



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 23 OF 2019

(CORAM: F.M. GIKONYO J.)

(Being an appeal from the judgment of Hon. T. Gesora (S.P. M) Delivered on 30th July 2019 in

Narok CMCC No. 180 of 2016)

MALIK BOEKI COMPANY LIMITED....1ST APPELLANT

BERNARD GACHUNGUI NDUNGU.....2ND APPELLANT

VERSUS

MICHAEL M PETER.....RESPONDENT

JUDGMENT

Impugned judgment

[1]. The judgment under challenge is one delivered in the Senior Principal Magistrate's Court at Narok Civil Suit No. 180 of 2016 on 30th July 2019 in which the trial court: -

- a) *Apportioned liability; defendants jointly and severally to bear 100% liability.*
- b) *Awarded General Damages Kshs. 750,000/=*
- c) *Special damages Kshs. 10,870/=*
- d) *Ordered the defendant to pay costs of the suit*

[2]. The three (3) grounds in the Memorandum of Appeal dated 5th August 2019 relate to one issue; i) quantum of damages.

Background

[3]. The suit arose from a road traffic accident, which occurred on 10/05/2015 along Narok-Mai Mahiu road when motor vehicle registration no. KBX 870N lost control and veered off its lane and landed in a ditch. The respondent was a passenger in the said motor vehicle and sustained the following injuries;

- a) Fracture of left clavicle
- b) Swollen tender left shoulder
- c) Blunt injury low back and chest

SUBMISSIONS

[4]. Directions were given that the appeal be disposed of by way of written submissions. The appellants and the respondent filed their respective written submissions.

Appellants' submissions

[5]. The Appellants did not testify or call any witnesses.

[6]. The appellants submitted in support of the appeal, that the award given in respect of the injuries sustained by the respondent was inordinately high, erroneous, overly excessive and did not match with awards on comparable injuries. The trial magistrate simply did not consider comparable awards cited. On this, they relied on the cases of *Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd [2013] eKLR*

[7]. According to the appellant, that the injuries suffered by the plaintiff are soft tissue in nature with a fracture and with no permanent incapacity assessed. Thus, an award of Kshs. 750,000/= is inordinately high and unjustified. They relied on the following cases; *George Mugo & Another v AKM(minor suing through next friend and mother of A.N.K[2018]* , *George Kinyanjui T/A Climax Coaches & Another Vs Hussein Mahad Kuyala [2016] eKLR*, *Ndungu Dennis Vs Ann Wangari Ndirangu & Another [2018] eKLR*, *PF(suing as next friend and father of SK(minor) V Victor O Kamadi & Another [2018] eKLR*, *Blue Horizon Travel Co Ltd V Kenneth Njoroge [2020] eKLR*, *Godwin Ileri Vs Franklin Gitonga [2018] eKLR*, *Lamu Bus Services & Anor Vs Caren Adhiambo Okello[2018] eKLR*, *Jitan Nagra V Abidnego Nyandusi Oigo[2018] eKLR*, *Zachariah Mwangi Njeru V Joseph Wachira Kanoga, Nyeri HCCA no. 9 of 2012* ,*Harun Muyoma Boge V Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012*, *MBITHI Muinde William V Rose Mutheu Mulatia [2019] eKLR* ,*Naom Momanyi Vs G4s Security Services Kenya Limited [2018] eKLR* ,and *Wakim Sodas Limited Vs Sammy Aritos [2017] eKLR*

[8]. Therefore, the appellants were of the view that this is a case where the court should disturb the award in accordance with the principles laid down in the case of *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR at Page 730*.

[9]. The appellants proposed a maximum award of Kshs. 450,000/= as being sufficient as general damages given the nature of injuries suffered. They relied in the case of *George Kinyanjui T/A Climax Coaches & Another V Hassan Musa [2016] eKLR*

[10]. On costs, the appellants submitted that costs follow the event. They prayed that they be awarded costs of the appeal based on Section 27(1) of the Civil Procedure Act.

[11]. In conclusion, the appellants urged this court to set aside the judgment of the trial court and uphold the appeal.

