



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NUMBER 77 OF 2019

GATETE MUTHEE DAVID.....APPELLANT

VERSUS

JOSEPH CHARO NDAA.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. Dr. Julie Oseko Resident

Magistrate delivered on the 10th September 2019 in Malindi CMCC No. 155 of 2017)

RULING

The appeal before me is against the award of damages by the trial court in the sum of Kshs.1, 211,190/= for pain and suffering and liability at 100%. The judgment was delivered on 10th September 2019.

Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the 7th of October 2019. His appeal is mainly on the Trial Court's finding on both quantum, and liability. The grounds of appeal are that: -

- (1) The learned magistrate erred and misdirected herself in law by assessing damages that was manifestly excessive and incomparable to the current judicial awards in analogous circumstances.**
- (2) The learned magistrate erred in fact and in law in failing to appreciate and apply the principles applicable in assessment of damages.**
- (3) The learned trial magistrate erred in law and fact in failing to take into account relevant factors in evaluating the evidence on record to determine quantum and liability.**
- (4) The learned trial magistrate erred in law and fact in finding the appellant wholly liable for the accident.**

At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

Brief Facts of the Case

The Respondent **Joseph Charo Ndaa** sued the Appellant **Gatete Muthee David** for general and special damages for injuries sustained in a road accident on the 19th of April 2017 along Malindi-Mombasa road at Kwa Chocha Area. It involved motor vehicle KBS 964S/ZC 1311 belonging to the Applicant and a tuktuk registration number KTWB 173C belonging to the Respondent. The Appellants then filed a statement of Defence dated 6th March 2018 denying all the averments in the Plaint. The matter proceeded for hearing on 22nd January 2019 and the Respondent called three Witnesses to testify in support of his claim.

The appellant presented evidence before the trial court to discharge the burden of proof on a balance of probabilities against the respondents. At the root of the trial was the issue of liability in negligence that resulted in the road traffic accident whereby the appellant sustained severe physical injuries.

In this respect the appellant gave evidence on causation and blameworthy of the accident that led him to be admitted at Malindi Sub-County Hospital for examination and treatment. Further the appellant relied on documentary evidence in the form of discharge summary, receipts on medical expenses incurred in the course of treatment, medical report by Dr. Ajoni Adede and police abstract to buttress his case on causation and loss of damage.

The respondents relied on their statement of defence and opted not to call any evidence in rebuttal to the appellant claim. The parties then

agreed to file their respective submissions on assessment of general and special damages. Consequently, based on the material before court a Judgment on liability was recorded in favor of the appellant as against the defendants jointly and severally at 100%.

Pursuant to the holding on liability as set out in the Judgment, bearing in mind the nature of injuries sustained and equally placing reliance on Dr. Ajoni Adede's medical report which stated that the Respondent had suffered the following injuries;

a) Head injury with

i) Loss of consciousness (30 minutes)

ii) Disorientation (confusion)

b) Severe blunt injury in the abdomen with

i) Bleeding within the abdomen

(haemoperitoneum)

ii) Vomiting of blood

c) Blunt injury to the waist

d) Shock (low blood pressure BP 49/35 due to the blood loss and pain (vasa-vagal response)

e) Abrasion on the right elbow

PW1, Chief Inspector George Naibei, adduced evidence and stated that there was an accident along Malindi-mombasa road at Kwa Chocha area involving a tuktuk registration number KTWB 173C and a trailer registration number KBS 964S/ZC 1311 and as a result of the accident the plaintiff suffered grievous harm. It was his evidence that the tuktuk was from Mombasa direction while the trailer was from Malindi direction. He stated that the driver of the trailer veered off his lane and hit the tuktuk, he stated that the accident occurred on the lawful lane of the tuktuk. The trailer had crossed the middle line and he blamed the driver of the trailer.

