



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 192 of 2006

TRACOM LIMITED

JOSEPH MACHARIA.....APPELLANTS

AND

HASSAN MOHAMED ADANRESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Muga Apondi, J.) dated 15th July, 2003

in

H.C.C.C. NO. 508 OF 1999)

JUDGMENT OF THE COURT

This appeal arises from the judgment of the superior court at Nakuru (Muga Apondi J.) delivered on 15th July 2003 in which the learned Judge awarded the respondent Hassan Mohamed Adan Ksh.2,545,013 being 75% of the entire award which was Ksh. 3,393,350/=. This award was in respect of general damages, special damages, future medical expenses and loss of earnings. The record shows that the matter before the superior court did not attract *viva voce* evidence as the parties entered a consent on liability at 75% against the appellant and 25% being the respondent's contribution and thereafter the parties agreed on the bundles produced by consent before the court and proceeded to submit on the question of the quantum of damages to be awarded to the respondent.

It is necessary for the understanding of this judgment that we set out what the parties stated before the hearing started and which the court apparently accepted. It was as follows:-

"Mrs . Mbanya:

We have a consent to record on the issue of liability. Judgment on by consent, liability (sic) be entered against the defendant at 75%.

Quantum:

That the parties submit their medical

- ***Reports***
- ***Medical Expense Receipts***
- ***Transport Expense Receipts***
- ***Accommodation Expense Receipts***

I do request that we be granted a date for submissions. The plaintiff will make submissions on future earning and future medical expenses. I will also make submission on general damages.

Ms. Nyongesa:

That is what we had agreed.

Court:

Oral submissions on 22nd May, 2003 at 2.30 p.m.”

On 22nd May 2003, Mrs. Mbanya, the learned counsel for the respondent, submitted the list of documents, stating in doing so, that the same had been agreed to be produced by consent and Mr. Musangi, appearing for the appellant confirmed that that was the position. The court remarked that the documents were received by it and ordered the matter to proceed as scheduled. Thereafter submissions by the advocates on both sides were received. We need to add here that earlier on, attempts had been made by the appellant to have a third party joined into the case but though leave to issue third party notice was granted by the court, and time to serve it was extended and adjournment given to effect the same, apparently by the time the case came up for hearing third party notice had not been served and the third party never featured in the matter any more.

The pleadings before us show that the suit before the superior court was based on a claim arising from an accident that took place on 12th June 1995 involving the respondent who was a lawful passenger in a motor vehicle registration number KAC 095Z along Nakuru – Naivasha road. The respondent alleged in the plaint dated and filed on 1st April 1998, that the second appellant Joseph Macharia who was the driver of that motor vehicle which belonged to the first appellant Tracom Ltd, drove the vehicle so negligently that he caused it to collide with another motor vehicle resulting in the respondent being severely injured and being hospitalized for a considerably long time. The respondent, as a result, suffered damages, both special and general and claimed the same. The appellants in their statement of defence dated 27th April 1999 and filed on 30th April 1999 admitted that an accident took place on the date and at the place specified in the plaint but denied that the accident occurred as a result of the second appellant's negligence and blamed the driver of the other vehicle for the accident. The appellants denied the claim for damages and put the respondent to strict proof thereof.

As we have stated above, the parties did not call witnesses and they relied on the documents which included several medical reports for their submissions. Part of their submissions were upheld in the learned Judge's judgment.

For the respondent, Mrs. Mbanya referred to six medical reports produced by consent of both parties

and she summarized his injuries as:-

- ***A concussion with loss of consciousness for 14 days,***
- ***Fracture and dislocation of the left hip joint***
- ***Fracture of the left humerous***
- ***Fracture of the meta (sic)-capal of the third finger***
- ***Blunt injury to the back***
- ***Laceration on his face leading to permanent and unsightly scars on the face***
- ***Laceration on his scalp***

One medical report stated that as a result of all the above injuries, the respondent developed features of post-traumatic psychosis which resulted in him reacting violently. The other medical report explained the cerebral irritations and mood swings, dizziness, insomnia and mental irritability. Mrs. Mbanya presented injuries as stated in different medical reports and the suggested cost of treating some of them. She said the respondent was 28 years old and had a shortening of the left lower limb by 8 cm and was confined to walking with a limp or with crutches. She ended her submissions by referring again to the medical reports and urged the court to award Ksh.50,000/= per year for 25 years being the multiplicand, Ksh.800,000/= for pain and suffering, Ksh.126,746 hospital expenses, Ksh.49,164/= in respect of drugs, Ksh.7,120 transport to and from hospital, Ksh. 310,320/= accommodation. All the awards sought, apart from the award sought for future medical expenses, were receipted and were not disputed by Mr. Musangi, the learned counsel for the appellants. As concerns loss of earning Mrs. Mbanya's take was as follows:-

“Prior to the accident, the plaintiff was in employment and hence I pray for a minimum award of Ksh.3,000/= p.m. and use a multiplier of 25 years. That would total to Ksh.900,000/=.”

The full total she requested was Ksh.3,443,350/=.

In response, Mr. Musangi, for the applicant, conceded that the respondent suffered actual injuries. He conceded what he called actual expenses at Ksh.493,350/= and accepted receipts for the same as authentic proof of that claim. He then stated:-

“A claim for earning capacity must be specifically pleaded and proven.

.....we cannot engage the Court in the fancies of speculation. There was no proof of income and you have asked (sic) to use a minimum of Ksh.3,000/=. Compensation cannot be assessed by guesswork. There is no proof that the plaintiff cannot continue to work. Dr. Shah stated that the plaintiff would not be able to do his business for 15 months after the accident; I pray that you entirely disallow that claim.”

Mr. Musangi, then without specifically saying the award for future medical expenses was misplaced, considered each medical report and maintained that costs of future medical expenses needed to be specifically proved and should not be left for random assessment. He contended, perhaps not without good reasons, that there should have been proformas from hospital to guide the courts of what was likely to be such costs. He also disputed the assessment of the multiplier in respect of that claim. He thus felt the amount that was being sought, having not been specifically pleaded and having not been proved to the required standards, should not be granted.

After the learned Judge of the superior court considered the exhibits before him particularly the medical reports as the claim in respect of bills which were receipted was not disputed, and after

considering the submissions of the learned counsel, he made the award as stated above. In doing so, the learned Judge addressed himself thus:-

“The issue of liability was resolved by the parties themselves as shown above. What the court has to do now is to make a fair and just assessment of the damages payable to the plaintiff.

At the outset, it is apparent that the injuries sustained have been agreed by both parties. Similarly, the expenditure by the plaintiff of Ksh.493,350/= is also not in dispute.

Besides the above, it is apparent that due to the serious injuries that the plaintiff sustained, he would need further treatment and medication. It is only fair that the court makes adequate provision for the above. In my estimation, an amount of Ksh.50,000/= per annum would be reasonable and fair under the circumstances. Given his age, a multiplier of 25 years would be fair.

Though the plaintiff’s counsel argued that her client would need a hip replacement, no documents like invoices and proformas were presented to the court for its guidance. Under the circumstances, it is not possible for the court to hazard any guess.

Apart from the above, it was not disputed that the plaintiff was in employment before accident. The plaintiff’s counsel has requested for a minimum amount of Ksh.3,000/= per month for the next 25 years. Though the defendants’ counsel has opposed the above saying that not enough proof has been addressed of the employment it is apparent that the informal sector in Kenya does not provide any formal documents to its employees. And in any event, the amount of Ksh.3,000/= is roughly the statutory minimum stage (sic). In view of the above the court hereby allows the above claim.

In view of the above, I hereby enter full judgment in favour of the plaintiff on the following terms:-

(a) General damages - Ksh.750,000/=

(b) Special damages

Hospital Bills - Ksh. 126,746/=

Drugs - Ksh. 48,164/=

Transport - Ksh. 7,120/=

Accommodation - Ksh. 310,320/=

(c) Future medical expenses - Ksh.1,250,000/=

(d) Loss of Earnings - Ksh. 900,000/=

Total - Ksh.3,393,350/=

Less 25% contribution - Ksh. 848,337/=

NETT (sic) - Ksh.2,545,013/=

(e) Costs of the suit

(f) Interest on the above.”

That is the award that the appellants are challenging. They challenge it in a memorandum of appeal dated 14th August 2006 in which three grounds were raised. These were:-

“1. That learned trial Judge erred in law and fact in making an arbitrary award of Ksh.50,000/= per annum for 25 years (Kshs.1,250,000/=) on behalf (sic) of further medical treatment without any basis, sound evidentiary or at all and on the erroneous premises, contrary to evidence adduced and without basis at all that the treatment would be life long and especially on an inflated multiplier of 25 years.

2. The learned trial Judge erred in law and in fact in making an award of Kshs.900,000.00 being loss of earning on the basis of inflated multiplier of 25 years without accounting for the fact that disability was not proved to be total and without recognizing the vicissitudes of life therefore imposing undue burden on the appellants herein, moreover. There was no clear evidence of the plaintiff's earning at the material time.

