



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO.E031 OF 2020

1. MARTIN MWIRIGI MBAYA

2. PARROT LIMITED.....APPELLANTS

-VERSUS-

ABDULRAHMAN SALIM MWAKUMBUKO.....RESPONDENT

(An Appeal arising out of the Judgment of Hon. Wambugu, Principal Magistrate

delivered on 27th November, 2019 at Kwale C.M.C. Case No. 378 of 2016)

J U D G M E N T

1. The Appellants were the Defendants and the Respondent, the Plaintiff in the original trial in **Kwale Chief Magistrate's Court Civil Case No.378 of 2016**. The Respondent instituted the said suit in the trial court seeking for general and special damages, arising from injuries sustained from an accident involving his **Motor Cycle Registration No.KMDK 991K** and the 2nd Appellant's **Nissan Pickup Registration No.KBD 568K** driven by the 1st Appellant.

2. The Respondent attributed the occurrence of the said accident to the negligence of the Appellants and evenly relied, inter-alia, on the doctrines of *res ipsa loquitur* and vicarious liability.

3. During the hearing, the Plaintiff testified and called an additional witness

whilst the defendant opted not to call any witness. The Plaintiff's case was that he was carefully riding the motor cycle when the 1st Defendant carelessly attempted to overtake him hence the accident. A police officer also testified as PW2 and stated that after investigations were conducted, the 1st defendant was found fully to be blame for the accident and even charged with the offence of causing death by dangerous driving vide **Traffic Case No.280 of 2018**.

4. Based on that evidence, the trial court found that the Plaintiff's case was uncontroverted and held the Defendants 100% liable for the accident and proceeded to award the Respondent a sum of Kshs.1,000,000/= as general damages.

5. Aggrieved by the award on damages, the Appellants lodged this appeal citing three **Grounds of Appeal** viz;

a) That the learned magistrate erred in law and in fact and misdirected himself as to the nature of the Respondent's injuries thereby awarding the Respondent a sum of Kshs.1,000,000/=in general damages which award is in inordinately high.

b) That the learned magistrate erred in law and in fact in assessing damages the parties agreed to and failed to apply the trite principles in awarding damages and specifically on general damages and comparable awards

for analogous injuries.

c) That the learned magistrate erred in law and in fact in

failing to consider relevant authorities and submissions by the appellant.

6. The parties agreed to canvas the appeal by way of written submissions and the record shows that both parties complied, with the Appellants filing their submissions on **4th May, 2021** whilst the Respondents filed theirs on **18th June, 2021**.

Appellants' Submissions

7. The Appellants have asserted that the Plaintiff/Respondent sustained injuries which included a bruise on the scalp, soft tissue injuries to the right thigh and fractured right femur. That according to the medical report by the **Dr. Udayan R. Sheth** dated **2nd June, 2017** the Respondent had fully recovered from those injuries and therefore the award of Kshs.1,000,000/= is unreasonably high in the circumstances.

8. They relied on a number of decided cases including the persuasive case of **Lim Poh Choo –vs- Health Authority (1978)** and the case of **Simon Taveta –vs- Mercy Mutitu Njerssu, CA Civil Appeal No.26 of 2013 eKLR**, where it was stated that the injuries suffered cannot be substituted by value of money but quantum should only be based on comparable

awards made on other cases. In that connection, the Appellants have submitted that in the case of **Akamba Public Road Services –vs- Abdikadir Adan Galgalo[2016]eKLR**, the court had awarded Kshs.500,000/= for injuries akin to the ones sustained by the Respondent herein. Similarly, in the case of **Mwavita Jonathan –vs- Silivia Onunga H.C.C.A No.17 of 2017 [2017]eKLR** the court awarded Kshs.400,000/= where the claimant had sustained *a left hip comminuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg which causes lot of blood.*

9. Based on those authorities, the Appellants have suggested that the award of Kshs.500,000/= is reasonable in regard to the injuries suffered by the Plaintiff.

