we are being urged to interfere with the awards made by the superior court. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.M. Lubia and Olive Lubia (1982–88) 1 KAR 727 at p. 730** Kneller J.A. said:-*

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See **Ilango v. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v. Kavoloto [1970] E.A., 414, 418, 419.** This Court follows the same principles.”*

The above stated principles continue to be applied by this Court in similar situations.

We have reproduced the salient paragraphs of the plaint as regards the injuries sustained by the 1st respondent (*who was the plaintiff in the superior court*). The 1st respondent produced medical documents to support the degree of injuries sustained. The learned Judge considered all that was placed before him and in the course of his judgment said:-

“I however observed that the injuries in all these cases were more serious compared to those suffered by the plaintiff herein. On average the preferred award in most of the cases was Kshs.4000,000/=. This is an old matter dating back to 1989. In the light of the said authorities most of which were decided around that time, and the nature of the injuries sustained by the plaintiff, I find an award of Kshs.600,000/= as being sufficient to reasonably compensate the plaintiff for general damages for pain, suffering and loss of amenities. In arriving at this figure I have taken into account the inflation trend of our currency since 1980's.

In **Rahima Tayah and Another v. Anna Mary Kinaru (1987 – 88) 1 KAR 90 Potter J.A.** gave the following advice:-

*“I would commend to trial judges the following passage from the speech of Lord Morris of Borthy-Gest in the case of **West (H) & Son Ltd v. Shepherd [1964] A.C. 326 at pg.345:-***

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

We think we have said enough as regards the general principles in assessment of general damages and how this Court ought to proceed in cases of this nature. Having considered what was before the learned Judge and the manner he proceeded to assess general damages, we are satisfied that the learned Judge had the correct approach. It would appear that the learned Judge was aware of the fact that comparable injuries should be compensated by comparable awards.

Can it be said that the award of **Shs.600,000/=** as general damages was so high and that the learned Judge took into account irrelevant factors or left out some relevant factors? We do not think so. Accordingly we uphold the award of **Shs.600,000/=**.

As regards special damages, it is trite law that these must not only be pleaded but be specifically proved. In this case, the learned Judge awarded the plaintiff (1st respondent) **Shs.3,200/=** as profit per day and multiplied this figure by 30 days. With due respect, there was no

evidence to support that finding. We accordingly set aside that figure. There was also an award of **Shs.12,940/=** as special damages for the hiring of drivers. There was no evidence in support of that finding. Accordingly, the award of **Shs.12,940/=** must be set aside too.

In view of the foregoing, this appeal partially succeeds in that the award of special damages is set aside leaving only **Shs.600,000/=** being the award for general damages for pain, suffering and loss of amenities. Hence, the final figure as regards damages will be **Shs.600,000/=** and not **Shs.708,940/=**. As the appellant has partially succeeded, we award him a third of the costs of this appeal. It is so ordered.

Dated and delivered at NYERI this 19TH day of NOVEMBER, 2010.

R.S.C. OMOLO

.....
JUDGE OF APPEAL

E.O. O'KUBASU

.....
JUDGE OF APPEAL

D.K.S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR