IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI, JJ.A. & ONYANGO OTIENO, AG. J.A.)

CIVIL APPEAL NO. 21 OF 2002

BETWEEN

DINESH KANTILAZ BARKRANIA

ARROW CARS LTD.....……. APPELLANTS

AND

JOSEPH NJAGI KAGAU…….....……..… RESPONDENT

(Appeal from a Judgment and Decree of High Court of Kenya at Machakos (Mr. Justice Mwera) dated 21st September, 2000 in H.C.C.C. NO. 216 OF 1994)

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JUDGMENT OF THE COURT

This appeal is only against the award of Shs.120,000/= as future medical expenses and the award of Shs.200,000/= as loss of earnings (business) to the respondent.

The respondent, as the plaintiff in the superior court, claimed general and special damages for the injuries he sustained in a road traffic accident due to the alleged negligence of the appellants.

He claimed special damages under several heads namely:

(a) Medical Report – Shs.2,000/=.

(b) Medical bills – Shs.200,000/=.

(c) Police abstract – Shs.100/=.

(d) Car hire services (loss of user) – Shs.273,000/=).

(e) Future medical expenses – Shs.400,000/=.

(f) Loss of earnings (business) Shs.2,800,000/=.

There was a consent judgment on liability apportioning liability at 80% against the appellants and at 20% against the respondent. The superior court (Mwera J) after considering the submissions awarded Shs.120,000/= for future medical care and Shs.200,000/= as loss of future earnings. The appellants appeal against the two awards on the ground that they were not convincingly proved by the respondent.

The assessment of damages is an exercise of discretion by the trial court. An appellate court will not disturb the award unless it is shown that the Judge proceeded on wrong principle of law or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low as to represent an entirely erroneous estimate – ***Butt v. Khan*** [1981] KLR 349.

Regarding the award of Shs.120,000/= for future medical expenses the respondent had suffered a multiple fragment fracture of the left humerus and plates and screws were inserted. Dr. Njoka was of the view that respondent would require an operation to regraft fracture site which would cost about Shs.100,000/= and also an operation for removal of plates and screws which would cost Shs.100,000/=.

There was also a medical report of Dr. R. P. Shah dated 17th June, 1997 indicating that the respondent did not require an operation for removal of the plate. The learned trial Judge considered the two medical reports and counsel's submissions and awarded Shs.120,000/=. The appellant's counsel does not show where the learned Judge went wrong. He submitted that a sum of about Shs.60,000/= should have been given which shows that the complaint is really on the quantum of damages. It has not been shown that the learned Judge either erred in principle or misapprehended the evidence in assessing the appropriate award for future medical expenses and in our view the learned Judge cannot be faulted.

The respondent's claim for loss of earnings was based on his evidence that because of the injuries he sustained as a result of the road traffic accident he failed to perform two contracts worth Shs.2.8 million and as a result the two contracts were cancelled. The respondent gave evidence that he was the Managing Director of a company called INTERGALLE SERVICES LTD which had been awarded two contracts – one from M/s. A. J. Faulkner & Sons Ltd. for training 30 people on Informix (Computer training) at Shs.20,000 per person – total Shs.600,000/= and another from M/s. Afrostock International Ltd for supply of computers work Shs.2.8 million. According to the respondent he had to buy and supply the computers but did not do so because of the injuries and consequently the contract was cancelled. The respondent's counsel submitted at the trial that the claim for Shs.2.8 million should not be allowed because firstly, the net loss was not proved, and, secondly, the claim would only have been made by the company and not by the plaintiff.

The learned Judge agreed that the claim of Shs.2.8 million was not proved and said in part:

> ***"That no figure was put forth as to what would have constituted the gross income and that the net income after deduction of VAT, other taxes, expenses involved in the training and supplying computers is not placed before the court. However the defence did concede that plaintiff suffered some loss though, except that it was not quantified. That is true in a case like this, this court ought to be guided as to what was expected from the 2 deals and what would have been the net loss because plaintiff could not perform – this was a grave omission on the part of the plaintiff. But if he had clinched the deals the plaintiff would have made some money. But he was down with injuries from the accident. This court thinks is fair to award Shs.200,000/=".***

The loss of earning quantified at Shs.2.8 million was pleaded as special damages, although the facts giving rise to such loss were not pleaded. As this Court has often said, special damages must not only be pleaded but also strictly proved. ***Hahn v. Singh*** [1985] KLR. 716.

In the present case, the learned Judge made a specific finding that the loss of earning claimed was not proved but nevertheless proceeded to award Shs.200,000/= certainly as an estimate of the loss without any factual basis. In doing so the learned Judge undoubtedly, erred in principle.

The claim for loss of earning was also fraught with the following other problems. Since the documents relied on by the respondent at the trial showed that the two contracts were offered to a company and not

to the respondent as an individual, the learned Judge should have considered the appellants' submission that the loss of profits (if any) was incurred by the company and make the appropriate finding on that issue before proceeding to award damages.

Furthermore, the learned Judge should have investigated the veracity of respondent's claim that the non performance of the contracts was due to illness. The respondent suffered a left arm fracture on 7th August, 1993 and was admitted in hospital for one week. That injury alone could not have stopped him from buying computers and supplying them by 30th September, 1993. He did not also explain what training on Informix entails and did not show that the injury could not have allowed him to conduct the training from 6th September, 1993.

Lastly, the claim for loss of earning, rather, loss of profitable contracts inevitably raised the problematical question of remoteness of damages as what the appellant was asserting is that due to injury caused by negligence of appellant he was unable to perform two remunerative contracts and as a consequence third parties cancelled the contracts. It is a question of law whether the loss of earnings claimed in this case was caused by the negligence of the appellant or by a novus actus interveniens – i.e. a new and independent act of third parties resulting in the cancellation of the two contracts. The court did not investigate the issue of causation. The case of ***KCM Thyssen v Wakisu Estate Ltd.*** [1960] EA 288 is a good illustration of the problem of remoteness of damages arising from personal injury claims.

It is evident from the foregoing that the respondent's liability to pay the Shs.2.8 million loss of earnings claimed or part of it was not established and the appeal against the award of Shs.200,000/= should be allowed.

The appellant has partially succeeded and is entitled, in our view, to half the costs of the appeal.

For the above reasons, the appeal against the award of Shs.120,000/= as future medical expenses is dismissed but the appeal against the award of Shs.200,000/= as loss of earnings is allowed and the award set aside. We would give half of the costs of the appeal to the appellants.

Dated and delivered at Nairobi this 18th day of March, 2004.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR