REPUBLIC OF KENYA

MBAKA NGURU & ANOR. VS. JAMES GEORGE RAKWAR

Court of Appeal, Nairobi

Omolo, Tunoi and Shah JJ.A

23rd December, 1998.

Civil Appeal No. 133 of 1998

(Appeal from a judgement

and decree of Juma J. In

Nrb. HCCC No. 5978 of 1993.

Pleadings - amendment - Suit for damages for negligence against two defendants of whom one fails to enter an appearance and interlocutory judgment is entered against him on liability and for special damages - the other defendant enters an appearance and files a defence contesting liability and damages - after interlocutory judgement entered against the fist defendant but before commencement of trial against the second defendant, plaintiff amends his Plaint by consent of second defendant and includes a new prayer claim ing “future medical expenses” - at the conclusion of the trial, the judge entered judgment for a global sum against both defendants which sum included an amount awarded for future medical expenses - whether judge erred in doing so without ordering the amen ded plaint to be served on the first Defendant and without affording him an opportunity to object to the amendment.

Damages - damages for pain, suffering and loss of amenities - paraplegia - whether an award of Shs. 2,500,000/= too high.

Damages - claim f or damages for loss of future earnings - whether required to be specifically pleaded and strictly proved.

Damages - Claim for damages for future medical expenses - whether required to be specifically pleaded and strictly proved.

The Plaintiff/Respondent was a passenger in a vehicle driven by the first Defendant (the first

appellant) and owned by the second Defendant (the second appellant). The Plaintiff received serious physical injuries when the vehicle overturned. He sued the two Defendants for damages arising out of this first Defendant's negligence for which he claimed the second Defendant was vicariously liable.

The first Defendant did not enter an appearance and interlocutory judgement in respect of liability and for special damages amounting to shs. 3,800/= was entered against him in default of such appearance. The second Defendant entered an appearance and filed its defence by which it denied liability and put the damages in issue. The issues were settled in due course and the suit was thereafter set down for hearing for the determination of the second Defendant's liability and the assessment of damages against both the Defendants.

On the day fixed for the hearing, the plaint was amended by consent of the Plaintiff's and second Defendant's counsel to include the allegation that the vehicle was at the time of the accident in the possession and control of the second Defendant and to include a prayer claiming "Future Medical Expenses". On completion of the hearing, the trial judge entered judgment in favour of the Plaintiff for Shs. 6,793,210 made up as follows:

1. General damages for pain, suffering and loss of amenities	Shs. 2,500.000.00
2. Loss of future earnings	Shs. 1,943,760.00
3. Future medical expenses	Shs. 2,349,450.00
	Shs. 6,793,210.00
	=========

The Plaintiff, who was 40 years old at time of the accident, suffered the following injuries:-

i) Paraplegia resulting from a fracture of the T12 thoracic Vertebra with spinal cord damage.

ii) Severed distal phallanx of the left index finger.

iii) cuts on the right cheek and in the right eye brow area.

As a result of these injuries, the Plaintiff suffered from incontinence of urine and stool and had recurrent bed sores, painful back due to implanted hardware, painful involuntary spasms especially on the left lower limb and difficulty in mobility, especially in transferring himself from bed to wheel-chair and vice-versa. His disability was medically assessed at 100%. The Defendants appealed.

HELD:-

i) The trial judge erred in entering judgment in the sum of Kshs. 6,793,210/= against both the Defendants jointly and severally when

some of the Plaintiff's claims were amended and included in his plaint after interlocutory judgement had already been entered against the first Defendant. He should have ordered the

amended plaint to be served on the first Defendant before holding him liable for the whole of the judgment amount. Had he done so, the first Defendant would have had an opportunity of objecting thereto. This course was also rendered necessary by reason of the fact that the second Defendant's vicarious liability was dependant on the first defendant's liability both as regards negligence and quantum of damages. However as the above issue was not taken up as a substantive ground of appeal and the second Defendant did not eventually contest the issue of vicarious liability, it was not necessary to decide the appeal on this ground.

ii) The amount of Shs. 2,500,000/= by way of damages was so inordinately high that it was appropriate to reduce it to Shs. 1,500,000/=.

iii) The claim for loss of future earnings was a claim for special damages which ought to have been specifically pleaded and strictly proved. Since it was neither pleaded nor proved, the award of Shs. 1,943,760/= would be set aside in its entirety.

iv) Likewise, the claim for future medical expenses was also not pleaded or proved. A mere reference to future medical expenses in a medical report produced at the trial was not sufficient to justify an award. Therefore, the award of Shs. 2,349,450/= for this head of damage would also be set aside in its entirety.

v) The total award of Shs. 6,7923,210/= was therefore reduced to Shs. 1,500,000/=.

Orders accordingly.

Muthoga and Mwiti for the Appellants/Defendants

Owino for the Respondent/Plaintiff.

Cases referred to:

1) Assuman Mohamed & Anor. vs Saluro B. Mohamed - Civil Appeal No. 30 of 1997

2) Kagaragari vs. Aya (1982 -88) I KAR 768

3) Salim Zein & Anor. vs. Rose Mulee Mutua - Civil Appeal No. 147 of 1994

4) Joseph Chege vs.The Attorney General - Nrb HCCC No. 6456 of 1992

5) Samuel N. Mabasa vs. Abdi Ogle - HCCC No. 1581 of 1990 (Nrb)

6) Abdi Aziz Abdul vs. Kenya Bus Services Ltd. - HCCC 1135 of 1987(Nrb).

7) Francis K. Mumu vs. Malaba & Others - HCCC No. 1460 of 1990(Nrb)

8) Geoffrey Mutuba vs. Marie Kuria & Another - HCCC No. 821 of 1991(Nrb)

9) Margaret Wanjiku vs. The Attorney General - HCCC No. 5602 of 1989(Nrb)

10) Cecilia Mwangi vs. Ruth W. Mwangi - Civil Appeal No. 251 of 1996

JUDGEMENT OF THE COURT

This appeal arises out of a road accident which occurred on 1st of May, 1993 along Mombasa-Nairobi road in Nairobi. For the sake of convenience we will refer to the parties as “the plaintiff” or “the defendants” or “the first defendant” or “the second defendant” as appropriate. The second defendant (Kenya Wildlife Service) was at the material time in charge of or in control of motor vehicle registration number GK 651U and the plaintiff was a passenger therein.

The said vehicle overturned whilst being driven by the first defendant (Mbaka Nguru) as a result of which

the Plaintiff (James George Rakwar) was seriously injured. It is trite law that when a vehicle overturns it is for the driver to explain the reason for such overturning and in the absence of a reasonable explanation, connoting no negligence, the negligence of the driver is presumed. In this case the first defendant, though served with the summons and copy plaint, did not enter an appearance and interlocutory judgment, in default of such appearance, was entered against him on 29th April, 1994. That means judgment was entered against him in respect of liability and special damages in the sum pleaded (Shs. 3,800/=) and the award of costs was to await judgment on assessment of general damages. The interlocutory judgment was against the first defendant only. The second defendant entered appearance and filed a defence on 18th February, 1994. In its defence the second defendant denied liability and put the damages in issue. The issues were settled by the Principal Deputy Registrar, Mr. Njai, on

24th October, 1994 and the suit came up for hearing, after some adjournments, as regards the second defendant’s liability and assessment of damages against both the defendants, on 12th June, 1997 and the hearing was concluded, after an adjournment, on 15th October, 1997. Written submissions were then filed and the learned judge (Juma, J) delivered judgment on 11th December, 1997. On 12th June, 1997, the plaint was amended by consent of the plaintiff’s and the second defendant’s counsel to include the allegation that vehicle GK 651U was at the material time in possession and control of the second defendant and also to include (in the prayers) a prayer in the following words:

“(e) Future Medical Expenses.”

The reason why we have set out the sequence of the events relating to the hearing in the superior court is because Mr. Muthoga (who appeared for the appellants - defendants with Mr. Mwiti took issue with the learned judge on his entering judgment jointly and severally against both defendants when some of the claims of the plaintiff were included in the plaint after interlocutory judgment was entered against the first defendant. Mr. Muthoga is right in saying that the plaint as amended should have been served on the first defendant so as to make him liable in respect of the whole judgment. If this lacuna (non-service on the first defendant of the amended plaint) was properly considered the learned judge would have adjourned the proceedings after ordering the amendments so as to enable the plaintiff to serve the first defendant with the amended plaint who would have then had the opportunity of objecting thereto, if he so wished. Mr. Muthoga’s argument is valid as the second defendant’s liability is vicarious and such

liability would depend on the first defendant's liability both as regards negligence and quantum of damages. However, this issue was not taken up as a substantive ground of appeal and in the circumstances of this case it is not now relevant. The second defendant did not eventually contest the issue of its vicarious liability and fully contested the issue of damages.