3. The learned trial Judge erred in law in not applying sound principles for assessment of damages and therefore reached a totally unsustainable and unreasonable judgment.”

In his submission in urging the appeal before us, Mr. Murimi, the

learned counsel for the appellants took issue with the award of 1,250,000/= in respect of future medical expenses and the award of Ksh.900,000 being the award made for loss of earnings. In his view, in making these two awards, the learned Judge of the superior court failed to apply the correct and acceptable principles that guide the courts in assessing the awards in that those two claims were neither pleaded specifically nor proved to the standards required in law. He further submitted that the medical reports produced in Court did not support the amount that was awarded for future medical expenses and as to the award for loss of earning there was nothing in the body of the plaint referring to that item neither was there a prayer for the alleged loss. He again contended that the alleged loss should have been specifically pleaded and proved before the court could award it. He however, had no dispute with the awards of Ksh.750,000/= being general damages for pain and suffering and Ksh.493,000/= which was in respect of disbursement for payment made to the various hospitals, doctors and other receipted payments. Mr. Ondieki, the learned counsel for the respondent, on the other hand, submitted that the award of Ksh.1,250,000/= for future medical expenses was properly made as it was pleaded in the plaint but full particulars were to be supplied later and in any event a consent was made by both parties in which both counsel said they would submit on that item before the court at the time of hearing the matter. In his view, all medical reports on the condition of the respondent did admit that there would be need for further medical attention and that would have to be paid for. On the future earnings Mr. Ondieki maintained that that item was not contested before the superior court and in any case the learned Judge, in his assessment went for the statutory minimum of Ksh.3,000/= per month which was not relevant, not pleaded and not proved and as to the assessment on special damages, Mr. Ondieki submitted that it was conceded by the appellants.

Our reading of the memorandum of appeal before us and our understanding of the submissions of learned counsel is that of the total award of Ksh.3,393,350/= of which 25% was deducted being the respondent's contribution, the appellants main complaint is in respect of two awards i.e. the award of Ksh.1,250,000/= being the award in respect of future medical expenses and the award of Ksh.900,000/= for loss of future earnings. We will consider these awards separately as indeed they were awarded as separate awards.

The award for future medical expenses is challenged on two fronts. First, that it was not specifically pleaded and strictly proved. Second, that the multiplier of 25 years was inflated. We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of **Kenya Bus Services Ltd vs. Gituma** (2004) 1 EA 91, this Court, stated:-

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the

infringement of a person's legal right should be pleaded."

We understand that to mean that once the plaintiff pleads that there would be need for further medication and hence future medical expenses will be necessary, the plaintiff may not need to specially state what amount it will be as indeed the exact amount of that future expenses will depend on several other matters such as the place where the treatment will be undertaken, and if overseas, the strength of the currency particularly Kenya currency at the time treatment is undertaken and of course the turn that the injury will have taken at the time of the treatment. We think all that will be necessary to plead (if it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require.

In the matter before us the respondent in his plaint stated at paragraph 5 as follows:-

"As a result of the aforesaid accident the plaintiff sustained injuries and has suffered loss and damages."

And at paragraph 6 of the same plaint, the respondent went on and stated:-

"PARTICULARS OF SPECIAL DAMAGE

- (a) ***Medical Report Ksh.1,500/=***
- (b) ***Police Abstract Ksh. 100/=***
- (c) ***Full particulars to be supplied at the hearing hereof.***
- (d) ***Cost of future medical expenses to be ascertained after professional consultation with his doctors.***

And the plaintiff claims damages."

Thus in our view, the respondent clearly pleaded that he would claim future medical expenses and he stated that the quantum of that claim would be ascertained after it was ascertained. The purposes of requiring certain claims to be pleaded is to forewarn the defendant that there are other claims to be made which may not be the necessary and immediate consequence of the wrongful act as those claims are in respect of losses which the law does contemplate as arising naturally from the infringement of the plaintiff's legal right. Further, as we have stated, the hearing before the superior court proceeded by way of exhibits and submissions by the two learned counsel. Those were preceded by a consent entered into by both parties. We have set out the terms of that consent. Mrs. Mbanja stated in that consent, that the parties would submit their medical reports, medical expenses receipts, transport expense receipts, accommodation expenses and then went on and said:-

"The plaintiff will make submissions on future earnings and future medical expenses."

Mr. Nyongesa in response to the same said that was what they had agreed.

