



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 49 OF 2016

PIUS GITAU.....APPELLANT

VERSUS

EWN (A minor through her mother and next friend MWK)RESPONDENT

JUDGMENT

1. The appellant, *Pius Gitau* was the defendant in Embu CMCC No. 6 of 2016. He was sued by the respondent, a minor through her mother and next friend *MWK* seeking general damages for pain, suffering and loss of amenities and special damages in the sum of KShs.7,650 following injuries sustained in a road traffic accident on or about 31st October 2015 along Embu-Kutus Road whose occurrence she blamed on the negligence of the appellant's authorized driver in driving or controlling motor vehicle registration number KAZ 344X.

2. The trial court's record shows that although the appellant filed a statement of defence dated 2nd February 2016 denying any liability for the accident, the parties on 11th May 2016 recorded a consent on liability in the ratio of 75:25 in favour of the respondent which was adopted as an order of the court.

3. The record further shows that the consent was recorded after the respondent had closed her case after calling one witness. The parties also agreed to file written submissions to guide the court in determining the issue of quantum.

4. On 17th August 2016, the trial court delivered its judgment on quantum and awarded the respondent general damages in the sum of KShs.1,000,000 less 25% being her agreed contribution to the accident and special damages in the sum of KShs.7,650. The respondent was also awarded costs of the suit and interest at court rates from date of the accident till payment in full.

5. The appellant was aggrieved by the trial court's decision hence this appeal. In his memorandum of appeal filed on 7th September 2016, the appellant advanced the following four grounds of appeal:

i. That the learned trial magistrate erred in law and fact in awarding a sum of kshs.1,000,000 for general damages for pain and suffering which award is inordinately excessive comparing to the injuries sustained by the claimant.

ii. That the learned trial magistrate erred in law and fact in failing to appreciate the principle that comparable injuries should attract comparable awards and thereby arrived at an award that is inordinately excessive.

iii. That the learned trial magistrate erred in law and fact in failing to consider useful authorities supplied by the defence and which were a useful guide in the assessment of damages.

iv. That the award of the learned trial magistrate is against the law and weight of the evidence on record.

6. At the hearing, the parties consented to having the appeal prosecuted by way of written submissions which both parties duly filed.

7. This being the first appellate court, it is my duty to re-examine and consider afresh the evidence and all material placed before the trial court to draw my own independent conclusions while bearing in mind that I did not have the advantage of seeing the witness who testified before the trial court and give due allowance to that disadvantage. See: *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123.

8. As the issue of liability for the accident was settled by consent of the parties, what is contested in this appeal is the trial court's decision on quantum.

9. In his written submissions, the appellant faulted the trial courts award of general damages on grounds that it was excessively high

considering that the respondent sustained soft tissue injuries on the left foot and a fracture on 3rd and 4th metatarsals which healed without leaving any incapacity. The appellant further submitted that the learned trial magistrate erred when he failed to consider his written submissions and authorities claiming that the same had not been filed while the truth is that they had been filed a month prior to the date judgment was delivered; that had the trial magistrate considered the said submissions and authorities, he would have arrived at a different decision on quantum. In support of his submissions, the appellant relied on the persuasive authority of *Richard Kieti Kaihuu V Musee Mutemi, [2018] eKLR*.

10. On her part, the respondent in her submissions filed on 16th July 2020 denied the appellant's claim that the award of KShs.1,000,000 as general damages was excessive. Relying on the authorities of *Patrick Kinyanjui Njama V Evans Juma Mukweyi, [2017] eKLR* and *Landmark Holdings Ltd V Linch Omondi Oketch, [2018] eKLR* as well as the authority cited before the trial court of *Hussein Abdi Hashi V Hassan Noor, [2004] eKLR*, the respondent maintained that the learned trial magistrate properly exercised his discretion in arriving at the impugned award. She argued that the award was fair and urged the court to uphold it.

11. A perusal of the court record shows that the respondent filed a set of supplementary submissions on 23rd September 2020 after the appellant had filed his submissions on 21st September 2020. Besides apparently attempting to steal a march on the appellant, the respondent filed the supplementary submissions without leave of the court. It is my finding that the submissions were irregularly filed and were wrongly admitted into the court record. They are thus expunged from the court record.

12. In considering whether or not the learned trial magistrate erred in his decision on quantum, I must start by pointing out that as a general rule, the award of damages is at the discretion of the trial court. An appellate court can only interfere with an award made by the trial court if it is satisfied that the trial court wrongly exercised its discretion by either misapprehending the evidence or applying the wrong legal principles. Case law abounds on the principles that guide an appellate court in deciding whether or not to disturb the trial court's award but for purposes of this appeal, it will suffice to cite two authorities. In *Kemfro Africa Limited T/A Meru Express Services & Another V Lubia & Another, [1987] KLR 30* the Court of Appeal expressed itself as follows:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. ...”

13. In *Mariga V Musila, [1984] KLR 251* the same court advised that an appellate court should not substitute its own discretion with that of the trial court. The court stated that:

“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..”

14. In this case, it is not disputed that the respondent sustained soft tissue injuries on the left foot and fractures on the 3rd and 4th metatarsals. From PW1's evidence and from the findings made by *Dr. Ruth Mulwa* in her medical report dated 10th December 2015, it is evident that the respondent was treated as an outpatient and her injuries healed completely without leaving any residual incapacity.

15. In his judgment, the learned trial magistrate relied entirely on the respondent's submissions and authority of *Hussein Abdi Hashi V Hassan Noor, [Supra]* where the plaintiff sustained a fracture of the lateral malleolus and fractures of 2nd to 5th metatarsals as well as a large laceration anterior to the ankle. He was admitted in hospital for treatment for 18 days and though the injuries healed, they left him with a permanent incapacity assessed at 20%. For those injuries, he was awarded KShs.800,000 general damages for pain and suffering.

16. It is obvious from the foregoing that the plaintiff in the case relied on by the learned trial magistrate sustained far more serious injuries than those suffered by the respondent in this case. It is trite that in assessing damages, the trial court should be guided by previous awards made for comparable injuries.

17. In this case, the trial court erred by not only failing to consider the appellant's submissions and authorities on quantum which the record shows were filed on 22nd July 2016 but by also failing to apply the general legal principle that comparable injuries should attract comparable awards.

18. In his assessment of damages, the learned trial magistrate was guided by an award made in favour of a plaintiff who had sustained injuries which were not comparable to the injuries sustained by the respondent.

19. In his submissions, the appellant had proposed a sum of KShs.100,000 relying on the authorities of *Samuel Mungai Njau V Wananchi Sanitary & Hardware Limited, [2004] eKLR* where the plaintiff was awarded KShs.150,000 and *Margaret Muthoni Wachira & 7 Others V Attorney General, [2000] eKLR* where the court dismissed the plaintiff's claim but indicated that it would have awarded her KShs.80,000 as general damages had her claim succeeded. A perusal of these authorities shows that besides the fact that they were decided over ten years prior to the date of the trial court's decision, the plaintiffs in those cases besides sustaining a fracture of the metatarsals suffered a combination of other injuries which were not sustained by the respondent in this case.

20. I have considered the persuasive authority of *Richard Kieti Kaihuu V Musee Mutemi, [Supra]* cited by the appellant and the authorities of *Patrick Kinyanjui Njama V Evans Juma Mukwayi* and *Landmark Holdings Limited V Linch Omondi Oketch* cited by the respondent.

I note that the plaintiffs in the authorities cited by the respondent suffered far more severe injuries than those suffered by the respondent. The respondent sustained only soft tissue injuries on the left foot and fractures on 3rd and 4th metatarsals which healed completely.

21. I am cognizant of the fact that each case must be considered on its own facts and circumstances and having taken all relevant facts into account, I agree with the appellant's submissions that the award made by the learned trial magistrate in this case was excessive and inordinately high. In my view, an award of KShs.500,000 at the time the trial court made its decision would have been reasonable compensation for the respondent's pain and suffering. The appeal therefore succeeds on terms that the award made by the trial court is set aside and is substituted with an award of KShs.500,000 which will be subjected to 25% respondent's agreed contribution. The award shall attract interest from date of judgment of the trial court until payment in full.

22. As the award of special damages was not contested on appeal, the same will remain undisturbed.

23. On costs, the respondent is awarded costs at the lower court but as the appeal has partially succeeded, each party will bear his/her own costs of the appeal.

It is so ordered.

DATED and SIGNED at NAIROBI this 9th day of March 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at EMBU this 18th day of March 2021.

L. NJUGUNA

JUDGE

In the presence of:

No appearance for the appellant

Mr. Njage for the respondent

Esterina: Court Assistant