REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 47 OF 2019

TIMOTHY WAMBUA MUTISO *alias* **TIMOTHY**

GIDEON WAMBUA MUTISO ..... APPELLANT

-VERSUS-

ANN NTHENYA MUMO *alias* **HANNAH**

NTHENYA MUMO .....RESPONDENT

(*Being an appeal from the judgment and decree delivered on 27th November 2018 in Senior*

Resident Magistrates' Court Tawa, SRMCC No. 164 of 2017)

JUDGMENT

1. In a judgment delivered on 27th November, 2018, the learned trial magistrate entered judgment for the respondent (*plaintiff in the trial court*) as follows –

> **1) "In summary, I enter judgment for the plaintiff against the defendants jointly and severally as follows –**
>
> **(1) Liability 90:10**
>
> **(2) Special Damages …….. Kshs.63,451/=**
>
> **(3) General Damages …… Kshs.700,000/=**
>
> **Total ……. Kshs.763,451/=**
>
> **This amount when subjected to apportionment comes to Kshs.630,634.50/=**
>
> **The plaintiff is awarded cost of the suit plus interest.**

2. Aggrieved by the judgment of the trial court, the appellant (*who was defendant in the trial court*) has come to this court on appeal through counsel on the following grounds –

> ***(1) The trial magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing general damages on pain, suffering and loss of amenities and thereby giving an inordinately high and manifestly excessive award unsupported by law so as to amount to an erroneous award in the circumstances of the case.***
>
> ***(2) The trial magistrate erred in law and in fact in ailing to appreciate and properly evaluate the evidence on record, in particular the evidence on the plaintiff's injuries and thereby erroneously awarded an inordinately high and manifestly excessive award on general damages.***
>
> ***(3) The learned magistrate erred in law and in fact in awarding general damages of Kshs.700,000/= for the injuries sustained by the respondent which is inordinately excessive given the circumstances of the case.***
>
> ***(4) The learned magistrate erred in law and fact in proceeding on the wring principles visa vis the evidence before him and laid***

down principles of law thus arriving at a judgment that was erroneous in the circumstances.

(5) The learned magistrate erred in law and in fact by taking into account irrelevant considerations/factors while awarding general damages.

(6) The learned trial magistrate further erred in law and in fact by failing to appreciate, consider and take into account the appellant's submissions on the quantum of damages awarded in the circumstances.

(7) The learned magistrate erred by making a decision on quantum that was erroneous, without proper basis and against the weight of the evidence.

3. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by J. Maluki & Company advocates for the appellant, and those filed by Annie W. Thoronjo & Co. for the respondent.

4. This being a first appellate court, I am required to reconsider the evidence on record, re-evaluate it and arrive at my own independent decision – See **Selle –vs- Associated Motor Boat Co. Ltd (1968) E.A 123.**

5. At the trial, only the respondent tendered evidence. The appellant elected not to call any witness. The appellant did not even subject the plaintiff to another medical examination or call a doctor to testify, or produce a medical report on the injuries suffered by the respondent.

6. Thus the evidence before the trial court was that of the respondent alone. In my view, from the evidence on record the respondent proved that the accident did occur when another vehicle crashed into the vehicle in which she was a passenger and that she was injured. The injuries suffered, from the evidence on record, were those described in the medical report dated 30/01/2017 prepared by Dr. Kimuyu J.A – described as deep cut wounds on upper chest, open fracture right distal tibia, cut wounds on both knees, and soft tissue injury right thigh. According to the medical report, the patient had healed scars and had recovered except for follow up medication.

7. From the respondent's evidence which was not controverted, the accident was caused by the negligence of the driver of the other vehicle who died in the accident. The dead driver is represented by the appellant. I thus find no fault on the part of the magistrate in the way he determined the injuries suffered, and assessment of liability at 90:10.

8. I must add that evidence from witnesses cannot be shaken through submissions. Also pleadings, whether be they the plaint or defence, are mere allegations and they remain so unless supported through evidence.

9. With regard to the quantum of damages awarded, courts have dealt with the issue of the principles to be applied by appellate courts in deciding whether to interfere with the awards of damages of a trial court, in several cases. Counsel on both sides herein have cited several court cases on this aspect. In my view it will be sufficient if I cite the case of **Kenfro Africa Ltd t/a Meru Express Service (1976) & Another –vs- Lubia & Another (1982 – 88) I KAR 727** and the case of **Bhutt –vs- Khan (1982 – 88) I KAR 1**, in which it was stated that he principle applicable, is that appellate courts will not interfere with a trial court's award of damages unless it is demonstrated that the court –

"took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

10. Coming to our present case, the appellants' counsel has argued strongly that the magistrate did not go by the recent awards in cases of similar injuries, and also that the trial court did not take into account the submissions of counsel for the appellant.

11. I note that in the judgment the trial magistrate stated as follows on the assessment of quantum of damages –

"For the above injuries, the plaintiff's advocate submitted that a sum of Kshs.1,000,000/= would adequately compensate the plaintiffs. The defendant's advocate on the other hand submitted that a sum of Kshs.54,601/= would be adequate.

I have looked at the authorities relied upon by the parties. I have considered the nature of injuries sustained by the plaintiff in the respective authorities compared to the injuries sustained by the plaintiff in our present case. I note that the plaintiff suffered serious injuries according to the doctor's report. The amount of Kshs.54,601/= proposed by the defendant is way on the lower side considering the nature of injuries. I find that a sum of Kshs.700,000/= would adequately compensate the plaintiff. I award the same as general damages."

12. From the above considerations in the judgment, it cannot be said that the trial magistrate did not take into account comparative awards, nor can it be said that he did not take into account the submissions and proposals of the appellants' counsel and the respondent's counsel, in determining the amount of damages to award. I thus find no error or misdirection on the part of the trial magistrate. I also do not find the award to be inordinately high to warrant this court interfering with the same. The appeal will thus fail.

13. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal of the appellant herein, with costs to the respondent.

DELIVERED, SIGNED & DATED THIS 29TH DAY OF MARCH, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE