



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL CASE NO. 23 OF 2019

SAMUEL NDUNG’U MBUGUA.....APPELLANT

-VERSUS-

JANE WAMBUI GITAHI.....1ST RESPONDENT

JOSEPH NJUHA MUGO.....2ND RESPONDENT

JUDGMENT

1. By plaint dated 24th October, 2016 the Appellant sought orders for General damages, for pain and suffering, loss of amenities and loss of earning capacity, special damages Kshs.9,634/-, cost and interest.

2. This was sought arising from road traffic accident of 4th March, 2016 where the Appellant while walking along minor road near Karuga Stage within Nyahururu Township when motor vehicle KAR 812H being driven by 2nd Respondent a driver, agent or employee and with owner’s authority negligently, carelessly and recklessly hit the Appellant occasioning him bodily injuries and thus loss and damage vide pleadings in said plaint.

3. The Respondent denied claim vide defence dated 6th June, 2016.

4. The matter was eventually heard by Appellant calling 2 witnesses and Respondents opting not to give any evidence.

5. The court held Respondent 100% liable and awarded Plaintiff Kshs.200,000/- General damages and Kshs.9,634/- as special damages.

6. The Appellant was dissatisfied with the award on general damages thus lodged appeal with 2 grounds of appeal namely:

i. That award of Kshs.200,000/- was an error of trial Magistrate in view of disclosed injuries thus low and that. Same award was low under heading it was sought.

7. During directions, the court directed parties to canvass appeal via submissions but only Appellant filed the same.

APPELLANT’S SUBMISSIONS:

8. The Appellant sustained several injuries after the accident including:

a. Massive swelling on the left dorsum of foot and ankle region of the left lower limb.

b. Fracture of the 3rd metatarsals pharyngeal.

c. Dislocation on the left ankle joint.

d. Pain in the 2nd finger of the right hand with haematoma.

e. Pain in the left wrist joint.

9. The Appellant was admitted to hospital for one day and due to his injuries he stayed home for about four months as he recovered. The Appellant is unable to walk long distances since he has not recovered fully. The medical report dated 22nd September, 2016 by Doctor Njeri D.N. (PEXT 3) confirmed the injuries as indicated in the plaint. The Appellant was re-examined by Doctor Jennipher Kahuthu on 11th October, 2017, the doctor confirmed the injuries as indicated in the initial medical report as dislocation with a fracture of the 3rd middle toe/3rd metatarsal pharyngeal joint.

10. It was submitted in trial court that, a sum of Kshs.600,000/- be awarded to the Appellant putting in mind the gravity of the injuries he sustained from the negligence of the Defendants. However the Appellant was awarded Kshs.200,000/- as general damages for pain, suffering and loss of amenities, which amount appellant submitted to be inordinately low.

11. In the case of John Kipkemboi & Another v Morris Kedolo [2019] eKLR, the distinguished Judge quoted the Court of Appeal decision in Bashir Ahmed Butt vs Uwais Ahmed Khan [1982 – 88] KAR which set out the parameters under which appellate court will interfere with an award in general damages when it held that:

“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...”

12. Thus it was submitted that a sum of Kshs.600,000/-ought to be awarded to the Appellant for pain, suffering and loss amenities. Reliance is made on the case of S.A.O. (Minor Thro’ next of Friend) M.O.O. v Registered Trustees, Anglican Church of Kenya Maseno North Parish [2017] eKLR where the Appellant was awarded general damages in the sum of Kshs.200,000/- by the trial court. The Honorable Judge T.W. Cherere set aside the trial court judgment and entered a fresh judgment for a sum of Kshs.600,000/-.

ISSUES ANALYSIS AND DETERMINATION

13. After going through the pleadings, proceedings and judgement of the court, finds that the two core issues were; **whether the award herein was inordinately low to warrant court interference and the order as to costs.**

14. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

15. In Peters v Sunday Post Ltd [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

16. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

17. On damages, the appellant pleaded that he sustained massive swelling on the left dorsum of foot and ankle region of the left lower limb, fracture of the 3rd metatarsals pharyngeal, dislocation on the left ankle joint, pain 2nd finger of the right had with haematoma and pain and left wrist joint.

18. At the hearing, the Plaintiff testified and stated that he got injured on his left leg. He also stated that he was admitted at the hospital for one day and due to his injuries he stayed at home for about four (4) months as he recovered. He further stated that he has not fully recovered as he was unable to walk long distances.

19. The medical report dated 22nd September, 2016 by Doctor Njeri D.N. (PEXT 3) confirmed the said injuries as indicated in the Plaint. The said Doctor indicated in the report that the appellant sustained fracture dislocation at the 3rd metatarsal joint and that the Plaintiff did not suffer permanent disability.

20. The appellant was re-examined on 11th September, 2017 by Doctor Jenipher Kahuthu. According to the second medical report, the doctor confirmed the injuries as indicated in the initial medical report as dislocation with a fracture of the 3rd middle toe. The second medical report also indicated that the he did not suffer any permanent physical disability.

21. The parties did not file written submissions. The trial court considered the nature of the injuries that the appellant sustained as a result of

the accident, the evidence on record and the testimony of the three witnesses and awarded the him Kshs.200,000/- as general damages for pain, suffering and loss of amenities and Kshs.9,631/- as special damages, which was proved, plus costs of the suit and interest at court rates.

22. The trial court relied on the cases of *Parodi Giorgio v John Kuria Macharia [2014] eKLR, Nairobi Civil Appeal No. 343 of 2012*, the High Court Judge allowed the appeal and awarded the Appellant Kshs.200,000/- as general damages, for similar injuries as those sustained by the Plaintiff in the present case.

23. And *Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR, Nairobi Cause No. 98 of 2011*, the court awarded Kshs.210,000/- as general damages, for almost similar injuries suffered by the Plaintiff in this case.

24. The two cited cases though of similar injuries they range in age between 8 and 11 years thus the inflation ought to have been factored in

25. I agree the award was inordinately low and thus this court warranted to interfere with the same. Thus the court will enhance same and therefore makes the orders;

i. The award of 200,000 is enhanced to 400,000.

ii. Appellant is awarded costs of the appeal.

DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022

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CHARLES KARIUKI

JUDGE