Thus, in the body of the plaint, the respondent pleaded cost of future medical expenses and averred that the same would be ascertained later. In the prayers, the respondent prayed for special damages and general damages, and interest on the two. The learned Judge of the superior court found that this head was properly pleaded. We have no reason to fault him on that aspect. The appellant was warned in good time by the pleadings at paragraphs 5, and 6 of the plaint together with the prayer for that award. Further, the respondent's counsel also stated before hearing, that she would address the court on that claim and the appellants then counsel readily responded and said they had agreed on that issue. In law, that issue was plainly before the court and the court had a duty to decide on it even if it had not been so specifically pleaded as was here. In the well known case of ***Galaxy Paints Co. Ltd vs. Falcon Guards Ltd (2000) 2 EA 385***, this Court stated:-

“It is trite law, and the provisions of Order X1V of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the Court’s determination.”

(Underlining supplied).

See also the case of ***Odd jobs vs. Mubia (1970) EA 476.***

As we have stated, in this matter we are certain that the issue of future medical expenses was pleaded but we add that even if it had not been pleaded, it was an issue framed by parties and left to the court to make a decision on. The court properly did so. What we have stated only concerns whether it was pleaded or not and whether the court could decide on it. We must next deal with the question as to whether it was indeed proved before we proceed to decide the appropriate multiplier in respect of the amount sought or what amount we find due.

The respondent did not give evidence in court. None did. However, there was evidence adduced through the medical reports that were provided as exhibits in court. Dr. M. P. Simiyu of Equator Surgical Clinic was apparently the first doctor to receive the respondent after the accident at Pine Breeze Hospital, Nakuru. His report was clear that by the time the respondent’s relatives took the respondent away, the respondent was still to be booked for open reduction as his hip joint had dislocated. Apart from that, Dr. Simiyu did not suggest any future medication. His report was prepared on 25th November 1995 about six months after the accident. Dr. Cyprianus Okoth Okere saw the respondent and prepared a medical report dated 13th January 1997. On the relevant issue, namely future medical expenses, Dr. Okere had this to say:-

“The fractures might develop into osteomyelitis in future. The fractured skull and the continuous headache might develop into fits in future. The left leg is shorter than the right one with six inches and he is unable to do his businesses. The scars are permanent and he still needs a medical attention.”

Whereas Dr. Mulimba said in his report dated 21st April 1998 there was fracture dislocation of the hip which had ended up disorganized despite subsequent treatment and that it would be difficult to salvage that hip as there being infection, total hip replacement would not be an option, he did not make any suggestion as to whether future medication would be necessary but his report left no doubt that the respondent would require future medication. The fourth report was from Kenyatta National Hospital. Dr. Fred Otsyeno for the Director was more specific in his report dated 23rd December 1999. He said:-

“These injuries have left permanent disabilities with poor prognosis. Hassan requires life medication which will cost about 100,000/= per year. He is unlikely to regain function of the left hip.”

Added to the above medical reports which were prepared before the year 2000, Dr. R. P. Shah, consultant surgeon, in his report dated 17th March 2000 said on the same issue:-

“Since the left hip is fusing and the Osteomyelitis (brue infection) is settling, he is unlikely to need any further operation.”

We note that that does not necessarily mean he would not need any future medication. The last medical report was that prepared by Dr. Kiama Wangai dated 19th May 2003. That report states in its remarks in conclusion:-

“Further he will be on medications for duration of time for the control of infections and through out his management. This approximate (sic) will cost Ksh.50,000/=.”

It is not certain whether that approximate expenditure is per year or for what period.