This appeal is, primarily and substantially, as Mr. Muthoga pointed out, against the quantum of damages and the propriety in awarding some of the heads of damages. The learned judge made the following awards:

1. General damages for pain, suffering and loss of amenities	Shs. 2,500.000.00
2. Loss of future earnings	Shs. 1,943,760.00
3. Future medical expenses	Shs. 2,349,450.00
	Shs. 6,793,210.00
	=========

He entered judgment against the defendants jointly and severally in the sum of Shs. 6,784,210/= if the arithmetic was properly done. However, nothing turns on this small difference.

Mr. Muthoga in arguing his first two grounds of appeal attacked the award of Shs. 2,500,000/= in respect of pain, suffering and loss of amenities as being far in excess of what was justifiable having regard to comparable awards in cases involving similar injuries, urging that there must be uniformity in awards. He relied on a passage in the judgment of this court in the case of Ossuman Mohammed & another vs. Saluro Bundit Mohumed, Civil Appeal No. 30 of 1997, (unreported) where this court said, quoting from the case of Kigaragari vs. Aya (1982 - 1988) I KAR 768:

> "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees."

In pointing out the principles upon which an appellate court may interfere, Mr. Muthoga relied on a passage in Salim Zein and another vs. Rose Mulee Mutua, Civil Appeal No. 147 of 1994 (unreported); The passage reads:

"The Appeal Court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage." These are the correct principles and have been followed for many years now. Keeping them in mind we refer to the various authorities relied upon by both counsel in the superior court with regard to the kind of injuries the plaintiff suffered. The injuries were:-

1. Paraplegia resulting from a fracture of the T12 thoracic vertebra with spinal cord damage.

2. Severed distal phallanx of the left index finger.

3. Cuts on the right cheek and in the right eye brow area.

As a result of these injuries the plaintiff, who was 40 years of age at the time of the accident, suffered from incontinence of urine and stool and had recurrent bed sores, painful back due to the implanted hardware, painful involuntary muscle spasms especially on left lower limb and difficulty in mobility especially self transfer from bed to wheel chair and vice versa. These are the unchallenged findings of Dr. Audi, a consultant surgeon and traumatologist practising in Nairobi and Professor Ruberti, a consultant neurosurgeon who put the plaintiff's disability at 100%. The cases quoted by counsel in the superior court as well as in this court showing comparable or near comparable injuries are as follows:-

1. Joseph Chege vs. Attorney General Nairobi, HCCC No. 6456, (unreported). For injuries of similar nature (permanent disability being 80%)Mbito, J www.kenyalawreports.or.ke 6 awarded a sum of Shs. 800,000/= for pain suffering and loss of amenities on 30th October, 1997.

2. Samuel Ndiwa Mabasa vs. Abdi Ogle, Nairobi HCCC No. 1581 of 1990 (unreported). For paraplegia and other resultant disabilities, similar to those of the plaintiff in this case, Mwera, J awarded a sum of Shs. 700,000/= for pain and suffering on 22nd July, 1992.

3. Abdi Aziz Abdul vs.Kenya Bus Services Ltd, HCCC NO. 1135 of 1987, (unreported). For similar injuries - paraplegia and resultant disabilities as well as some brain injuries, Butler- Sloss, J awarded a sum of Shs. 800,000/= for pain and suffering and loss of amenities on 22nd May, 1989.

4. Francis Kaguta Mumu vs. Malaba and others, HCCC No. 1460 of 1990. For similar injuries - paraplegia and resultant disabilities, Mwera, J awarded Shs. 900,000/= for pain suffering and loss of amenities, on 18th March, 1993.

5. Geoffrey Mutuba (Minor) vs. Manie Kuria & Another NBI HCCC No.821 of 1991. For paraplegia and resultant disabilities, Mbogholi-Msagha, J awarded a sum of Shs. 2,000,000/= for pain suffering and loss of amenities on 17th April 1993.

6. Margaret Wanjiku & others vs. The Attorney General & another NBI.HCCC No. 5602 of 1989. For paraplegia and resultant disabilities, Mbogholi - Msagha, J awarded a sum of Shs. 1,000,000/= for pain suffering and loss of amenities on 14th March, 1991.

