REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 45 OF 2019

MICHAEL OKELLO.....APPELLANT

VERSUS

PRISCILLA ATIENO.....RESPONDENT

(An Appeal arising from Judgment and Decree delivered on 19.06.2019 in Ukwala SRM's Court Civil Suit No 103 of 2018 by Hon. G. Adhiambo, Senior Resident Magistrate)

JUDGMENT

1. This judgment determines the appellant's appeal filed on 17/10/2019 vide Memorandum of Appeal dated 11/10/2019. The impugned judgment and decree was delivered on 19/6/2019 vide Ukwala SRM CC No. 103 of 2018 by Hon. G. Adhiambo, SRM.

2. The Respondent herein PRISCILLA ATIENO was the Plaintiff in the lower court while the appellant MICHAEL OKELLO was the Defendant. The suit filed vide Plaint dated 6/8/2018 on 8/8/2018 arose out of a Road traffic accident involving the Respondent passenger in the appellant's motor vehicle registration No. KCA 714L Toyota Hiace Matatu when the said motor vehicle was allegedly negligently, carelessly and or recklessly driven along Kisumu-Busia road that it caused an accident at Nzoia River area as a result of which the Plaintiff passenger in the said motor vehicle suffered severe personal bodily injuries and that he also suffered loss and damage.

3. The parties agreed on liability and judgment on liability was entered by consent by the parties' advocates on 13/3/2019 where judgment was entered on liability at 90% against the defendant/appellant herein and 10% contribution by the Plaintiff/Respondent herein.

4. What remained as parties could not reach consensus was the quantum of damages payable hence the plaintiff testified and called no witness, the medical report by the doctor who examined him having been produced by consent. The defendant called one witness DW1 Dr. Jenipher Kahutho whose testimony taken on 24/4/2019 was expunged from the record after objections by the Plaintiff's counsel were upheld as the witness' statement and medical Report intended to be produced had not been supplied upon the Plaintiff's counsel in advance as required by law (Order 11 of the Civil Procedure Rules).

5. In her judgment delivered on 19/6/2019, Hon. G. Adhiambo awarded the plaintiff/Respondent herein Kshs. 500,000/= general damages for pain, suffering and loss of amenities plus special damages of Kshs. 6,000/= less 10% contribution, net Kshs. 455,400/= plus costs of the suit and interest at court rates.

6. It is that judgement that gave rise to this appeal where the Defendant/appellant complains that: **Grounds of appeal**

1. That the award of Kshs 500,000 general damages was erroneous and overly excessive;

2. That the trial court relied on a questionable medical report and disregarding the respondent's own admission during cross examination that she never suffered any fracture;

3. That the trial court failed to analyze evidence on record and disregarded the appellant's evidence on record that the respondent had not suffered any fracture coupled with the fact that she never produced any Xray film or report to support the alleged fracture;

4. That the trial magistrate failed to appreciate the place of the Doctor's opinion evidence in the determination of the case and totally disregarded the law of evidence that expert evidence is a piece of evidence to be considered alongside other evidence on record and is not binding on the court in any way;

5. That the award of damages was exorbitant based on an exaggerated medical report notwithstanding evidence on record which showed otherwise;

6. That the trial magistrate disregarded the decisions filed alongside the appellant's written submissions that guided in the quantum of damages appropriate and applicable in similar injuries as the case in question;

7. That the trial court's assessment of damages was injudicious.

7. The appellant urged this court to set aside the award of damages and make its own assessment and order for costs.

8. As the appeal is against quantum of damages only, the same, as admitted to Hearing on 14/12/2020, directions were given on 8/2/2021 with parties agreeing to canvass the appeal by way of written submissions. The appellant's counsel filed written submissions and authorities on 26th February 2021 whereas the Respondent's counsel filed written submissions on 2/3/2021 and on 1/3/2021, this court reserved this appeal for judgment delivery on 27/4/2021.

Submissions

9. The Appellant's counsel coalesced the seven grounds of appeal into one and framed only one issue for determination being quantum of damages awarded.

10. According to the appellants' counsel, this court should find that the Respondent sustained only soft tissue injuries as listed being bruises and a cut wound and blunt injuries hence the award of Kshs. 500,000/= general damages was manifestly excessive and inordinately high as to warrant this court to interfere.

11. Reliance was placed on several cases including **Denshire Muteti Wambua Vs Kenya Power & Lighting Co. Ltd [2013]eKLR** on the general method of assessment of damages being that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

12. It was submitted that in the instant case, the injuries sustained by the Respondent did not warrant the award. This court was urged to consider the decisions in three cases namely:

a) George Mugo & Another V AKM (minor suing through next friend and mother of A.N.K [2018] where Kemei J awarded Kshs. 90,000/= for soft tissue injuries.

b) George Kinyanjui T/A Climax Coaches & Another Vs Hussein Mahad Kuyala [2016]eKLR the Respondent sustained injuries on his chest, neck, knees and lost two teeth and the High Court on appeal reduced an award of Kshs. 650,000/= to Kshs. 109,890/=; upon a finding that that the loss of teeth was unrelated to the accident in question, as the Respondent had sustained soft tissues.

c) Ndungu Dennis Vs Ann Wangari Ndirangu & Another [2018]eKLR where Ngugi Joel J reduced general damages for soft tissue injuries from Kshs. 300,000/= to Kshs. 100,000/=.

13. According to the appellant, the trial magistrate erred by relying on wrong principles to arrive at the high award of Kshs. 500,000/= as general damages yet the Respondent sustained soft tissue injuries hence the award was inordinately high and erroneous. Counsel also urged the court to reduce the award to between Kshs. 90,000/= to Kshs. 120,000/=.

14. This court was therefore urged to set aside the judgment of the trial court on quantum.

15. Opposing the appeal on quantum and as submitted by the appellant's counsel, the Respondent's counsel filed written submissions dated 1/3/2021 on 2/3/2021 reiterating the evidence on the injuries sustained by the Respondent, the two medical reports, P3 form and treatment notes which were all produced by consent and stated that non-production of the Xray films was a non-issue as the medical experts who examined the Respondent and prepared medical reports looked at the Xrays in the course of such examinations.

16. It was submitted that the Respondent in cross examination stated that she suffered a fracture on the left hand at the shoulder, and that that was the same as the 1st anterior rib which the medical reports say was fractured hence it was upon the medical experts to pin point the exact bone fractured.

17. It was further submitted that the appellant adduced no documentary evidence to controvert the Respondent's evidence hence the appellant cannot challenge the plaintiff's evidence on appeal.

18. On the criteria for assessing of damages, reliance was placed on **Halsbury's Laws of England 4th Edition Vol. 12 (1) pg. 348.**

19. The Respondent's counsel submitted that his client sustained both bony and soft tissue injuries and that as at the hearing date, nine months had lapsed from date of accident yet she was still complaining of incessant pain on the chest and left hand.

20. Counsel submitted that assessment of general damages is in the discretion of the trial court and therefore an appellate court is not justified in substituting a figure of its own for that awarded by the trial court simply because it would have awarded a different figure, if it had tried the case at the first instance. Reliance was placed on **Catholic Diocese of Kisumu Vs Suphia Achieng Tete C.A. 284/2001[2004](2) KLR 55 cited in Machakos HCCA 42 of 2018 in Joseph Kivati Wambua Vs SMM & Another.**

21. The Respondent's counsel therefore submitted that the award of Kshs. 500,000/= was not inordinately high to warrant interference by this

court as there is no evidence that the trial court acted on wrong principles of law, misapprehended the facts or made a wholly erroneous estimate of the damage suffered by the plaintiff/ Respondent herein.

22. Counsel for the Respondent relied on two decisions from Eldoret High Court (Appeals) (a) **Kennedy Kipkoech Kosgey Vs Kormoto General Agencies HCCA 36/2011** where the Plaintiff was awarded Kshs. 400,000/= general damages for fracture of ribs together with soft tissue injuries, in (2009) and **George Kinyanjui T/A Climax Coaches & Another Vs Hansan Mugo Agoi (HCCA 29/2012)** where Kshs, 450,000/= was awarded to the Plaintiff for injuries involving compound fractures of the rib.

23. It was therefore submitted on behalf of the Respondent that this court should be slow to interfere with the trial court's findings on the Respondent's degree of injury. Further, that the trial court had the benefit of hearing the Respondent, observing her physical injury as well as her demeanor, which benefit cannot be overlooked. Counsel for the Respondent repetitively urged this court not to interfere with the discretion exercised by the trial court and instead uphold the award of general damages and dismiss this appeal with costs.

Determination

24. Having considered the pleadings as filed on injuries before the trial court, reassessed the evidence as adduced in support of the pleaded injuries and submissions together with judicial authorities cited by both parties' counsel in their respective submissions on appeal, the main issue derived from all the many grounds of appeal is whether the trial magistrate made an award of general damages that was inordinately and excessively high in the circumstances, having regard to the injuries sustained by the Respondent.

25. It has been stated and restated from time to time that in assessment of damages, the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards, keeping in mind the correct levels of awards in similar cases. This court will, therefore, in determining this appeal, establish whether the trial court followed this principle and if so, whether this court should interfere with the award of general damages.

26. The Court of Appeal in **Alfarus Muli vs. Lucy M Lavuta & Another Civil Appeal No. 47 of 1997** held that:

> ***"The appellate Court interferes only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding…Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."***

27. The appellant has urged this court to reduce the award of general damages on account that the Respondent was awarded damages that are so high as to be an erroneous estimate since, in the appellant's view, the Respondent sustained soft tissues injuries.

28. **In Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini Vs A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730,** Kneller J.A. stated:

> ***"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 by the former Court of Appeal of Eastern Africa 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. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970]E.A. 414, 418, 419. This court follows the same principles."***

29. The principles espoused in the above Court of Appeal decision have stood the test of time and continue to be applied by all appellate courts.

30. ***The question I pose in this appeal is, what kind of injuries did the Respondent sustain to attract an award of Kshs. 500,000/= in general damages?***

31. According to the Plaint filed on 8/8/2018 dated 6th August 2018, it was pleaded that the Respondent/Plaintiff suffered injuries involving:

a) Blunt injury to the head

b) Blunt injury to the forehead

c) Blunt injury to the neck

d) Blunt injury to the chest with fracture of the 1st anterior rib

e) Bruises and blunt injury to the left shoulder

f) Bruises to the left shoulder

g) Bruises and blunt injury to the left upper limb

h) Bruises and blunt injury to the right upper limb

i) Cut wound and blunt injury to the right lower limb

32. In her witness statement dated 6/8/2018 filed with the plaint, the Respondent/Respondent relied on the medical report of Dr. J.C. Sokobe regarding the injuries that she suffered. The medical report by Dr. Joseph C. Sokobe was admitted in evidence by consent of both parties' counsel and the same is dated 28/6/2018. The said medical report enumerates the injuries which were pleaded in the plaint. As at the time of examination, the Respondent had occasional chest pains. Following the accident, she was treated on I.M tetanus toxoid, analgesics, antibiotics and bed rest. She also had healed scars on the upper and lower limbs and some tenderness on deep chest palpation. Xrays taken showed fracture 1st left anterior rib. The Doctor concluded that the Respondent Priscilla Atieno sustained both bony and soft tissue injuries from which she was recovering well.

33. In compiling the medical report, the doctor made reference to the Treatment Notes from Ambira Sub County Hospital where the Respondent was treated and discharged and a filled P3 form at Ambira Sub County Hospital.

34. I have perused the treatment notes and P3 form which were produced as exhibits by consent and I find that the injuries named in the said documents are consistent with what Dr. Joseph Sokobe found and indicated in the Medical Report dated 28/6/2018 and which injuries were also pleaded by the Respondent.

35. I must however make some observations of the pleaded injuries:

(a) The blunt injury to the head and blunt injury to the forehead appear to be one and the same injury since the 1st injury does not say which part of the head.

(b) Injury No 7 & 8 in the Medical Report are duplicated. They are both blunt injury and bruises to the right upper limb save that in the 8th injury, there was also a cut, while in the 7th injury and there was a bruise.

(c) Apart of the fracture of the 1st anterior rib, all the injuries suffered by the Respondent were soft tissue injuries which were mostly blunt injuries with one bruise on the left and right support limbs and cut wound on the right lower limb.

36. In her evidence (oral testimony) in chief, the Respondent testified that she sustained fracture of the left arm, injuries on the right hand, injuries on the chest, injuries on the right leg, injuries all over the body that is bruises all over the body. She was treated as an outpatient. She still had her chest and left had aching.

37. On being cross examined, she maintained that she sustained the injuries stated and a fracture on the left hand at the shoulder and that it was the only fracture that she sustained. She maintained that she was feeling pain in the chest and on her ribs when she breathes but that she did not sustain a fracture on the ribs. She stated that the last time she had gone to hospital was in October 2018. She was testifying on 13/3/2019.

38. From the above testimony of the Respondent, it is clear that she stated that she did not sustain any fracture of the ribs and claimed that she fractured her shoulder. Her P3 form and treatment notes which are the first documents written by the medical personnel who attended to her are clear that she never sustained any fracture of the hand or shoulder. The fracture was noted on the 1st rib anteriorly.

39. The problem is that from her treatment notes dated 20/6/2018, there is no indication that any Xray was ordered for and neither does the medical officer who filled the P3 Form on 22/6/2018 nor Dr. Joseph Sokobe who prepared the Medical Report on 28/6/2018, the same month of the occurrence of the accident say that he personally did an Xray on the Respondent to determine the existence of a fracture of 1st left anterior rib. The Respondent herself, not a medical person, maintained that she never suffered any fracture of the rib.

40. I therefore find that there was no proof of fracture of the rib as alleged in the treatment notes, P3 form and Medical Report all produced as exhibits. I further find that there was duplication of some injuries as stated above. In addition, I find that one cannot confuse a fractured rib which is in the chest and a fractured shoulder which is on the upper limb. I further find that all the injuries sustained by the Respondent were soft tissue injuries.

41. I must mention that the medical evidence though expert evidence, as correctly stated by the appellant's counsel, is opinion evidence which is not binding on a court and must be taken together with all other evidence on record. In **Shah & Another -vs- Shah & Others (2003) I EA 290**, the court held:

"The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---"

12. The court further stated:

"---If there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion."

13. In **Dhalay -vs- Republic (1997) KLR**, the Court of Appeal held:

> ***"It is now trite law that while the courts must give proper respect to the opinion of experts, not, as it were such opinions are binding in the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and congent basis for rejecting the expert opinion, a court would be perfectly entitled to do so."***

42. In **Sentongo and Another vs. Uganda Railways Corp. Kampala HCCS No. 263 of 1987** **Byamugisha, J** held, citing ***Sarkar on Evidence*** 12th ed. pp 506.R., that:

> ***"Medical evidence based on the evidence of other witnesses or prescriptions without observing the facts is not of much value compared with the evidence of a Doctor who personally attended the patient as this is hearsay. Medical reports have to be proved by the person giving them. The Evidence of an expert is to be received with caution because they often come with such a bias in their minds to support the party who calls them that their judgement becomes warped and they become incapable of expressing correct opinion."***

43. Albeit, the Respondent's counsel in his submissions stated quite correctly that the trial court had the benefit of seeing and hearing the Plaintiff/Respondent as she testified, there is absolutely no evidence that the trial magistrate made reference to the demeanor of the Respondent. There was also no observations made concerning the injuries pleaded and or testified of. What the trial magistrate did was to accept the injuries as pleaded and as per the Medical Report of Dr. Joseph Sokobe. She did not analyze the oral evidence of the Plaintiff/Respondent *vis avis* the pleadings and the Medical evidence contained in the treatment notes, the P3 form and the Medical Report by Dr. Sokobe.

44. Having found that the injury regarding fractured rib was not proved on a balance of probability as the alleged fracture was not supported by any medical or oral evidence, it follows that reliance on the **Eldoret HCCA 36/2011 Kennedy Kipkoech Kosgey Vs Kurmoto General Agencies** (supra) by the trial magistrate was erroneous as there was fracture of a rib in that case, together with other soft tissue injuries. Furthermore, the injuries sustained by the Plaintiff in the above case were more serious as to attract an award of Kshs. 400,000/= and the Plaintiff's permanent incapacity in the said case was assessed at 5%. The injuries were:

(i) Blunt trauma to the chest

(ii) Fracture of the anterior ribs (more than one)

(iii) Dislocation of shoulder

45. In **the George Kinyanjui T/A Climax Coaches and Another** (supra) case, the Respondent/Plaintiff had suffered injuries involving:

(i) Loss of two teeth

(ii) Blunt trauma to the neck

(iii) Blunt trauma to the chest

(iv) Fracture of the left clavicle

(v) Fractures of the 4th & 5th left ribs

(vi) Blunt trauma to the spinal column and right scapula area

(vii) Dislocation of the left shoulder joint

46. The trial court had awarded the Plaintiff Kshs. 800,000/= general damages which award was set aside and substituted with an award of Kshs. 450,000/= on appeal in (2016).

47. No doubt, the above injuries were equally more serious and were mostly fractures as opposed to the present respondent's injuries which are soft tissues injuries with no permanent incapacity assessed. Assessment of damages for injuries suffered cannot be confined to one limb or area of the body where there are multiple injuries. The extent and nature of injury, the pain suffered and the residual effects are all important factors in assessing damages.

48. In this case, the trial magistrate did not consider the fact that comparable injuries should be compensated by similar awards of general damages. The two cases referred to by the trial court addressed situations involving multiple injuries including fractures whereas in the present case, the respondent sustained soft tissue injuries. The trial court no doubt awarded an inordinately excessive damages and iam persuaded that there is merit and justification in interfering with the a\ward.

49. I however, take note and recognize the fact that no two injuries can be the same, although the general principle is that in assessment of general damages, comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

50. Having perused the decision in **George Kinyanjui T/A Climax Coaches & Another (supra) and Ndungu Dennis Vs Ann Wangari**

Ndirangu & Another, I am satisfied that the award of Kshs. 500,000/= made to the Respondent was an inordinately excessive award.

51. The injuries sustained by the Respondent herein were similar to those sustained by the Plaintiff in **Maore Vs Mwenda [2004]eKLR** where the Court of Appeal allowed the appeal and entered judgment for Kshs. 100,000/= reducing the award from Kshs. 300,000/=.

52. In that case, the Respondent, according to the Medical Report by Dr. Sala Kwera, sustained injuries involving:

- ***Injury to the right shoulder***
- ***Injury to the chest***
- ***Injury to the back***
- ***Injury to the left leg with haematoma***

He was given tetanus toxoid, the bruises were cleaned and dressed then he was discharged on anti-inflammatory drugs. On examination, he complained of back pain and pain on the left hip.

53. The above decision was made over 16 years ago. No doubt there is inflation and time lapse.

54. For the above reasons, I am of the humble view and I am satisfied that an award of Kshs. 250,000/= general damages less 10% contribution would be sufficient compensation to the Respondent for the injuries sustained in the material accident in June 2018.

55. Accordingly, I allow this appeal on quantum, set aside the award of Kshs. 500,000/= general damages awarded to the Plaintiff/Respondent by the trial court and substitute it with an award of Kshs. 250,000/= less 10% contributions leaving a balance of Kshs. 225,000/= plus special damages as proved and not challenged on appeal in the sum of Kshs. 6,000.

Total Kshs. 225,000

+ 6,000

231,000

56. Costs are in the discretion of the court and in any event, to a party who is successful. However, in this case, I order that each party do bear their own costs as the appeal was only on quantum and the fact that the Respondent's costs as awarded in the trial court are considerably reduced in view of the reduction of the general damages by half in this appeal.

57. Orders accordingly.

Dated, signed and Delivered at Siaya this 27th day of April, 2021

R.E. ABURILI

JUDGE

Parties absent

CA: Modestar and Mboya