



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 157 OF 2017

JAMES GICHUKI GATHURA.....APPELLANT

VERSUS

ENTONOX ENTERPRISES LIMITED.....RESPONDENT

(Being an appeal from the judgment delivered by the Honourable C. K. Kisiangani, Resident Magistrate at Machakos on 1st November 2017 in Machakos CMCC No. 450 of 2016)

BETWEEN

JAMES GICHUKI GATHURA.....PLAINTIFF

VERSUS

ENTONOX ENTERPRISES LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 8th July, 2016, the Appellant herein instituted a suit against the Respondent for damages arising from road traffic accident which allegedly occurred on 20th July, 2013 when the plaintiff who was a passenger in motor vehicle registration no. KBU 086S belonging to the Respondent sustained injuries after the said vehicle overturned.
2. After hearing the case the Learned Trial Magistrate found the Respondent liable and awarded the Appellant Kshs 304,110/- as damages. The Appellant was however aggrieved by the quantum of damages awarded and lodged this appeal.
3. According to the Appellant, the said award was on the lower side in view of the injuries sustained by the appellant. It was also contended that the Learned Trial Magistrate erred in failing to award special damages to the Appellant as approved. It was therefore sought that the appeal be allowed and the judgement of the lower court be set aside and substituted with a higher award as may be assessed by this Court.
4. Before the Trial Court the Appellant testified that sustained a deep cut due to friction on the tarmac. In his evidence it was a soft tissue injury. After the accident, he was taken to Machakos Level 5 Hospital then to Kenyatta Hospital where he was admitted for 7 days. At the Hospital, he was operated on and daily dressing done. He was also treated at MP Shah Hospital and admitted for 2 days and was operated on and skin grafting done. According to him, paid Kshs. 2,860/= by cash and also used his NHIF Card and that his middle finger of his left hand could not stand firm like the rest and his left shoulder still hurt. According to him, the NHIF paid Kshs. 257,648/= but he admitted that he had not produced by NHIF Card since the receipt for Kshs.257,648/= were with his advocate. Referred to the P3 form he stated that Section B indicated on upper limb degloving injury left forearm which left muscle, lost use of left middle finger due to muscle injury and bruise left knee. Doctor has assessed incapacity of his middle finger at 10%.
5. The parties agreed to produce the medical report of Dr Kimuyu by consent. According to the said report, the Appellant sustained extensive injury to the left forearm, injury to the left middle finger with loss of function and bruise of the left knee. The doctor concluded the Appellant suffered serious soft tissue injuries involving joints and muscle and had not fully recovered. As a result, he lost the function of the left index finger and permanent incapacity assessed at 10%.

6. I have considered the submissions filed herein.

7. The general law is that money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts, which are awarded, are to a considerable extent be conventional. See Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.

8. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general 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 below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

9. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

10. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

11. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

12. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be

assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

13. In my view, all the cases relied upon by the Appellants were cases in which the Plaintiffs sustained serious injuries with fractures as opposed to the instant case here the Appellant sustained serious soft tissue injuries. The authorities cited by the Respondent on the other hand were in respect of injuries which bore similarities to the injuries sustained by the Appellant herein. Having considered the authorities cited by the parties, it is my view that those of the Respondent disclosed injuries which were more comparable to the ones sustained by the Appellant herein. While sitting as the trial court, it may well be that this Court could have arrived at a different figure, I am unable to find that the award was so inordinately low as to represent an entirely erroneous estimate.

14. In the premises, I find no merit in this appeal which I hereby dismiss but with no order as costs

Judgement read, signed and delivered online at Machakos this 23rd day of February, 2021.

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Mukula for Mrs Nzei for the Appellant

Mr Kariuki for the Respondent

CA Geoffrey