



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.E029 OF 2021

BETWEEN

ANYANGO OYUGI.....1ST APPELLANT

MAKARIOS ARASA MOGAKA.....2ND APPELLANT

AND

DOROTHY ADHIAMBO OGANA.....RESPONDENT

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

SPMCC No. 13 of 2019 by Hon. B. Omwansa–Senior Principal Magistrate).

JUDGMENT

1. Anyango Oyugi and Makarios Mogaka, the appellants herein, were the defendants in Oyugis Senior Principal Magistrate's SPMCC No. 13 of 2019. This was a claim that arose from a road traffic accident involving motor vehicle registration number KCF 516Y owned by the appellants. The respondent sustained injuries that gave rise to this case. The learned trial magistrate delivered judgment dated 10th March, 2021. She made an award of Kshs. 350,000.00 in general damages and Kshs. 6,500.00 in favour of the respondent before factoring liability.

2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Kimondo Gachoka & Company Advocates. They raised grounds of appeal as follows:

- a) That the learned trial magistrate grossly misdirected himself in failing to appreciate the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.
- b) That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of law applicable.
- c) The learned trial magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
- d) The learned trial magistrate erred in law and fact in relying on extraneous circumstances which were not supported by the evidence on record, hence arriving at a wrong finding as regards the nature of the plaintiff's injuries.
- e) The learned trial magistrate erred in fact and in law by basing his judgment solely on the testimony of the plaintiff and disregarding the defendant's evidence on record.
- f) The learned trial magistrate erred in fact and in law by awarding the plaintiff inordinately high quantum as damages in the circumstances of this case.
- g) The learned trial magistrate erred in assessing an award, hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by the defendant.
- h) The learned trial magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced which was not sufficient to warrant the amount.

i) The learned trial magistrate erred in fact and in law in awarding damages to a claimant/plaintiff for injuries not pleaded by the respondents herein.

j) That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

3. The appeal was opposed by the respondent through the firm of Everlyne Kuke & Company Advocates. It was argued that the award was reasonable in the circumstances of this case.

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 parties herein entered consent on liability on 19th August, 2020. The consent was recorded at the ratio of 90:10 in favour of the respondent. Parties having agreed on liability and recorded a consent on the same, the trial court had only one task; assessing the quantum of damages.

6. It is trite law that an appellate court will only interfere with an award of the trial court 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.

7. The respondent as a result of the complained of accident sustained the following injuries:

a) Fracture of right 3rd metatarsal bone.

b) Blunt chest injury.

c) Tenderness/swelling of the chest wall.

8. Due to these injuries, she was put on treatment as follows:

a) Broad-spectrum antibiotics;

b) Plaster cast (back slab);

c) Broad-spectrum anti-inflammatory analgesics;

d) Physiotherapy sessions; and

e) Mobility using crutches.

9. In the trial court, the appellants made a proposal of Kshs. 80, 000.00 while the respondent made a proposal of Kshs.2, 000,000.00. Each party cited decided cases to support their proposal.

10. The respondent relied on the case of **Zachary Kariithi v. Jason Otieno Ochola 2016 eKLR**. In this case an award of Kshs. 2,000,000.00 was given for the following injuries:

a) Chest pains;

b) Injuries to the waist,

c) Compound fracture of the right tibia/fibula;

d) Compound fracture of the left femur bone mid shaft;

e) Fracture of the right femur bone;

f) Fracture of 3rd, 4th & 5th ribs of the right side;

g) Injuries to the forehead;

h) Injuries to the hip joint; and

i) Injuries to the big left toe.

The injuries sustained by the complainant therein are more serious than the ones suffered by the respondent in the instant case.

11. The appellants on their part relied on the decision in **Nyambati Nyaswabu Erick Toyota Kenya LTD & 2 others [2019] eKLR** where an award of Kshs. 90,000.00 was given. The injuries sustained were captured in paragraph 4 as follows:

4. According to the plaint, the appellant sustained a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs. In his testimony, the appellant produced the medical reports and stated that his injuries had healed. The medical report by Dr. Ezekiel Oganda Zoga dated 11th May 2015 following his examination of the appellant on 3rd October 2014 confirmed the injuries enumerated in the plaint. At the material time, the appellant complained of chest pains but the doctor noted that he was in stable condition, had mild tender on the chest and a scar on the right temporal maxillary area. He concluded that, "Following the RTA Eric sustained some severe soft tissue injuries which are healing well. No permanent disability anticipated".

It is evident that the complainant in the instant case suffered severe injuries compared to what the complainant in the Nyambati (supra) case sustained. These were soft tissue injuries. In the instant case the complainant sustained a fracture. I have not therefore been persuaded to interfere with the trial court's award.

12. The appeal is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 31ST DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE