



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 90 OF 2016

SIMON KIMOTE.....APPELLANT

-VERSUS-

AGRO SOLUTIONS LIMITED.....RESPONDENT

(Being an Appeal from the judgment and decree of Hon I.M. Kahuya,

Senior Resident Magistrate in Machakos CMCC 574 of 2014

delivered on the 18.8.2016)

BETWEEN

SIMON KIMOTE.....PLAINTIFF

-VERSUS-

AGRO SOLUTIONS LIMITED.....DEFENDANT

JUDGEMENT

1. Vide plaint in the trial court filed on 1.8.2014 the suit arose out of a road traffic accident where the appellant had been a pillion passenger aboard motorcycle registration KMCJ 072Q. It was pleaded that on 10.11.2011 the respondent's authorized agent, rider, servant in the course of his employment so recklessly drove and managed motorcycle registration KMCJ 027Q that he caused the same to collide with motorcycle registration KMCR 522J as a consequence whereof the Appellant was injured. The Appellant instituted **Machakos CMCC 574 of 2014** where he attributed negligence to the respondent and he indicated that he sustained right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury. He sought special damages of Kshs 44,290/- and general damages, future medical expenses, costs and interest. The trial court vide judgement delivered on 18.8.2016 found the respondent 100% liable and awarded Kshs 350,000/- general damages to the appellant and special damages of Kshs 585/- as well as costs and interest. The appellant was not satisfied with the award claiming it was inordinately low and thus prompting the instant appeal.

2. The appeal is solely on quantum and sets out the following 4 grounds which are to the effect that the trial magistrate erred in fact and in law in: -

(i) Awarding general damages of Kshs 350,000/- that were inordinately low in view of the severe skeletal injuries sustained by the appellant that resulted in 60% permanent incapacity on the appellant.

(ii) Failing to award Kshs 600,000/- as future medical expenses to the appellant.

(iii) Failing to consider the findings in the medical report that was produced by the appellant.

(iv) Awarding Kshs 585.00 as special damages instead of the amount pleaded and proved by the appellant.

3. The appellant's counsel prayed that the appeal be allowed and that the lower court's judgement on quantum be quashed and an award commensurate with the appellant's injuries be made.

4. The parties agreed to canvass the appeal via written submissions which they filed and exchanged.

5. Learned counsel for the appellant vide submissions filed on 4.2.2020 submitted that the award of Kshs 350,000/- was too low. Reliance was placed on the case of **Peris Onduso Omondi v Tectura International Limited & Another (2012) eKLR**. It was submitted that comparable awards commensurate to the injuries suffered by the appellant in the case of **Peris Onduso Omondi v Tectura International Limited & Another (2012) eKLR** gave amounts of Kshs 3,500,000/- as general damages. On the aspect of future medical expenses, it was submitted that the appellant pleaded for the same and quantified it and was thus entitled to Kshs 600,000/-. It was submitted on the issue of special damages that the appellant produced receipts worth Kshs 40,090 and was thus entitled to an award of the same.

6. In reply, learned counsel for the respondent agreed with the award of the trial court and submitted that the trial court did not err in its award. Counsel cited the case of **Gladys Lyaka Mwombe v Francis Namatsi & 2 Others (2019) eKLR** where Kshs.305,500/= was awarded by the trial court as general damages and upheld on appeal in respect of cut wound on the anterior part of the scalp, a head injury, spinal cord injury, neck injury, fracture of the lower tibia and fibula and a cut wound on the face; **Naomi Momanyi v G4s Security Services Kenya Limited (2018) eKLR** where Shs.300,000/= was awarded by the trial court as general damages and upheld on appeal in respect of fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. The court was urged to dismiss the appeal.

7. This being an appeal against quantum, the role of the Appellate court in this regard was considered in the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** where the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages as laid down by the Court of Appeal in **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** where the grounds were that if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

8. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** the court listed some principles to guide the court in awarding general damages, viz;

a. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.

b. The award should be commensurate to the injuries suffered.

c. Awards in decided cases are mere guides and each case should be treated on its facts and merit.

d. Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.

e. Awards should not be inordinately high or too low.

9. The Appellant has averred that the learned magistrate's award was **extremely low**. He wants the court to review the evidence and facts on record and increase the award.

10. The evidence in the trial court was as follows; Pw1 was the appellant who testified that as a result of the accident he went to Machakos Level 5 Hospital, was transferred to Menelik Hospital and that he had to undergo surgery a second time at Bishop Kioko then he went to seek medical advice from Aga Khan Hospital. He told the court that he required knee replacement and that he had a medical report that was prepared by Dr. Mutunga where the future medical costs would be Kshs 850,000/- On cross examination, he testified that he did not have the receipts for the bill at Bishop Kioko. He admitted not indicating the cost of future medication in his plaint.

11. **Pw2 was Pc Kanyigo** attached to traffic division in Machakos who testified on behalf of Cpl Wanjohi who had investigated the matter. He testified that the appellant was issued with an abstract in respect of the accident and which was produced as an exhibit.

12. The Appellant closed his case and so did the respondent which closed their case without calling any witnesses.

13. The proceedings indicate that the medical report of Dr. Mutunga and the P3 form were tendered with no indication of an objection by the respondent and which were relied upon by the trial court.

14. I have analyzed the evidence that was adduced before the trial court as well as the submissions of the learned counsels. The issues for determination as elicited from the appeal are: -

1) Whether a case for disturbing the award by the trial court has been made.

2) If yes, how much is the appellant entitled to?

15. The appellant testified that he was involved in a road traffic accident and was injured. The trial court made a finding on liability at 100%.

16. On quantum, the respondent pleaded that he suffered right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury.

17. According to the medical reports on record, there seems to be agreement that the appellant suffered right femoral fracture lower 1/3, tibia plateau fracture, blunt head injury and blunt neck injury.

18. I had the benefit of going through the written submissions that were filed by the counsels for the parties as well as the authorities that were supplied therein.

19. The appellant seems to disagree with the finding on damages by the trial court and has urged this court to increase the award. In addressing the entitlement of the appellant in respect of damages, the cardinal principle in awarding damages is 'restitutio in integrum' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – **See Halsbury's Laws of England 3rd Ed. Vol. II p.233 para 400.**

20. In this regard bearing the fact that the medical reports agree that the appellant suffered soft tissue injuries, and fracture of the femur and tibia it is probably true that the appellant suffered the same and comparable awards by courts are to the tune of Kshs 350,000/- to 400,000/-. In the case of **Isaac Muriungi Mbataru v Silas Kalumani [2017] eKLR**, the court reduced an award of Kshs 350,000/- to Kshs 200,000/- for similar injuries. In **Joseph Mutua Nthia v Fredrick Moses M Katuva (2019) eKLR** where Shs. 400,000/= was maintained by the High Court as general damages in respect of similar injuries. I find the award by the trial court to be reasonable and resonates well with the authorities submitted by the respondent and thus I see no need to disturb the same. I therefore retain the award of the trial court.

21. The respondent took issue with the non-award of what amounts to future medical expenses. However, he did not plead the same neither did his evidence lay any factual basis for grant of the same. In **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** that placed reliance on the case of **Kenya bus Services Ltd v Gituma, (2004) EA 91**, the court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That flows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

22. I find that in view of failure to plead the same as well as inadequacy of the evidence on record, this court cannot award future medical expenses.

23. The plaintiff claimed for special damages of Kshs 44,290/- and that the court awarded the sum of Kshs 585/-. The record speaks to the fact that no receipts totaling to Kshs 44,290/- were produced by the appellant and as such the court could not award that which was not specifically proved. I agree with the trial court that because the special damages were not specifically proven, the appellant was not entitled to the amount pleaded. I see no reason to disturb the award of the trial court.

24. The upshot is that the Appellant’s appeal is devoid of merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 26th day of January, 2021.

D. K. Kemei

Judge