



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 243 of 1998

MOHAMMED HASSAN MUSA

DENNIS CONSTELLO DOYLE APPELLANTS

AND

PETER M. MAILANYI

DIAMOND TRUST (K) LIMITED..... RESPONDENTS

(Appeal from the judgment & decree of the High Court of Kenya at Embu (Etyang J)

dated 30th June, 1998

in

EMBU H.C.C.C. NO. 32 OF 1997)

JUDGMENT OF THE COURT

This is an appeal by the defendants against the judgment and decree of the High Court of Kenya at Embu (Etyang J) given on 30th June, 1998 whereby the learned Judge awarded to the plaintiff a total sum of Shs. 3,266,774/= in respect of damages made up as follows:

i) Shs.950,000/= for pain, suffering and loss of amenities;

ii) Shs.1,200,000/= for loss of earning (diminished capacity);

and

iii) Shs.1,116,674/= special damages (medical, hospital bills and bills for drugs.

The plaintiff is a well-known Advocate of the High Court of Kenya practising in Nanyuki in the law firm of Messrs Ole Kaparo & Mailanyi. He was admitted to the Roll of Advocates on 9th December, 1988.

At about 8.30 p.m. on 26th October, 1994, the plaintiff was driving his Mercedes Benz saloon motor vehicle registration number KPA 800 along Meru-Nanyuki road when at a distance of about 600 metres

from Timau Police Station he saw headlights of an oncoming motor vehicle which was swinging from side to side. The plaintiff dimmed his lights expecting the oncoming vehicle to do the same but instead its lights went off completely. The plaintiff applied his brakes and sensing danger swerved off the road towards his left and slowed down. The oncoming vehicle collided with the plaintiff's motor vehicle pushing the driver's door up to the steering wheel crashing and trapping the plaintiff's right hand between the steering wheel and the door. The plaintiff's motor vehicle lost control and went off the road for about 50 metres towards Nanyuki Town and cut off across the road again for about 40 metres and then stopped. The oncoming vehicle sped off the scene and it was only after a strenuous search by both the police and the plaintiff that its owner and driver were identified. Its registration number is KAD 775L a Hino lorry owned by the second defendant and driven by the first defendant.

The plaintiff who was in the company of his wife and another passenger was removed from the wreckage of his car by the members of the public and rushed to the nearby Nanyuki Cottage Hospital for treatment, which was later followed by prolonged medication both at Nanyuki and Nairobi Hospitals. The treatment necessitated several operations.

The plaintiff brought an action against the defendants for damages arising out of the accident. He is one of the respondents in this appeal.

In his plaint filed in the superior court on 12th September, 1996, the plaintiff averred that the accident was caused by the sole negligence of the first defendant who was at the material time the driver and/or employee of the second defendant, the owner of the motor vehicle registration number KAD 775L. The defendants by their defence denied negligence as they well might and pleaded that the collision was caused solely or alternatively was contributed to by the negligence of the plaintiff. The alleged loss and damages were also denied.

Pleadings were closed on 19th February, 1997 and the suit was listed for hearing on 3rd July, 1997. On that date Mr Arithi appeared for the plaintiff while Mr Gachura held brief for Mr Miller of Messrs Oraro & Rachier Advocates, for the defendants. The suit was further adjourned by consent to 1st December, 1997. On that day Mr Kibe holding brief for Mr Miller asked for another adjournment on the ground that Mr Miller had instructed him so to do in order to facilitate an out of court settlement. On all these occasions, the learned Judge obliged. The suit was eventually scheduled for hearing on 4th March, 1998. On the even date, Mr Kibe once again held brief for Mr Miller and he informed the court that Mr Miller had called him from Nairobi to say that he was unable to travel to Embu due to the then Bank strike. Once again he applied for an adjournment. This time, Mr Arithi vehemently opposed it, contending that the reason given for the adjournment was not good enough nor reasonable in the circumstances, since the strike had not in any case paralysed other sectors nor did it affect the court functions. The learned Judge rejected the plea for adjournment and ordered that the suit to proceed to hearing.

It is contended in this appeal that the refusal to grant the defendants an adjournment on 4th March, 1998, given the grounds and reasons advanced on their behalf, was such a heavy action as to cause them grave injustice as it denied them an opportunity to participate in the proceedings of that day. We do not find any merit in this ground of appeal. Adjournment is entirely discretionary, though the discretion must be exercised in a judicial and reasonable manner and not arbitrarily or with capriciousness. In this instance, the appellants had repeatedly and casually sought adjournment on a variety of grounds and did not show sufficient cause for them. It is manifestly clear that that casual manner adopted in giving adjournments on mere asking for it is antithesis to the public policy of early disposal of suit. The learned Judge by not acceding to the request for adjournment cannot, therefore, in the circumstances, be faulted.

Mr Kibe told the court that he had no further instructions to proceed and he withdrew from the proceedings. The hearing went on ex-parte and the plaintiff gave his evidence but he called no other witness. There were in all 17 exhibits produced by way of documentary evidence. The most important exhibits for the purposes of this appeal were the medical reports made by Professors Mulimba and Sande and the statements of accounts prepared by Messrs Obwocha & Associates, Certified Accountants.

In a reserved judgment, indeed a full and a careful one, delivered on 30th June, 1998 at Meru, the learned

Judge found in favour of the plaintiff on the issue of liability. He held:

"I have the plaintiffs' account of how this accident occurred. I will apportion liability against the 1st defendant at 100%. The defendants admitted, in their written statement of defence, the contents of paragraphs 1,2,3 and 4 of the plaint. This admission essentially meant that the 1st defendant was at all material times the driver, agent and/or employee of the 2nd and 3rd defendants co-owners of the motor vehicle KAD 755L. Therefore I hold that the 2nd and 3rd defendants were vicariously liable for the torts and negligence of the 1st defendant."

We did not understand the defendants to seriously challenge the findings of the learned Judge save by a bare assertion in ground one of the grounds of appeal that this holding was contrary to the evidence adduced before him. We recollect that the plaintiff was the only witness to testify and then he proceeded to tender the documents which were accepted by the learned Judge. There was no other evidence in contrast. The learned Judge having found the facts as above set out the burden was on the defendants to show that there was no evidence upon which the learned Judge could come to such a conclusion or that he misapprehended the evidence or that his apprehension of it was plainly wrong.

We now turn to what we think is the most crucial part of this appeal. The defendants aver that the learned Judge misdirected himself in making conclusions in respect of the nature, extent and residual permanent disability suffered by the plaintiff in the absence of admissible expert medical evidence. They contended further that it was wrong for the learned Judge in assessing the general damages for pain and suffering and loss of amenities and for loss of earning capacity (diminished capacity) on the unproven assumption that the plaintiff's injuries had affected his earning capacity.

The plaintiff testified that as a result of the accident his right hand was severely shattered and he had lost complete use of it. It was now all an ugly twisted muscle. The accident had necessitated two major operations at Nairobi Hospital. During the trial the plaintiff produced the two medical reports prepared, as earlier stated in this judgment, by Professors Mulimba and Sande. Mr Miller who had resurfaced for final submissions argued that the medical reports should not be accepted by the learned Judge and that the reports were not properly before the Court because their authors had not produced them but instead had been produced by the plaintiff himself. Mr Miller contended that since the parties had not consented to their production then, they cannot be relied upon for the purposes of determining the extent of the injuries suffered by the plaintiff and that, therefore, damages could not be awarded as injuries will not have been proved. He placed much reliance on Section 48 of the Evidence Act Cap 80 Laws of Kenya and wondered on what basis the court was being called upon to form an opinion when the medical reports were tendered by a person who was neither the maker of them nor an expert. The learned Judge agreed with Mr Miller. He held, and in our view quite properly so, that the plaintiff was under a duty to summon the makers of the reports if he wanted the court to assess the degree of his injuries and to award damages appropriate to them.

