



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
Civil Appeal No. 315 of 2001

SOSPHINAF COMPANY LIMITED

JAMES GATIKU NDOLO APPELLANTS

AND

DANIEL NG'ANG'A KANYI RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Rimita J) dated 23rd day of March, 2001

in

H.C.C.C. NO. 827 OF 1993)

JUDGMENT OF THE COURT

This is an appeal against the judgment of the superior court (Rimita J) dated 23rd March, 2001 wherein the superior court awarded to the respondent herein a total of Shs.3,020,000/= as damages as a result of injuries sustained by him in a road traffic accident.

The superior court had after trial found that the respondent had not proved that the appellants herein were liable for the accident and dismissed the respondent's suit.

However, on appeal by the respondent to this Court against the dismissal of the suit in *Civil appeal No. 52 of 1999, Daniel Ng'ang'a Kanyi vs. Sosphinaf Company Ltd. U Another* (unreported), the judgment of the superior court was set aside and judgment was entered for the respondent on the issue of liability. The case was remitted to the superior court for the assessment of damages hence the award precipitating this appeal.

The respondent had produced a Medical Report prepared by Dr. J. Ndungu Muiru dated 6th March, 1995 as exhibit at the first trial. At the resumed trial, for the assessment of damages, no fresh oral evidence was taken. Instead the damages were assessed on the basis of further medical reports by Dr. Joseph W.

Githaiga dated 2nd February, 2001 (respondent's exhibit) respectively, and Mr. M. A. Sheikh dated 11th January, 2001 (appellant's exhibit) and by written submissions. The award of Shs.3,020,000/= comprised of:

- (a) ***Shs.2,000,000/= awarded as general damages for pain and suffering and loss of amenities;***
- (b) ***Shs.420,000/= as loss of earning capacity, and***
- (c) ***Shs.600,000/= as future medical treatment.***

In computing the award of Shs.420,000/= for loss of earning capacity, the learned Judge applied a multiplicand of Shs.3,500/= per month being the respondent's monthly earnings as a farmer and a multiplier of 15 which award was reduced by "1/3 deduction because of farm inputs". The award of Shs.420,000/= was calculated thus $\text{Shs.3,500} \times 12 \times 15 \times \frac{2}{3} = 420,000/=$.

In assessing the cost of future medical treatment, the learned Judge took into account that the costs of medicine was estimated at Shs.30,000/= - Shs.3,5000 per year and that the respondent was 50 years old at the time of the trial.

The appellants being aggrieved by the award appeal on on 5 grounds, thus:

- “1. Given the injuries suffered by the respondent, the learned Judge erred in awarding General damages of shs.2,000,000/= for pain and suffering which was in ordinarily high as to represent an entirely erroneous estimate.***
- 2. The learned trial Judge erred in failing to consider adequately the medical report by Mr. M. A. sheikh as to the respondent's physical incapacity and awarding the respondent damages on total physical incapacity basic.***
- 3. The learned trial Judge erred in law in awarding a sum of Shs.420,000/= under the head of loss of earning capacity when there was no basis at all for that award.***
- 4. The learned Judge erred in fixing the multiplier at 15 years.***
- 5. The total award was in ordinately high and against the evidence before the court.***

This is a first appeal. The appellants have cited the case of *Mariera v Kenya Bus Services (MSA) Ltd* [1987] KLR 440 which spells out the duty of the first appellate court which is unnecessary to reproduce. The appellants have further cited the case of *Kitavi v. Coastal Bottlers Limited* [1985] KLR 470 for the principles on which this Court can disturb an award of damages by a trial judge. Similarly, we do not find it necessary to recite those principles.

In assessing the damages, the learned trial Judge relied mainly on three medical reports of Dr. J. Ndungu Muiru dated 6th March, 1995; Dr. Joseph W. Githaiga dated 22nd February, 2001 and Mr. M. A. sheikh dated 11th January, 2001 respectively.