Respondent's Submissions

10. On his part, the Respondent submitted that the award of damages is a discretion of the court and the award should not be disturbed unless it is shown that the court acted either on a wrong principle of the law or on irrelevant factors leaving out the relevant ones. He added that the trial court took in consideration all the relevant factors including the need for future medication in awarding the Plaintiff the sum of Kshs.1,000,000/=.

11. In seeking to persuade the court to uphold the award, reliance has been placed on the case of **George William Awour –vs- Beverly Awour Ochieng [2020]eKLR**, where the court awarded Kshs.1,200,000/= for injuries similar to the ones sustained by the Plaintiff. On that basis, the Plaintiff craved for the court to dismiss the present appeal and retain the award by the trial court.

Analysis and Determination

12. The duty of a first appellate Court as was held in the cases of **Mwana Sokoni –vs- Kenya Bus Service Ltd (1985)KLR 931** and **Selle –vs- Associated Motor Boat company ltd (1968) EA 123** as to analyse and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

13. This court has considered the record of appeal, the lower court record and the submissions made by the parties. The court has also considered the authorities cited by the parties as well as the those that were relied on by the trial court. From the grounds of appeal and reliefs sought by the Appellants, it is evident that the Appellants are only contesting the findings of the trial court with regard to quantum of damages but not liability. The finding of the trial court on liability therefore remains undisturbed.

14. The record shows that it is only the medical report by **Dr. Ajoni Adede** which was presented as evidence before the trial court as “**exhibit 5**”. Although the Appellant cited the medical report by **Dr. Udayan Seth** to submit that the Respondent had fully recovered, the same was not produced as evidence hence its veracity was not tested. That shows beyond per-adventure that the injuries sustained by the Respondent are to be ascertained by the medical report by **Dr. Ajoni Adede** dated **3rd September, 2017** which forms part of the court record. The medical report shows that the Respondent sustained the following injuries; fracture at the right femur, cut on the right thigh and bruises the scalp. Besides that, the doctor formed the opinion that the Respondent had sustained seven percent (7%) permanent disability and would even have to incur a sum of Kshs.90,000/= as costs for future medication.

15. The trial court based its award in the case of **Thomas Mwendo & 2 Others [2009]eKLR** where an award of Kshs.700,000/= had been made. However, the trial court did not state whether the injuries sustained in the **Thomas Mwendo** case were akin to the ones sustained by the Respondent herein but expressed the opinion that the sum of Kshs.1,000,000/= would be an adequate award.

16. At this point, it is note-worthy that while appreciating that awarding of

damages is a discretion of the trial court, it is trite in law that before the court interferes with the award made by the trial court, it should first be satisfied that the trial court either acted on a wrong principle of law, or has misapprehended the fact, or for these or other reasons made a wholly erroneous estimate of the damage suffered.

17. In that connection, I had the benefit to read through the authorities that were relied on by both parties. For the Appellants, they relied on the case **Akamba Public Road Services –vs- Abdikadir Adan case (supra)** where the Plaintiff suffered fracture of the right tibia leg bone and right fibular bone and a blunt injury to the right ankle. The court then awarded Kshs.500,000/=. For the Respondent, he relied on the case of **George William Awour –vs- Beverly Awour Ochieng(supra)** where the Plaintiff suffered fractures of the right femur and left tibia fibula. The tibia fibula fractures were found to be compound whilst the femur fractures were simple and the court then awarded Kshs.1,200,000/=.

18. In my view, I find that both authorities provide a valuable comparison taking into account the nature and extent of the injuries sustained by the Respondent. I proceed to find that the award of Kshs.1,000,000/= was not a product of erroneous estimate of damages but an adequate award in the circumstances that were undisputedly presented.

19. In the premises, I find no merit in this appeal and hereby dismiss the same with costs to the Respondent.

Orders accordingly.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JANUARY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance by Appellants

M/S Owiti counsel for Respondent