



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 46 OF 2019

(Being an Appeal against the Judgment / or Decree of the Chief Magistrate's Court at Kitui

by Honourable S. Mbugi (SRM) delivered on 17th July, 2019 in Kitui CMCC No.433 of 2017)

VICTORIA MWIKALI MUSYOKA.....PROSECUTOR

VERSUS

LUCY MUENI MWANDIKWA ALIAS KILONZI.....ACCUSED

JUDGMENT

1. This appeal arose from the Judgment delivered by **Hon.Stephen Mbugi** Chief Magistrate on 16th July 2019 in Kitui Chief Magistrate's Court Civil Case No.433 of 2017 where respondent had sued the appellant for tort of negligence. The **Respondent LUCY MUENI MWANDIVA alias Kilonzi** did blame the **Appellant Victoria Mwikali Musyoki** for a road traffic accident that occurred on 6th April, 2017 which saw the **Appellant's** motor vehicle Registration No. **KBZ 744S** knock down the Respondent causing her injuries.

2. The trial court upon evaluation of evidence presented to it found the **Appellant** 80% to blame and apportioned 20% contributory negligence to the **Respondent**. On quantum, after factoring in 20% contributory negligence the trial court awarded the **Respondent** ksh.323,640/=

3. The **Appellant** felt aggrieved by the said judgment only on quantum and preferred this appeal raising the following grounds namely:

(i) That the Learned Magistrate's award is so manifestly high in the circumstances as to amount to an erroneous estimate of the damages suffered by the Respondent.

(ii) That the Learned Magistrate misapprehended and misunderstood the extent and severity of the injuries suffered by the respondent.

(iii) That the Learned trial Magistrate relied on authorities which were not relevant in her view.

(iv) That the Learned trial Magistrate failed to consider the injuries suffered by the Respondent as per the medical evidence tendered.

(v) That the Appellant's written submission's were totally disregarded which in her view occasioned miscarriage of justice.

(vi) That the Learned trial court erred by relying on the initial treatment notes summary and X-ray from Kitui County Hospital and thereby arrived at wrong decision on quantum.

4. In her written submissions through Learned Counsel M/s **Tindi Munyasi and Co. Advocates**, the **Appellant** submits that the **Respondent** outlined the injuries she suffered as follows:-

a) Deep cut wounds on the face.

b) Deep cut wounds on the chin and

c) Deep cut wounds on both knees.

5. The **Appellant** further submits that the Respondent in her oral testimony testified that she was at the material time six months pregnant and that she suffered a miscarriage at Kitui Hospital. The **Appellant** points out that while the accident occurred on 6/4/2017, the Respondent miscarried in September 2017. The Appellant contends that the miscarriage was not related to the accident because in her view, when the **Respondent** was initially treated she was x-rayed and her foetus was found to be intact.

6. The **Appellant** further contends that the **Respondents** medical report by her Doctor one **Dr. John Mutunga** indicates that she had suffered soft tissue injuries which were anticipated to heal fully.

7. The **Appellant** further avers that the **Respondent** neither pleaded that she had lost her pregnancy due to the accident nor informed her doctor of the same. She faults the **Respondent** for failing to amend her pleadings to include loss of pregnancy and that it was improper for her to bring up the issue in her final written submissions. She further contends that no document was tendered to prove the said claim.

8. She submits that the soft tissue injuries pleaded did not warrant the high award of **ksh.400,000/=** terming it excessive and erroneous. In support of her contention, she relies on the decisions in **Michael Kariuki Muhu -VS- Charles Wachira Kariuki and Another [2015] eKLR** and **Easter Produce (K) Ltd (Savani Estate) –vs- Gilbert Mulunzi Makotsi [2013] eKLR** where the **Appellate** court revised the awards on general damages to **ksh.120,000/=** and **ksh.70,000/=** respectively.

9. The **Appellant** further submits that comparable injuries should as far as possible attract comparable or similar awards for fairness adding that a party should be bound by his/her pleadings. She submits that an award of **ksh.120,000/=** to the **Respondent** could have been fair and urges this court to revise the award made on lower court award and the Respondent **ksh.120,000/=** as general damages.

10. The **Respondent** has opposed this appeal through written submission by her learned counsel **M/s Mulu and Co. Advocate**. She contends that it is the Appellant who took her to hospital after the accident. She submits that she lost her pregnancy a few months after the accident adding that her placenta was affected by the accident and she avers, that her radio-logical report and treatment notes from Kitui General Hospital proved her claim.

11. She submits that her medical evidence tendered to prove her injuries were never challenged by the **Appellant** and that the fact that her claim of loss of her pregnancy was not disputed either.

12. The **Appellant** submits that the award given to her was justified and has cited the decision in **Catherine Wanjiku Kingori and 3 others –vs- Gibson Theuri Gichubi [2005] eKLR** where the plaintiff was awarded **ksh.300,000/=** for similar injuries to support her contention. She further cites the decision of **Bashir Ahmed Butt –vs- Mwais Ahemed Khan (1982 – 88) KAR 5** in urging this court not to interfere with the lower court's award because in her view it was not inordinately too high. According to her the right principle in the award were applied by the trial court.

13. This court has considered this appeal and the submissions made. I have also considered the response made by the Respondent. In my considered view this appeal which is only on quantum basically raises only one issue for determination which is:

(a) Whether the award made to the Respondent was too high in regard to the injuries pleaded.

14. It is trite law that a party is bound by his/her pleadings and under the provisions of **Order 6 rule 1** of the **Civil Procedure Rules** a party cannot deviate or depart from his pleadings once the pleadings are closed save only for when and if a party seeks to amend his pleadings and is granted leave to so amend.

15. This court has perused through the pleadings filed by the parties in this appeal at the lower court and it is true that the **Respondent** pleaded at paragraph 6 of her pleadings that she suffered the following injuries namely:-

a) Deep cut wounds on the face.

b) Deep cut wounds on the chin and

c) Deep bruises on both knees.

16. The **Respondent** gave those particulars of injuries in her pleadings in compliance with the provisions of **Order 2 Rule 4(1)** of the **Civil Procedure Rules** which requires a plaintiff to specifically plead any fact or injury suffered as a result of any tort or illegality in order to give the opposite party or adverse party a chance to defend himself or herself to avoid ambush or surprises during trial.

17. In her evidence during trial, however the **Respondent** departed from her specific pleadings in her pleadings and stated that she later suffered a miscarriage after the accident. She further submitted in her written submissions before the trial court that due to the impact of the accident she lost her 35 weeks pregnancy which greatly traumatized her. She therefore pleaded for an award of **ksh.500,000/=** in general damages.

18. It is obvious going by the submissions filed by the Respondent in the lower court that the main gist of her claim was loss of her pregnancy notwithstanding the fact that the same had not been pleaded. In my view what the **Respondent** pleaded were only soft tissue injuries. The claim of loss of pregnancy in her final written submissions amounted to a departure of what was pleaded which rendered the claim unsustainable in law.

19. This court has perused through the judgment of the learned trial magistrate and though the trial court clearly slated that the issue of miscarriage was never pleaded and was not subject of consideration in the assessment of quatum of damages, this court is persuaded that the mind of the trail court was either swayed by that fact or applied wrong principles in the assessment odamages. Either way, this court finds that the trial court fell into error. This court is aware that awarding general damages in Road Traffic Accident is a discretionary matter and I am properly guided by the principle in **Butt –vs- Khan (1982-88) KAR I** where the Court of Appeal set the following parametres in interfering with the discretion of a trial court;

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

20. As I have noted above, the plaintiff suffered what can be classified as soft tissue injuries which the doctor opined were anticipated to heal after some time. I have looked at the decision of **Michael Kariuki Mulu –vs- Charles Wachira Kariuki & Another [2015] eKLR** and find that in that case the plaintiff suffered soft tissue injures similar to the ones suffered by the Respondent herein. The Court in that case found that an award of Ksh.120,000/= would have been fair had the plaintiff proved her case. I am persuaded that taking everything into consideration including inflationary trends an award of ksh.150,000/= would have been adequate compensation for the **Respondent** given the injuries suffered and specifically pleaded.

21. For that reason this court finds that the award made by the trial court of Ksh.400,000/= was rather too excessive or high in the circumstance given the evidence pleaded and presented to that court. In sum this appeal is allowed. The award given by the trial court of kshs.400,000/= is set aside and in its place an award of ksh.150,000/= is awarded less 20% contribution which translates to Ksh.120,000/=. The **Respondent** will have costs and interest in the lower court in respect to the awarded sum.

Dated, Signed and Delivered at Kitui this 27th day of January, 2021.

R. K. LIMO

JUDGE