The three medical reports show that the respondent sustained compound depressed skull fracture of the right frontal bone and was admitted in hospital in a confused state; that he underwent the surgical operation which involved the elevation of the fractured bone and removal of part of the frontal bone; that he was admitted in hospital for 4½ months and that he was left with a large depression and unsightly scar on the frontal region of the head (the size of a duck's egg). According to the medical report of Dr. Joseph Muiru, the respondent developed a post – traumatic epilepsy and has to take anti – epileptic drugs life long. Further, according to Dr. J. W. Githaiga, the respondent suffers from epileptic attacks once every 3 – 4 months and will need constant anti – epileptic medication for life which is likely to cost an average of Shs.30,000 – 35,000/= per year. Both Dr. J. N. Muiru and Dr. J. w. Githaiga reports that the defect on the skull will predispose respondent to further brain injury and that the respondent is unlikely to engage in

gainful employment.

The respondent in his evidence said in part:

“I had injuries on the head. I usually have fits. I was advised to be buying drugs by a doctor. I take 3 tablets every day. I use 90 tablets for a month. I have a receipt of shs.2,360/=. The receipt is dated 31st January, 1995 ...”.

And when concluding his evidence in chief, he stated:

“Before the accident I was a farmer. I have 9 children. I used to grow tomatoes and cabbages. I cannot do any hard labour now. I do not (sic) little farming but I have difficulties. My son assists me. I am praying for special and general damages”.

Mr. Wamaasa learned counsel for the appellants submitted that the award of Shs.2,000,000/= is excessive and does not reflect the injuries sustained by the respondent. He referred to the medical reports; the appellants’ submissions in the superior court and the authorities relied by the respondent in the superior court. Mr. Mbigi for the respondent, on his part, submitted that the respondent sustained a severe head injury and that the award of Shs.2,000,000/= was not excessive.

The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by the trial Judge and will invariably depend on the peculiar facts of each case.

In this case, the trial Judge considered the evidence of the respondent, the three medical reports which he quoted extensively, the submissions of respective counsel and the authorities cited to him in arriving at what he referred to as *“adequate compensation”*. It is evident from the medical reports that the respondent sustained a severe head injury resulting in the deformity of the skull which deformity has exposed the respondent to further brain injury.

As a result of the injury the respondent suffers from intermittent epileptic fits and poor memory. No doubt the respondent suffers from severe residual incapacity.

It has not been shown that in assessing the damages the learned Judge failed to apply the relevant principles nor can it be justifiably said that the award is in the circumstances of the case so high that it amounts to an erroneous estimate.

There are no valid ground, in our view, for interfering with the award.

Mr. Wamaasa further contended that there was no basis for the award of Shs.420,000/= for loss of earning capacity which claim was neither pleaded nor proved. It is not true as Mr. Wamaasa submitted that the respondent did not say that he was a farmer. Indeed, the respondent testified that he was a farmer growing tomatoes and cabbages before the accident and that as a result of the accident he could not do any hard labour. That evidence was not challenged at the trial. Although the respondent did not say how much he was earning from the farming activities, there was ample medical evidence that his earning capacity had been reduced as a result of the accident. The sum of shs.3,500 assessed by the trial Judge as his monthly income cannot be said to be a wholly erroneous estimate.

The loss of earning capacity is a prospective financial loss which is awarded as part of general damages and which does not have to be specifically pleaded (see ***Butler v. Butler*** [1984] KLR 225). The case of ***Kantilal Khimji & another v. Joseph Mutunga Wambua*** – Civil Appeal No. 135 of 1988 (unreported) cited by the appellants’ counsel did not decide that such a claim should as a matter of law be pleaded. That case merely decided that a claim for loss of earnings from the date of the accident to the date of the trial are special damages which should be specifically pleaded. In this case, the loss of earning capacity

was a direct consequence of the accident which justified an award in the form of general damages. In our view, the learned Judge applied the correct principles in making the award.

Similarly, the claim for future medical treatment was part of the general damages which did not have to be specifically pleaded. The respondent's counsel had claimed shs.1,000,000/= while the appellants' counsel had recommended an award of Shs.300,000/=. The trial Judge took into consideration that the respondent was taking 3 tablets daily; that the estimated annual cost of drugs was Shs.30,000 – Shs.35,000 and the age of the appellant in arriving at an award of Shs.600,000/=. Taking into consideration the nature of the injuries sustained by the respondent the cost of drugs and other imponderables, the award was, in our view, eminently reasonable.

For those reasons, the appeal has no merit. We dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 5th day of April, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR