



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. E002 OF 2021

LILIAN ANYANGO OTIENO.....APPELLANT

VERSUS

PHILIP MUGOYA OGILA.....RESPONDENT

[Being an appeal from the Judgment and Decree of Hon. S. O. Temu SPM

dated 17th December 2020 issued in Nyando SPMCC NO. 35 of 2015]

JUDGMENT

This is a Judgment on the quantum of damages awarded by the learned trial magistrate.

1. The issue of liability had been resolved by consent of the parties; so that the Defendant bore responsibility for 20% of the cause of the accident.
2. In his Judgment, the learned trial magistrate held as follows when he was assessing the appropriate award;

“I have looked at the Plaintiff, and the injuries stated thereon are not supported by any medical records known or produced herein.

The plaintiff’s advocates ignored the medical documents provided to assess the claim for general damages and he instead used the injuries stated in the Plaintiff, which have no basis.”

3. The trial court further stated that the authorities cited by the Plaintiff were unrelated to the injuries suffered by the Plaintiff; and they could not therefore be the basis for assessment of the appropriate damages.
4. Ultimately, the trial court awarded Kshs 100,000/= as General Damages.
5. The Appellant was aggrieved by the said award; and that is what prompted this appeal.
6. Being the first appellate Court, I am obliged to re-evaluate all the evidence on record. In order to appreciate the process of re-evaluation of the evidence, the said evidence must be placed in perspective. In effect, the starting point must be the particulars set out in the Plaintiff.
7. It is well settled that parties are bound by their pleadings. Therefore, the evidence led by any party should advance the case of the said party, as spelt out in the pleadings.
8. Any evidence which is tendered by a party, but which does not advance the case set out in the pleadings, is deemed irrelevant.
9. In the Plaintiff herein, the particulars of the injuries were as follows;

- **Head injury, with dislocation of cervical spine of the neck.**
- **Chest injury, with damage of the rib cage and blunt abdominal injury.**
- **Tissue injuries of both upper limbs with dislocated wrist and elbow joint.**

- **Dislocated pelvic frame involving both hip joints and damage of the right lower limb, with dislocation at the ankle joint.”**

10. I have looked at the Medical Notes from Ahero Sub-District Hospital. The injuries listed therein were as follows;

“Right hand pain Right ribs pain Joint pain at the elbow”

11. The said notes indicate, (at page 37 of the record), that;

“IMP: Soft tissue injury secondary to RTA”

12. The notes further indicate that the Plaintiff was sent for an X-ray of the left hand and of the right lower limb (ankle joint).

13. At the centre of page 38, we find the following information;

“X-ray reports – Normal x-ray c calcaneop spark noted on the Right tibia fibula.”

14. The Appellant has submitted that the doctor at the Ahero sub-district hospital could not make a conclusion of the extent of the injuries because he was waiting for the x-ray reports.

15. But as shown above, the doctor actually stated that the x-ray reports were normal. He cannot have been waiting for a report about which he had already concluded that it was normal.

16. The injuries cited in the P3 Form are consistent with those in the treatment notes.

17. PW2, BENSON OOOLE, is a Clinical Officer who was attached to the Ahero District Hospital, at the material time. After examining the Plaintiff, he recorded the treatment notes.

18. In his evidence **PW2** said;

“She had an injury on the right hand and minor lacerations on other parts of the body. She had injury of lacerations on the chest and elbow joint. The injuries were soft tissue.”

19. During cross-examination, the Clinical Officer made it clear that although x-rays were done, there were no fractures.

20. However, he added that Dr. Nicodemus Omollo, who received the x-ray results, told him that there was a fracture.

21. PW3, NICODEMUS BUNGE, was a Clinical Officer. He was attached to the Ahero Sub-County Hospital, at the material time.

22. It is he who filled the P3 Form.

23. When being cross-examined, **PW3** said that the Plaintiff had suffered soft tissue injuries.

24. In view of the fact that the 2 Clinical Officers who examined the Plaintiff, and who gave evidence on her behalf, both made it clear that the Plaintiff sustained soft tissue injuries, I find that that constitutes the sum total of the evidence regarding the Plaintiff’s injuries.

25. Although the Plaintiff talked about the dislocations of her neck, left hand and right foot, I find that the evidence tendered did not support her assertions.

26. I now have to consider whether or not the general damages awarded by the trial court were commensurate to the injuries sustained by the Plaintiff.

27. It is well settled that an appellate Court should not be quick to interfere with the decision of the trial court, just because the said appellate court or any other Judge might have reached a different conclusion.

28. If an Appellant satisfies the Court that the decision of the trial court was based on wrong principles or that the trial Court had taken into account irrelevant factors, then the Court would be entitled to set aside the decision.

29. In the event that the Appellant satisfied the Court that the trial Court had failed to take into account one or more relevant factors, the Court would set aside the decision of the learned trial magistrate.

30. It is also settled that when it is manifestly evident that the award was either so high or so low, compared to those awarded by other courts for comparable injuries, that would be a basis for setting it aside.

31. During the trial, the Plaintiff submitted that an award of Kshs 600,000/= would be appropriate.

32. I note that the case of **ROSELINE VIOLET AKINYI Vs CELESTINE OPIYO WANGWAU, CIVIL APPEAL NO. 25 OF 2015**, did not support the Plaintiff's claim. I say so because in that case. Aburili J. had been called upon to determine the question regarding the liability of an insurer to settle the judgment against the insured. The learned Judge held thus;

“In my view, the statutory duty imposed on the insurance company only gives the applicant the right to sue for recovery of the amounts due in a decree against the insured, and not a right to expressly execute the decree against the insurance company without obtaining a decree against it.”

33. In the other 3 cases cited by the Plaintiff at the trial, the injuries were more serious than those sustained by the Plaintiff herein.

34. In **DAVID MURIUNGI DANIEL & ANOTHER Vs MARTIN GITHONGO NDEREVA, H.C.C.A. NO. 7 OF 2015**, the Plaintiff suffered, inter alia;

a. subluxation of the cervical spine at C3 to C5;

b. Displaced fracture of the left clavicle.

c. unstable pelvis, secondary to multiple pelvic bone fractures.

35. Clearly, the case was not comparable to that of the Plaintiff herein.

36. In the case of **MOGAKA SYDNEY Vs FAITH NDUNGE NYUNDO, H.C.C.A. NO. 20 OF 2017**, the main injury was the compression of the spine at L2.

37. In that case, the appellate court reduced the damages from Kshs 450,000/= to Kshs 300,000/=.

38. In **CAROLYNE INDASI MWONYONYO Vs KENYA BUS SERVICE LTD, H.C.C.A. NO. 17 OF 2007**, the Plaintiff suffered soft tissue injuries and the dislocation of the right knee.

39. The appellate court awarded Kshs 350,000/=.

40. During the appeal, the Appellant cited more comparable cases, being;

i. MICHAEL OKELLO Vs PRISCILLA ATIENO H.C.C.A. NO. 45 OF 2019, in which Kshs 250,000/= was awarded for soft tissue injuries.

ii. JOSEPH MWANGI KIARIE & ANOTHER Vs ISAAC OTIENO OTIENO, H.C.C.A NO. 30 OF 2018, in which the award of Kshs 300,000/= was reduced to Kshs 180,000/=, for soft tissue injuries.

iii. MICHAEL ODIWUOR OBONYO Vs CLARICE ODERA OBUNDE, H.C.C.A. NO. 01/2020.

The award of Kshs 500,000/= was reduced to Kshs 200,000/= for soft tissue injuries.

41. Meanwhile, the Respondents urged the trial court to award Kshs 60,000/=.

42. In the case of **MOKAYA MOCHAMA Vs JULIUS MOMANYI NYOKWOYO H.C.C.A. NO. 101 OF 2010**, the court awarded Kshs 70,000/= as general damages.

43. The Plaintiff in that case had suffered

“only minor soft tissue injury, but also suffered a concussion for a few minutes coupled with a head injury.”

44. The injury there was only a minor one, with a concussion for a few minutes: And the nature of the head injury was not specified.

45. However, it does appear that the Plaintiff in that case had lesser injuries than the Plaintiff in the case before me.

46. After giving due consideration to all the authorities cited before me and also before the trial court, I find that the learned trial magistrate awarded a sum that was very much on the lower side. Accordingly, the said award is set aside.

47. I substitute it with an award of Kshs 150,000/=.

48. The costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH, 2022.

FRED A. OCHIENG

JUDGE