Mr. Owino for the plaintiff laid stress on the above-mentioned Shs. 2,000,000/= awarded in 1993 to justify the award in this case in the sum of shs. 2,500,000/= but he conceded that the Margaret Wanjiku case stood by itself. In the other

cases the award for comparable injuries stood at Shs. 800,000/=to 1,000,000/= for pain suffering and loss of amenities, some four years ago. The Plaintiff in this case has been incapacitated one hundred per cent as a result of the injuries already enumerated by us. The award must however reflect the trend

of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions and also keeping in mind that the plaintiff is left alone to deal with his problems, his wife having left him, we consider that the learned judge's award of Shs. 2,500,000/= for pain suffering and loss of amenities is so inordinately high that it does not correctly represent the damage suffered. We are mindful of the fact that some of the awards referred to by counsel are not too recent. We assess the general damages for pain suffering and loss of amenities at Shs. 1,500,000/=. In so doing we note that the plaintiff's injuries are of grievous nature.

We come now to the award of Shs. 1 ,943,760/= for loss of future earnings. It is noted that such damages were not pleaded. This court in the case of Cecilia Mwangi & Another vs. Ruth W. Mwangi, Civil Appeal No. 251 of 1996, (unreported) said:

> "Loss of earning is a special damage claim. It must be specificallypleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but those have also to be proved on a balance of probability. The plaintiff cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Ltd. Vs. Mayende (1991) 2 KAR 232 at page 235 where this court www.kenyalawreports.or.ke 7 referred to the cases of Ali vs. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported), and Shabani vs.City Council of Nairobi (1985) I KAR 684 and the statement by Lord Goddard C.J. in the case of Bonham Carter vs. Park Ltd (1948) 647 T.L.R. 177 was approved:"

We need not set out here the statement of Lord Goddard C.J. It will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to damages claimed under this head we are constrained to disallow the whole of that award and we set it aside wholly. We would point out that the learned judge, in any event, in applying a 13 year multiplier for loss of earning capacity, in respect of a 40 year old plaintiff erred. The plaintiff was kept in the employment of the second defendant some four years after the accident with no salary loss. He would have had even more years to work had he not been retrenched along with 600 other employees of the second defendant. If he was not given any lump sum payment for early retirement (we are told he was paid in that behalf) and if his pension had been arrested (which was not the case) then an eight year multiplier would have been appropriate if the claim was properly pleaded.

Mr. Owino for the plaintiff laid stress on the fact that the plaintiff had given evidence as to his loss of earning capacity and the evidence was not challenged. What the plaintiff said was:

> Prior to accident I was in charge of Rhino Capturing Unit. My title was assistant warden. On transfer I was to assist the officer in charge. Was there for 8 months then transferred to Mombasa to do administrative work. There for 3 years and then transferred to Kwale since July last year. My job of Assistant Warden translated into Tannest (sic) officer. My job had been advertised. I was not taken. I am still there getting same salary. I agree I should be retired on medical grounds. My basic salary is Shs. 15,575/= per month.

The plaintiff did not even say he was claiming loss of earning capacity damages. Not having pleaded the same and also not having actually claimed the same he is not entitled to any. In fact the loss of earning capacity was really not in issue on the pleadings as well as on the evidence. We do not see how the second defendant's counsel could have cross-examined the plaintiff when there was no such claim pleaded.

We come now to the claim under the heading "Future Medical Expenses". There is no such claim made in the body of the plaint. Nor is there any suggestion in the body of the plaint that such a claim would be made. There is no quantification of any sort in the body of the plaint in respect of this claim. In those circumstances simple references in a medical report to costs of future medication do not help the plaintiff. Simply putting in a prayer for such a claim does not help. If properly pleaded and proved the plaintiff would certainly have been entitled to some damages under this head but the way the learned judge proceeded to calculate and award a sum of Shs. 2,349,450/= under this head does not take into account the global view the learned judge ought to have taken if the plaintiff was entitled to the same. The learned judge also failed to take into account the accelerated receipt of such payment and the probability that the sum awarded would be invested at interest. All this however, is academic as we wholly disallow this award.

The upshot of all this is that the total award of shs. 6,793,210/= is hereby reduced to Shs. 1,500,000/= which sum will carry interest at court rates from 11th December, 1997. The defendants have had considerable success in this appeal and therefore the second defendant will have three-quarter of its costs. Those are our orders.