RESPONDENT'S CASE

[12]. The Respondent testified and called two witnesses in support of her case.

[13]. The respondent submitted that this court lacks jurisdiction to entertain the present appeal on the ground that no decree or order was extracted at the time the appeal was filed. He cited the cases of *Chege Vs Suleiman CA No. 12 of 1987*, *Nancy Wamuyu Gichobi Vs Jane Wawira Gichobi -CA Appeal No. 15 of 2013* and *Mzamil Vs Ansari and Ruth Anyollo Vs Agnetta Oiyela*.

[14]. The respondent submitted that the judgment entered by the trial magistrate on 30th July 2019 was just and fair. The respondent urged this court to sustain the award by the trial court. The principles upon which an appellate court may interfere with an award of damages by trial court were stated in *Butt V Khan [1981] KLR 356* and *Robert Msioki Kitavi V Coastal Bottlers Limited [1982-88] 1KAR 89*

[15]. The respondent submitted that an award of Kshs. 750,000/= was equitable. He relied in the authorities relied on in the trial court; *H Young & Co Vs Edward Yumatsi [2016] eKLR*, *Joseph Ogara Vs Rebecca Nyambuqa [2018] eKLR* and *Nicholas Njoroge Thiongo Vs Joseph Ngerenwa Of 1998*.

[16]. In conclusion, the respondent submitted that the learned trial magistrate did not misdirect himself and did exercise his discretion judicially. He urged this court not to interfere with trial court's exercise of discretion. He further urged this court to dismiss the appeal with costs to the respondent.

ANALYSIS AND DETERMINATION

Duty of court

[17]. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

[18]. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle & Anor -Vs- Associate Motor Boat Co. Ltd 1968 EA 123*.

Issues

[19]. This appeal is on quantum of damages. Is there a lawful justification to interfere with the discretion of the trial court in assessment of damages?

Quantum

[20]. According to the Court of Appeal in ***Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR*** : -

‘An appellate court will not disturb an award for general 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 at a figure which was either inordinately high or low...’

Applying the test

[21]. The trial magistrate awarded Kshs 750,000.00 as general damages. The appellants regard it to be inordinately high. The respondent states that the award is commensurate to the injuries sustained.

[22]. The amount of damages is assessed by the court after evaluation of the nature and extent of injuries; and of course being guided by comparable awards in earlier decisions. I am content to cite the observation by the Court of Appeal in ***Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR*** that –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

[23]. The respondent herein sustained the following injuries-

- i. *blunt injury(tender)- low back*
- ii. *swollen –tender- left shoulder*
- iii. *fracture-left clavicle*
- iv. *blunt injuries(tender)- chest*

[24]. Dr. Mwaura on behalf of the respondent assessed incapacitation at 5%. Dr. Jenipher Kahuthu on behalf of the appellants assessed that no disability is expected upon complete healing. That no stiffness of the shoulder joint noted as stated by Dr. Mwaura. He noted that the respondent experiences pain- left shoulder on exertion and that he is unable to carry heavy objects (not more than 30kg).

[25]. The Appellants cited authorities with the awards ranging from **Kshs 50,000/=** to **Kshs 130,000/=** which related to soft tissue injuries; and others ranging from **Kshs 300,000/=** to **kshs 450,000/=** for fracture injuries. The authorities cited by the Respondent range between **Kshs. 500,000/=** and **Kshs. 600,000/=**.

[26]. Upon consideration of the nature and extent of injuries, authorities cited and comparable awards, and inflation, the award by the trial court is reasonable compensation of the injuries sustained; it is neither inordinately high nor erroneous estimate of damages. I do not also find any error in principle on the part of the trial court. Accordingly, the award of **Kshs 750,000.00** is fair compensation for pain and suffering.

[27]. In the upshot, I find that the appeal lacks merit and is hereby dismissed. The appellants shall bear costs of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 21ST DAY OF FEBRUARY, 2022

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF: -

- 1. Ngángá for appellant**
- 2. Wachira for respondent**
- 3. Kasaso C/A**