It is clear to us that all the medical reports agree that the respondent would require future medication. Two reports i.e, that prepared by Kenyatta National Hospital and that prepared by Dr. Wangai suggest the estimated amount whereas others are silent on that but that he will need future medication is not in our mind in dispute. Of the two reports suggesting amounts needed, the Kenyatta Hospital report which suggests approximate figure of Ksh.100,000/= per year was prepared on 23rd December 1999. It is instructive that Dr. Shah's report made about three months later said the left hip was fusing and Osteomyelitis was settling down such that in his mind respondent was unlikely to need any further operation. Dr. Wangai's report made three years later suggested only Ksh.50,000/= for future medical expenses. Thus there was some evidence of progressive drop in the need for future medication. The amount of Ksh.50,000/= that the learned Judge of the superior court used as the amount that would be required every year was an amount suggested by the respondent's counsel in her submission. The learned Judge referred to it as a reasonable and fair amount in the circumstances. He, with respect did not consider that that was the amount as at the time the report was made in May 2003. He also did not consider that it reflected a 50% decrease from the amount in Kenyatta Hospital report made in December 1999. In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award – see the case of ***Henry H. Ilanga vs. M. Manyoka [1961] EA 705 at page 713***. In this case, as we have stated, the learned Judge failed to consider what he should have considered. Hence we are entitled to interfere with the award of Ksh.50,000/= per year on this head. We reduce it to Ksh.40,000/= per year. The second matter we need to consider is whether the multiplier of 25 was proper. Again this was a figure suggested by Mrs. Mbanya. There was no evidence of the respondent's age except what came out in the medical reports. Dr. Okere's report puts his age at 24 as at 13th January 1997. Professor Mulimba's report puts it as 25 years in 1998. In Kenyatta National Hospital's report he was 22 years in 1995 when the accident occurred. Dr. Shah says in his report that respondent was 27 years in the year 2000 and lastly Dr. Wangai said in his report the respondent was 28 years as in the year 2003. Thus, all the reports agree that the respondent was born in the year 1973 except that of Dr. Wangai which by calculation puts his year of birth as 1975. Be that as it may, we do not think the respondent would need medication of the same requirement for 25 years as suggested by Mrs. Mbanya and accepted by the superior court. We have demonstrated above that his health problem was getting progressively less. In our view a multiplier of 22 years would be fair. Thus we would allow for future medical expenses an amount of Ksh.40,000/= per year for 22 years from the date of the superior court's judgment. That totals to Ksh. 880,000/=.

The next complaint was on the award of Ksh.900,000/= for loss of earning. In our view this point was well taken. There is throughout the plaint no mention of loss of earning or even of loss of earning capacity. It is not pleaded in the particulars of special damages. It is not pleaded in the prayers and is not in the consent. Mrs. Mbanya stated that she would make submissions on future earnings but when she made an attempt to do so, all she said was to the effect that the same was not known but a figure of Ksh.3,000/= could be used as a minimum award. It was not stated where the respondent was employed, if he was employed. It was not stated what businesses he was doing if he was doing any business. Mrs. Mbanya in reply to Mr. Musangi's submissions in the superior court stated that there were some businesses where records were not kept. That may be so, but would that business not have a name? There was no evidence that the amount of Ksh.3,000/= was what he was earning. In fact Mrs. Mbanya admitted in effect that they had no evidence of what he was earning and that is why she was prepared to settle for what she called minimum award. If anything, pursuant to Legal Notice No. 193 of 1995, the minimum wages for general labourer was Ksh. 1904/= and for minor, stone cutter, turnboy, waiter, cook was Ksh.2,055/=. The general wages for machine attendant and others in that category was Ksh.2,156/=. These were the minimum wages in 1995 when the accident occurred and none of them was near Ksh.3,000/=. If the respondent was a businessman as Dr. Shah's medical report says, then the court was not told what business he was engaged in and the income per year or per month. Thus this claim was allowed despite the fact that it was neither pleaded nor strictly proved. In the case of ***Karani vs. Nchedu***

(1995-1998)1 EA 87 to which were referred by Mr. Murimi this Court stated:-

“The claim for loss of earning is a special damage. It must be pleaded and proved. That is the law. The plaintiff gave some evidence in which she said she used to operate a kiosk of some sort at Kasarani, near Nairobi, from which she made Ksh.50,000/= per month. She produced no documentary evidence to support this claim but even if she had, it would have been of no practical value because the claim was not pleaded. There was really no legal basis for the award and it is accordingly set aside.”

That was in a case where there was an attempt to prove loss of earning. Here there was no attempt at all, we repeat, it was not pleaded and not proved. The sum of Ksh.3,000/= was thrown to the court from the blues and baptized “*minimum award*”. That could not be a basis for allowing this award. We agree with Mr. Murimi that this award was not proper in its entirety. We disallow it.

In conclusion, we allow the appeal to the extent that the award for future medical expenses is reduced from the figure Ksh.1,250,000/= to Ksh.880,000/=. The award for Ksh.900,000/= in respect of loss of earning is set aside as it was neither properly pleaded nor strictly proved. The total amount of Ksh.3,393,350/= is reduced to a sum of Ksh.2,123,350/= less 25% contribution which comes to Ksh.1,592,512/50. That amount will carry interest at court rates. The respondent will get half the costs of this appeal and of the superior court. To that extent, the appeal succeeds and those are the orders of the Court.

Dated and delivered at Nakuru this 6th day of November, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR