



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.E12 OF 2020

BETWEEN

RAI CEMENT LIMITED.....APPELLANT

AND

MICHAEL OCHIENG OTIENO.....RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's

PMCC No. 64 of 2019 by Hon. C. Okore –Senior Resident Magistrate).

JUDGMENT

1. Rai Cement Limited, the appellant herein, was the defendant in Oyugis Principal Magistrate's PMCC No. 64 of 2019. This was a claim that arose from a road traffic accident on 1st December, 2016. The accident involved motor vehicle KCM 063J /ZF 7191 trailer and motor cycle KMEA 605B. The respondent who was riding the said motor cycle sustained injuries for which he was awarded of Kshs.3, 500, 000/= general damages.

2. The appellant was dissatisfied with the finding on liability and the award and filed this appeal. He was represented by the firm of Okongó Wandago & Company Advocates. Six grounds of appeal were raised as follows:

- a) The learned trial magistrate erred in both law and fact in finding that the respondent proved his case against the appellant on liability and in holding the appellants 100% liable when the evidence on record could not support such a finding.
- b) The learned trial magistrate erred in law in both law and in fact when in making the kshs.2,500,000/- in respect of damages for pain and suffering which amount is so excessive and inordinately in the circumstances.
- c) The learned trial magistrate erred in both law and fact in awarding kshs.200, 000/- for future medical expense which amount is speculative, as the same was never supported by evidence as by law required.
- d) The learned trail magistrate erred in law and in fact for awarding damages under the various heads which were excessive and against the weight of evidence led at the trial and in doing so failed to consider, in making the award relevant facts and circumstances, thereby exercising her discretion wrongly.
- e) That the learned trial magistrate erred in law and fact when he failed to appreciate that the damages he awarded in the circumstances of the case were so excessive and inordinately high that they constituted and erroneous estimate, and in doing so, she failed to be guided by recent trends in such awards.
- f) The learned trial magistrate erred in failing to find and to hold that the evidence of the plaintiff/respondent was of no probative value and could not establish a case, both in respect of quantum and liability as required in law.

3. The respondent was represented by the firm of W. O Ochuka & Company Advocates. The appeal was opposed and it was contended that it lacked merits.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs.**

Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The trial magistrate made a finding that the respondent was 100% liable for the accident. The appellant contends that this was contrary to the evidence. So, how did the accident occur?

6. Michael Ochieng Otieno, the respondent in his evidence said that the offending lorry of the defendant was approaching from the opposite direction. In the process of overtaking another vehicle, the driver of the said motor vehicle moved to his lane and collided with his motor cycle. This was on 15th February 2019 along Oyugis-Kisumu road.

7. In the statement of defence the appellant denied that the accident complained of ever occurred. However, in his statement filed in court, he conceded that the accident indeed occurred and was happened when he swerved to avoid to run over a man who was lying on the road. This is doublespeak and the learned trial magistrate was justified to find the driver 100% liable.

8. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...an appellate court will not disturb an award of damages unless it is so, inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

9. The respondent herein sustained the following injuries:

- a) Multiple fracture of the right tibia and fibula leading to amputation of the right lower limb below the knee;
- b) Massive damage of the right supra-pelvic and lower abdominal region;
- c) Fracture of a rib from the right rib cage, with multiple soft tissue injuries; and
- d) Soft tissue damage of the right hip region with haematoma.

10. At the trial court, the respondent prayed for Kshs.5,000,000/= for pain and suffering while the appellant was of the opinion that an award of Kshs.500, 000/= would be adequate compensation. Each party cited authorities in support of their proposal. Of the authorities relied by the parties, I find the decision in **Ngooro Timothy & another vs. Daniel Mutuga Wangechi [2020] eKLR** very persuasive. In this case the learned judge observed:

The respondent suffered a degloving injury/crush injury of the right foot resulting to below knee amputation of the right limb. He was admitted to hospital for about two weeks and discharged on crutches.

For this injuries he was awarded 3 million on 7th Day of May, 2020. These injuries were less severe than what the respondent herein sustained. I will not therefore interfere with the award of the learned trial magistrate.

11. It was argued that an invoice is not proof of payment. This is true. However, courts are at times required to take judicial notice of how the citizenry operate especially in respect of hospital bills. Since there was no argument that the said invoices were fictitious, I find that the invoice produced told the true state of what the respondent was expected to pay to the hospital where he received treatment.

12. In order for a party to succeed in claiming an award for future medical expenses, the same must be specifically pleaded and strictly proved. This was held in the case of **Copana Limited vs. David Ouma Abanga [2021] eKLR**. In the instant case this was not the case. I therefore set aside Kshs.200, 000/= under this head.

13. The respondent was awarded kshs.2, 500,000/- in respect of damages for pain and suffering. The appellant contended that it was so excessive and inordinately in the circumstances. In the case of **Simon Ano Mua vs. Kioga Mukwano (t/a Kioga Mukwano Transporters) & 2 others [2013] eKLR** the Plaintiff was amputated his left leg, four inches below the knee. He was in hospital for a month and underwent surgery 14 times. The learned trial Judge awarded general damages of Kshs 2 Million for pain, suffering and loss of amenities. I find the injuries comparable with what the respondent herein suffered. I will therefore not interfere with the award of the learned trial magistrate.

14. From the foregoing analysis of the evidence on record, I set aside the award of the learned trial magistrate and substitute as follows:

a) Special damages	Kshs. 413,832.00
b) Pain and suffering	Kshs. 2,500,000.00
c) Loss of future earnings	<u>Kshs. 800, 000.00</u>
Total	Kshs. 3,713,832

15. Since the appeal has partially succeeded, the appellant will be entitled to one third costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF JANUARY, 2022

KIARIE WAWERU KIARIE

JUDGE