PW2, the Plaintiff, adduced evidence that on the 19th of April 2017 he was driving a tuktuk registration number KTWB 173C from Mombasa direction heading towards Malindi direction at about 7.45pm and visibility was by headlights. He testified that upon reaching the Kwa Chocha area he saw a trailer coming from Malindi direction and it was at a very high speed and that the driver lost control, veered off his lane and hit the tuktuk on the left hand side as a result whereof he suffered serious injuries. He stated that he was treated at Malindi Sub-County Hospital where he was admitted for weeks. He produced treatment notes, discharge summary, medical report, receipt for the medical report, receipts for medical expenses, search and demand letter. He blamed the driver of motor vehicle registration number KBS 964S/ZC 1311 for careless driving, veering off his lane and failing to have regard to the safety of other road users. On cross examination he maintained that the accident occurred on the lawful side of the tuktuk and that he tried to evade the said accident by moving to his extreme left but still the trailer followed him there. He stated that part of the tuktuk was on the tarmac road and part of it was off the road.

It was **PW3, Joseph Nzai's** testimony that he was walking along the Malindi-Mombasa road and was facing towards Malindi direction and he witnessed occurrence of an accident involving a tuktuk and a trailer. According to him the trailer had no headlights and it was being driven at a very high speed. The driver of the trailer veered off his lane and hit the tuktuk and after hitting the tuktuk he swerved back to his lane but the trailer was across the road. He stated that he blamed the driver of motor vehicle registration number KBS 964S/ZC 1311 for the careless driving.

The Appellant did not call any witnesses to challenge the evidence adduced by the Respondent.

The Trial Court delivered judgment in favor of the Respondent against the Applicant at 100% liability, General damages of Kshs.1, 200,000.00/=, special award of Kshs.11, 190.00/= as well as costs and interests on 10th September 2019.

This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified^[1]. The parties filed Written Submissions but did not find it necessary to orally highlight.

The Appellant's Submissions

Counsel for the Appellant submitted on all the grounds collectively. He submitted that the appellant is aggrieved by the court's decision both on quantum and liability. He submitted that on liability the Plaintiff, an eye witness and the Police Officer testified. The Police Officer testified using the Occurrence Book and the Police Abstract. Whereas he admitted that his name did not appear anywhere in the Police Abstract as an investigator he confirmed that the Occurrence Book record showed that the accident occurred when the tuktuk collided with the Appellant's Motor Vehicle. According to the Investigating officer who filled the Occurrence book, the tuktuk was moving in a zigzag manner and collided with the appellant's vehicle on the rightful lane of the defendant's vehicle. There was no basis for the Police Officer to imply that the Appellant's driver was on the wrong since no other report on the accident save for the one made in the OB. The court did not refer to the Police Officer's evidence on making its finding on liability.

It was also his submission that the eyewitness who had witnessed the accident while walking along the Malindi-Mombasa Highway and blames the appellant's driver for the accident was not a credible witness to be relied upon by the trial court. In his witness statement signed on the 25th of July 2017 he alleges to have been riding an unidentified motor cycle while in court he had stated that he was walking and did not know anything about a motorcycle. It was Counsel's submission that if the eyewitness didn't recall such a crucial detail of the accident his evidence cannot be relied upon. Further he submitted that the trial court did not analyze the eye witness's statement in arriving at its finding on quantum.

He conclude that from the evidence of the 3 witnesses it was clear that the evidence given by the Police Officer and that of the Respondent is conflicting as the Police records shows that the Plaintiff was to blame while the Respondent's evidence is that the Appellant was to blame.

On the issue of quantum, the Appellant relied on the following cases where the Respondent's injuries are comparable to those suffered by the Plaintiffs; **Edwin Masese Onsando V Teresa Gesare Masese [2019] eKLR** and **Shreeji Enterprises (K) Limited v John Kyeene Wambua & Another [2015] eKLR** where the courts awarded Kshs. 200,000/= revised downwards from Kshs. 500,000/= and Kshs. 600,000/= respectively, to submit that the damages awarded by the trial court were excessive.

He further submitted that the court only considered the plaintiff's authorities wherein the plaintiff suffered a fracture of the skull which was a far more grievous injury than those suffered by the plaintiff/respondent. Consequently, he asked that the Court find that the trial court's award was excessive and that an award of Kshs. 250,000/= would suffice as fair compensation for the Plaintiff's injuries. For this he relied on the cases of **Samuel Muthama v Kenneth Maundu Muindi** and **JMN (Minor) v Petroleum & Industrial Service LTD** where the court awarded Kshs.380,000/= and Kshs. 180,000/= respectively.

The Respondent's Submissions

The Respondent reminded the Court in his submissions that an award of general damages is an exercise in judicial discretion based on the evidence placed before a Court and that it is not to be interfered with unless it is shown that it was exercised on the wrong principles. For this submission he relied on the decision in **Anne Wambui Ndiritu v Joseph Kiprono Rokoi & Another [2004] eKLR**.

On the issue of liability, he submitted that the trial court did not err and that it had considered all the evidence and correctly found the defendants 100% liable as they had proved on a balance of probability that the driver of motor vehicle registration number KBS 964S/ZC 1311 was negligent in the manner that he controlled, managed and or drove. They further submitted that they had proved on a balance of probabilities that the trailer did not have a proper lookout and attention and did not mind the safety of other users.

He further submitted that the Appellant did not call any witnesses or by any means rebut the evidence adduced by the Respondent hence the Learned Magistrate did not error and for this submission he relied on the case of HCCA 58 of 2013 **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR**.

On the matter of quantum it was the Respondent's submission that he had suffered grievous harm which had him admitted for two weeks in the hospital and was at risk of head injury related complications throughout his life, which injuries the Appellant did not dispute during trial and as such the Trial court had not erred at all. He further submitted that the award of damages was not excessive at all but a fair representation of awards of similar injuries. For this the respondent submitted the case of **Kyoga Hauliers (K) Paluku v Phillip Mahiu Nyingi**.

He further submitted that the award of general damages is discretionary and that an appeal court should not interfere unless it is evident that the trial court took into consideration extraneous matters of that the award was too exaggerated as not to fall within the limits set by precedence. As such he prayed that the appeal be dismissed with costs.

Issues for Determination

I stand by the Court of Appeal for East Africa in *peters -vs- sunday post limited [1958] ea 424* where Sir Kenneth O'Connor stated as follows:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt -vs- Thomas (1), [1947] A.C. 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a

cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- i. **First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
- ii. **In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
- iii. **It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.**

These three principles are well settled and are derived from various binding and persuasive authorities including;

- a) *Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);*
- b) *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O’Kubasu, Githinji and Waki JJA); Virani T/A Kisumu Beach Resort v Phoenix of East*
- c) *Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002).*

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this court in my view:

1. Liability
2. Quantum

liability

It is my considered opinion after thorough perusal of the evidence before me that the Appellant ‘s driver acted negligently by veering off his lane hence occasioning the accident. I am inclined to believe the testimony of PW1 who produced the Police Abstract. Further the Appellant did not adduce any evidence to rebut the testimony of the witnesses at the trial as such I find that the learned Magistrate did not error in finding that the 2nd Defendant who was the Appellant’s employee, had caused the accident.

Consequently, I am in agreement with the Learned Magistrate’s finding on 100% liability against the Appellant.

Quantum

The issue for determination here is whether the award of general damages of Kshs.1, 200,000.00/= in light of the injuries stated above is inordinately high to persuade this court to interfere with it.

From the evidence adduced by the respondent it is clear that he had indeed suffered serious injuries with 3% disability.

Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **bashir ahmed butt v uwais ahmed khan** [1982-88] KAR 5 where the court held that;

“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 at a figure which was either inordinately high or low”

It must be noted that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as possible comparable” to the other person’s injuries, and the after effects.

In the case of **SAVANNA SAW MILLS LTD VS GORGE MWALE MUDOMO (2005) eKLR** the court stated as follows: -

“It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”

The test to be applied in an award of damages is clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the Respondent had clearly proven the amount pleaded as special damages and as such I find no reason to vary the Learned Magistrate’s decision on that.

Having considered the unchallenged medical reports, if these are established as the injuries suffered by the Respondent, what amount of damages would compensate for them? If one takes into account the actual injuries suffered by the Respondent it becomes readily obvious that an award of Kshs.1, 200,000.00/= is manifestly excessive. For this I shall rely on the Court of Appeal's decision in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that:-

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 All ER 297*. It was echoed with approval by this Court in *Butt v. Khan [1981] KLR 349* when it held as per Law, J.A that:

‘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 at a figure which was either inordinately high or low.’ Emphasis my own.

Looking at similar cases where the plaintiffs suffered similar injuries I am persuaded that the Learned Trial Magistrate's estimate on the amount of general damages entitled to the Respondent was excessive. Illuminating the excessive nature of the award in this instance, in **Joseph Mwanza v Eldoret Express Ltd KSM HCCC No. 160 of 2004 (UR)**, the plaintiff sustained head injury with multiple facial injuries, laceration over the right frontal scalp, gross right periorbital oedema and tenderness with enophthalmos, diplopia and ophthalmoplegia of the right eye, swelling and tenderness over the facial side bone, craniomaxillofacial fractures, compound depressed frontal bone fracture and small subdural haematoma and undisplaced fracture of the orbit. He was awarded Kshs. 1,200,000/- in 2012.

In circumstances where the Plaintiffs suffered injuries comparable to the Respondent herein, the awards by the Court are generally lower than the 1,200,000/-. For instance, in **Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR**, the Plaintiff had suffered severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. He was admitted for 5 months in an unconscious state for that period. At the time of examination, he was complaining of headache and chest pain and inability to extend the left middle finger. The doctor's prognosis stated that the respondent was not able to hold anything tightly with the left hand. He also noted that the respondent suffered recurrent headaches as a result of the head injury. He concluded that the injuries were treated well and healed well without permanent incapacity. In this case, the Court held that the award of Kshs. 600,000/- given by the trial court was inordinately high and substituted it with an award of Kshs. 350,000/- as general damages.

Similarly, in **Francis Ochieng and Another v Alice Kajimba MGR HCCA No. 23 of 2014 [2015] eKLR** the claimant sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, loss of 5 anterior lower and two upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. The court held that an award of Kshs. 350,000/- was sufficient.

In **KISII BOTTLERS LIMITED v JOSEPHINE AKINYI MWIKWABE [2011] eKLR** where the Plaintiff sustained blunt head injuries, cerebral concussion, blunt injuries on the abdomen, bruises on the abdomen, fracture on the right hand and complained of persistent pain on right arm, headache and dizziness, they were awarded 220,000/- by the trial court which award was maintained on appeal.

I am also convinced that the Learned Trial Magistrate's reliance upon the case of **HCCA No. 21 of 2013 Kyoga Hauliers (K) Paluku v Phillip Mahiu Nyingi** wherein the Plaintiff had suffered a skull fracture to reach the conclusion that the amount of general damages that should be awarded is Kshs. 1, 200,000/= to account for passage of time and inflation, was ill conceived as it cannot be compared to the circumstances in this case. This Court finds reason to revise the quantum awarded to the Respondent. In my view an award of Kshs. 500,000/= would be adequate to compensate for the injuries suffered in this case.

Determination

The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of **Shah (supra), Paul v E. A. Cargo Handling Services Ltd 1974 EA 75**.

When I scrutinize and evaluate the record, I am not satisfied that the Learned Trial Magistrate correctly exercised her judicial discretion and applied her mind to the principles on the award with regard to general damages for pain and suffering. I think as a whole that there are grounds for this court to differ with the Judgment of the trial court. As regards the claim on special damages the trial court Judgment remains intact and is hereby affirmed.

The upshot, then, is that the appeal is allowed and the Court sets aside the assessment of damages by the Lower Court. In its place, the Court substitutes an assessment of quantum for general damages for Kshs. 500,000/=. The amount awarded in special damages will not be affected.

For equitable reasons, I will not award costs on this appeal. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JANUARY 2021

.....
R NYAKUNDI

JUDGE

This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.

(annkiusya@yahoo.com and mba@mmmlaw.org)

[1] See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123