Unfortunately, the learned Judge then gravely misdirected himself in his effort to assess damages. He said:

"The plaintiff cannot use that hand at all. He removed his coat and shirt before me. He stood on the witness stand, three or four metres from me. And I saw his hand. It was shattered, twisted muscle. It was just hanging loosely down his shoulder."

The learned Judge concluded that as he had seen the injured hand with his own eyes he did not need the opinion of Professors Mulimba and Sande to make a finding that:

"the hand of the person standing before me (plaintiff) was shattered and of no use to him. "

The learned Judge compared the appearance by the plaintiff before him and an amputee and said:

"Take the case of plaintiff whose leg is amputated as a result of injuries which he sustains in a road traffic accident. A court does not require a Professor of Medicine to come to court and say that; yes, the

plaintiff's leg was amputated. That fact is all too visible to the court. Besides in this case, there is credible evidence from the Plaintiff himself." (emphasis ours).

The purport of that holding by the learned Judge is that the plaintiff's right hand was a total loss and the plaintiff was therefore entitled to damages for that loss, pain and suffering and loss of amenities without the court relying on the medical reports that had been tendered but rejected during trial. The learned Judge relied on his own observation of the extent of the injuries and proceeded to make an award of Shs.950,000/=.

We have carefully considered this approach by the learned Judge. We believe that in motor accidents such as the one which presented itself before the learned Judge and where the injured person himself sues as the plaintiff alleging that the hand or his other limbs though not amputated were completely dysfunctional, medical evidence must be led to show the degree and the severity of the injuries suffered and their resultant effects on the life of the injured person.

The plaintiff in this instance had, as a matter of prudence, to offer the opinion of physicians and surgeons to show his physical condition, the nature of the injury whether temporary or permanent, the effect of physical injuries upon the body or mind and their probable future consequences.

Though doctors are experts in their own right, their evidence is really of an advisory character given on the facts submitted to them. The functions of expert witnesses were succinctly stated by Lord President Cooper in *DAVIE V EDINBURGH MAGISTRATES [1953] SC 34* when he said:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury, to form their own independent judgment by the application of these criteria to the facts proved in evidence."

The testimony of an expert is likely to carry more weight, and more readily relate to an ultimate issue than that of an ordinary witness. The learned Judge might only have been carried away or shocked by the sight of the seemingly shattered hand. He could not, therefore, tell its effectiveness by mere observation. He needed the aid of medical evidence. His opinion in this respect in our view, might be fallible, limited and imperfect.

With due respect to the learned Judge there was no basis for him to hold that the plaintiff's hand had been completely shattered and was useless. It is on record that in March 1998, the plaintiff testified that his legal practice had suffered loss due to the injuries and his performance had greatly diminished and would do so for the next 27 years. But, in August 1998, barely five months later he deposed to in an affidavit in support of an application for stay of execution that he was in active practice and his performance had not deteriorated in any way.

The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendants as well as to plaintiffs, that sum must be commensurate with the injuries suffered. We are satisfied that the learned Judge acted on wrong principle of law and he made a wholly erroneous award of damages for unproven injuries. There was no evidence whatsoever to enable the court to make calculations or to reach a conclusion thereon. Clearly, the onus on this lay on the plaintiff and that onus has not been discharged. The award cannot therefore stand and must be set aside.

In paragraph 10 of the plaint, the plaintiff pleaded:

"10. FURTHER, after the accident, the Plaintiff who is an advocate of the High Court of Kenya and is right handed, has been completely unable to carry on with his practice as an advocate and therefore claims Sh.200,000/- per month for 30 years that he was expected to be in active practice. At the time of the accident he was aged only 33 years."

In support of that claim the Plaintiff produced a yearly audited accounts done by Messrs Obwocha & Associates based in Nakuru. He produced five booklets of these audited accounts from the years 1992 -

1996. The 1992 accounts showed a net profit of Sh.2,909,978/-. The 1993 accounts showed a net profit of Sh.2,816,485/- while the 1994 accounts showed a net profit of Sh.1,372,881/-. There was however, a loss of Sh.1,022,847/- in 1995 and a loss in 1996 of Sh.965,278/-. The plaintiff said that these accounts showed that the accident in question affected his legal practice. He said the average income per month had been Sh.200,000/-. He therefore claimed this amount from the date of the accident (26.10.1994) to November 1997 the date of discharge from hospital a period of three years. The amount so claimed is Sh.7,200,000/- (Sh.200,000 x 12 x 3).

The plaintiff further told the court that he cannot now practice law as he used to do because he cannot travel as much as he used to. He cannot drive his vehicle which in any case was a total loss. He said his savings were all used up to meet medical expenses. So, he has not been able to raise enough cash to buy another vehicle. Consequently, he is not able to bring the law firm to its past status and most clients have left it since he cannot travel far from Nanyuki.

The plaintiff stated that he is teaching himself to write with the left hand. Besides, Mr Francis Xavier Ole Kaparo, his partner, has been elected Speaker of the 8th Parliament and cannot help in the practice. He said that Mr Kaparo was his sleeping partner who never shared his profits, meaning Mr Kaparo received nothing from this law firm. The plaintiff further told the court that he was only claiming a reduced sum of Sh.100,000/- per month for 27 years which made a grand total of Sh. 39,600,000/-. As we have demonstrated hereinbefore the plaintiff later, after getting judgment, recanted the gravity of his injuries and their effect on his legal practice.

The learned Judge correctly held that loss of earnings had to be strictly proved unless there is an admission, they being special damages. He held that as the authors of the accounts had not been called to testify and produce them, he had to reject them. However, the learned Judge thought that it was safe to assume that the plaintiff earned not less than Shs.20,000/= per month and using a multiplier of 10 years he assessed loss of earnings at Shs.20,000/= x 12 x 10 =Shs.1,200,000/=.

The learned Judge again awarded the plaintiff Shs.1,116,674/= for medical and hospital bills as well as the costs of drugs. These sums were comprised in various receipts which the learned Judge thought were genuine.

It has been held time and again by this Court that special damages must be pleaded and, of course, strictly proved. The claims for the loss of earnings are matters of special damages which ought to have been strictly pleaded but was not done. Nor were they proved. We refer to the case of *OUMA V NAIROBI CITY COUNCIL 1976 KAR 297 at 304* where Chesoni, J., (as he then was) held:

"Although special damage had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged, the plaintiff's failure to prove such damage at trial with certainty and particularity precluded the court from making any award of special damages."

Also, see *KENYA BUS SERVICES V MAYENDE 1991 2 KAR 232 at 235* where it was held referring to the remarks by this Court in *MARIAM MAGHEMA ALI V JACKSON M NYAMBU T/a SISERA STORE CA 5 OF 1990* and in *IDI AYUB OMARI SHABANI V CITY COUNCIL OF NAIROBI (1985) 1 KAR 681 AT 684*:

"... Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in Bonham Carter v Hyde Park Hotel Ltd (1948) 64 T.L.R. 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying, this is what I have lost, I ask you to give me these damages'."

We have come to the inevitable conclusion that, unfortunately for the plaintiff, despite his indefatigable efforts to bring the first defendant to justice, the plaintiff failed to prove his case as he is required to by law. We sympathise with him but sympathy is not enough. He may have been injured but the law must be

observed. His undoing was that he presented his case with a lot of assumption and unfortunately the learned Judge went along with him. There was no justification to ignore elementary principles of law and procedure. The appeal must accordingly succeed.

There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached. The manner of execution of the decree and the crude tactics employed by the plaintiff in this respect together with the speedy release of the decretal sum raises many issues about the credibility of the plaintiff's evidence as regards the accident and the gravity of his injuries. Is this not ambulance chasing in reverse?

For the reasons above stated, the appeal is allowed. The judgment of the superior court together with all consequential orders are set aside and vacated. The appellants shall have the costs of this appeal and of the suit in the superior court.

Dated and delivered at Nairobi this 30th day of June, 2000.

P. K. TUNOI

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

M. Keiwua

JUDGE OF APPEL