



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 228 OF 2018

(Being an Appeal from the Judgment of Hon. Kiage (RM) in Mombasa CMCC No. 578 of 2017 delivered on 11/10/2018)

JESCA KAJUMWA MASELA.....APPELLANT

VERSUS

RAZICK AZIZ OBUBA.....RESPONDENT

JUDGMENT

1. The Appellant was the Plaintiff in **Mombasa CMCC No. 228 of 2018**. She had sued the Respondent, Razick Aziz Obuba seeking general damages for pain, suffering and loss of amenities for injuries sustained in a road accident on or about 10/11/2016. The Appellant blamed the occurrence of the accident on the negligence of the Respondent and sought to be awarded general damages, special damages of Kshs. 38,979/= together with costs of the suit and interest.

2. The particulars of negligence are pleaded as that on or about 10/11/2016, the Plaintiff was lawfully walking along Mishomoroni road, off old Mombasa-Malindi road whereupon reaching near Safari area stage, motor vehicle registration number KBG 589M insured and/or, registered and/or beneficially owned by the Defendant was negligently driven, managed and or controlled that it came from Mishomoroni side towards town at a very high speed, overtook other motor vehicles, veered off the road and knocked the Plaintiff/Applicant. As a result, whereof, the Plaintiff fell and sustained serious injuries for which the Defendant is liable and or vicariously liable.

3. The Respondent in his Statement of Defence averred that the Appellant was to blame for her own negligence and in particular failing to have regard to motor vehicle registration number KBG 598M, failing to keep to the pedestrian walk, walking carelessly and dangerously on the road, failing to walk with due care and attention and lastly failed to move to avoid the accident.

4. The record stipulates that the parties on 14/5/2018 entered a consent in terms that liability be apportioned at a ratio of 20% against the Plaintiff (the Appellant herein) and 80% against the Defendant (the Respondent herein).

5. The trial court, upon hearing the case delivered its Judgment on 11/10/2018 and awarded the Appellant Kshs. 286,351.20 together with costs of the suit with interest in favour of the Plaintiff against the Defendant.

6. Upon being aggrieved by the decision of the trial court, the Appellant lodged this appeal through the Memorandum of appeal dated 7/11/2018 and faulted the trial court's finding on quantum for being inordinately low. The Memorandum of Appeal advanced two (2) grounds of appeal which are as follows:

a) THAT the Learned Magistrate erred in law and fact in making a finding and arriving at an award of damages which was inordinately low so as to represent an erroneous estimate of damages payable in view of the injuries sustained by the Applicant

b) The Learned Magistrate erred in law and in fact in failing to uphold and apply the doctrine of stare decisis and or failed to correctly appreciate the holding in the High Court decision cited and thereby arriving at a wrong conclusion of law.

Directions of the Court

7. The court on 18/9/2020 indicated that the Appeal shall be canvassed by way of written submissions by the parties. The Appellant filed submissions on 30/9/2020. The Respondent has not filed any document in court despite being served with the directions of the court on 24/9/2020.

Analysis and Determination

8. This Court in exercise of its obligation as the first appellate court has the duty to re-analyze and re-evaluate the evidence on record in order to arrive at its own conclusion. However, in doing so the court must be reminded that it did not have the benefit of seeing or hearing the witness (see the case of *Selle & Another v Associated Motor Boat Company Limited & others 1968 E.A. 123*).

9. In the instant Appeal, it is evident that the parties entered into a consent on liability and thus there was no examination of witnesses. But the parties agreed the evidence of the Appellant during assessment of costs be compared with what was adduced before the trial court.

10. Having considered the Memorandum of Appeal, Record of Appeal and the written submissions of the Appellant, the only issue that arises for determination is whether the award of damages was inordinately low so as to warrant interference by this court.

11. The Appellant was awarded general damages of Kshs. 350,000/= and special damages of Kshs. 7,939/=, the same was further calculated against the agreed 20%:80% liability. In finality, the Appellant was awarded damages of Kshs. 286,351.20/=.

12. The trial court was of the view that after it had considered the extent of the injuries sustained it was satisfied that an award of Kshs. 350,000/= was sufficient for general damages. On the award of special damages, the same was reached based on the attached documents which added up to Kshs. 7,939/=, as opposed to Kshs. 38,979/= pleaded by the Appellant.

13. It was not in dispute that the Appellant incurred injuries as was listed in the Complaint as at the time of the accident, and the same indicated in the P3 form and treatment charts.

14. The court in *Butt v Khan [1981] KLR 349* sets the guiding principle of when an appellate Court can interfere with an award of damages 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 added)

15. The trial court in its judgment acknowledged the authorities as were relied on by the parties. The Appellant relied on *Hussein Abdi Hassan v Hassan Noor [2004] eKLR* and proposed an award of Kshs. 950,000/= while the Respondent relied on *Lily Becher Bailey v Kirima Kamau HCCC No. 2037/1998 Nairobi* and proposed Kshs. 250,000/=. The trial court on the other hand granted an award of Kshs. 350,000/= considering the nature and extent of the injuries.

16. Regarding the appeal on quantum, the Appellant has submitted that the award of Kshs. 286,351.20/= is inordinately low and is not comparable to similar awards made for similar injuries.

17. The discretion to award damages by a trial court is always unfettered and the same must be exercised judiciously in accordance with the law considering the relevant facts and circumstances of each case.

18. The Court of Appeal in addressing the question on whether to interfere with damages, in *Mariga v Musila, (1984) KLR 251*, it held as follows:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

19. The Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR* rendered itself on the matter of assessment of quantum as below: -

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

20. According to the record, the medical report by Dr. S.K Ndegwa prepared on 21/3/2017 the Appellant sustained the following injuries: -

- i) fracture of the first metatarsal on the left foot,
- ii) fracture of the proximal phalanx of the left big toe,
- iii) massive 10*4 cm degloving injury on the left foot,

21. The Appellant in the Report is said to have been admitted to hospital for 30 days, surgical procedures done and was discharged walking with aide of two crutches. In conclusion the doctor formed the opinion that the Appellant was expected to heal with 7% permanent disability.

22. I have considered the medical report of Dr. Ndegwa as to the nature of the injuries sustained and the award on damages proposed. I have further considered the authorities cited by the parties herein both in the trial court and the Appellant's submissions in this appeal.

23. The court in assessing the general damages has been invited to consider the cases of *Njora Samuel v Riachard Nyang'au Orechi [2018] eKLR* in which, the court upheld an award of Kshs. 500,000/= in the instance of a Respondent who had suffered a fracture of one (1) metatarsal with no permanent disability and the case of *Grace Wamue v Wicks Mweithi Njenga [2020] eKLR* the High Court on appeal saw it fit to award Kshs. 500,000/=. The Court established that the Respondent had suffered the following injuries; Blunt chest injuries, Blunt injury- left lower limb, swollen left tender foot and fracture of the left 3rd and 4th metatarsals.

24. Having considered all the two authorities relied by the Appellant I am of the view that they have more closely similar injuries and should attract a kin award. In the circumstances I find the award of Kshs. 350,000/= inordinately low and I exercise my discretion to revise the award upwards. I am of the considered view that Kshs. 500,000/= would constitute a more suitable award on general damages taking into account the fact that the Appellant suffered 7% permanent disability. The said sum shall be subjected to the agreed proportion on liability. I will not venture into the amount awarded on special damages since the same was not challenged.

It is hereby so ordered.

Dated, Signed and Delivered at Mombasa this 16th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D. O. CHEPKWONY