



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 75 OF 2018

PORIM INSURANCE BROKERS LIMITED.....APPELLANT

VERSUS

PATRICK RUGENDO MUGAMBI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Mutunga, SRM delivered on the 26th March, 2018 in Mombasa SRMCC No.2406 of 2015)

JUDGMENT

1. The Appellant was the Defendant in **Mombasa Civil Suit No.2406 of 2015** where the cause of action was a personal injury claim that was a result of a traffic accident that occurred on or about **16th September, 2013**.
2. By a **Plaint** dated 9th December, 2015, the Respondent sued the Appellant in respect of a road traffic accident that occurred on the date aforesaid. It is alleged that on the material day, the Respondent was lawfully walking besides the road along Migadini Road, and when he reached Umoja Primary School, the Appellant's authorized driver, servant, employee and/or agent negligently and/or carelessly drove the Motor Vehicle Registration **KBW 586 L** causing it to veer off the road and knocked down the Respondent an action that caused him severe injuries, loss and damage.
3. The Respondent blamed the Appellant for the accident and set out the particulars of negligence at paragraph 4 of the **Plaint**. He sought for *general damages; special damages of Kshs.3,000.00/= and costs plus interest*.
4. In response to the **Plaint**, the Appellant filed a Defence on **the 22nd April, 2016** and denied that any accident occurred. He pleaded in the alternative and that if any such accident occurred, the same was solely caused and/or substantially contributed to by the Respondent's own negligence and sought that the suit be dismissed as against it.
5. The Respondent called three (3) witnesses while the Appellant did not file any witness statements nor call any witnesses during the trial. The suit was thus undefended.
6. PW1 was **Dr. Ajoni Adede**, who stated that he prepared the medical report dated **15th January, 2015** for **Patrick Mugambi** who was involved in a road traffic accident. He stated that the Respondent sustained a fracture of the left femur thigh bone, right tibia, tibia disc pro lapse of neck vertebrae bone no. C6, head injury, blunt object injury to the chest and right shoulder and a cut on the left knee.
7. It was PW1's testimony that the Respondent was admitted at Aga Khan Hospital for 5 days and had metal implants in his fibia, tibia and femur. He stated that X-rays were done and he was discharged on a wheel chair.
8. He testified that he examined the Respondent after four months who was using crutches and had been re-admitted and metal implants removed. He stated that he identified an 18 cm scar on the left thigh, the left knee was stiff with the right ankle swollen and stiff. He further stated that the neck had a 2 cm operation scar and was stiff on all directions. He also found a 3 cm scar on the left knee.
9. According to PW1, the Respondent had a permanent partial disability at 16% with no mental deficit in relation to the head injury. He stated that he was paid Kshs.2,000/= for preparing the Medical Report and a further Kshs.3,000/= to attend court. Lastly, he stated that the Respondent was 45 years old at the time and that once one is over the age of 18 years, injuries do not heal completely.
10. The Respondent testified as PW2 and stated that he worked as a Human Resource Officer at Kenya Airports Authority. PW2 told court that on **16th September, 2013** at 6:00 pm, he was walking from work and when he got to Migadini at the bumps, a motor vehicle hit him

from behind and threw him into a ditch.

11. PW2 went on to state that after hitting him, the motor vehicle also landed into the ditch. He stated that good Samaritans rushed him to Bomu hospital for treatment, where first aid was administered and there after, he was transferred to Aga Khan Hospital where he got admitted for one week.

12. PW2's identified the motor vehicle as a Toyota Fielder Registration **No.KBW 586 L**. He testified that he reported the matter to Changamwe Police Station and was issued with P3 form dated the **2nd October, 2013**. Later, he was issued with police abstract on **15th January, 2015**. He added that the driver of the motor vehicle was one Joshua, and the car was owned by **Porim Insurance Brokers Ltd**.

13. PW2 told court that he sustained fractures on both legs; the left leg from the waist to the knee; his right lower leg also sustained a fracture and both legs had metals inserted in them. He stated that he also sustained a fracture on the spinal cord and has a metal implant in his spine. He further stated that he sustained injuries on the back of the head and the court observed a huge scar. He testified that his leg had shortened after the metal implants were removed and that his legs had both not healed as they were still swollen and painful.

14. Finally, it was PW2's evidence that he had a limp, and could not walk or stand for long and that he would feel pain when he wore shoes. He said he was still on painkillers. He also stated that he had not fully recovered. He prayed that the court grants him special and general damages as well as the cost of the suit for his pain and suffering.

15. **PW3** was **No.708755 CPL, Abdulahi Dida** who was stationed at Changamwe Police Station at the Traffic Section. He stated that an accident had occurred along Migadini road near Umoja School within Changamwe jurisdiction involving motor vehicle **KBW 586 L** make Toyota Fielder which was driven by one **Joshua Ngigi Muthee** and a male pedestrian namely **Patrick Lugendo Mugambi**.

16. **PW3 testified that the motor vehicle swerved to the left to avoid hitting a child who had crossed the road, and in the process knocked down the victim and landed into a ditch on the left side.**

17. **He told court that the incident was reported and recorded in an OB and a P3 form which was filled at the Coast General Hospital was issued while the driver was charged on 4th February, 2015 in Traffic Case No.903 of 2015 with the offence of driving without due care and attention.**

18. After hearing the parties, the trial court delivered its **Judgment on 4th February, 2018** and awarded the Respondent as against the Appellant, *general damages of Kshs. 1,600,000/=; special damages of Kshs.3,000/= and costs plus interest at the court rates.*

19. Being aggrieved by the decision of trial court delivered on **4th February, 2018**, the Appellant has raised the following grounds of Appeal: -

1. THAT the Learned Magistrate erred in law and in fact and misdirected himself as to the extent and nature of the respondent's injuries thereby awarding the respondent a sum of Kshs.1,600,000.00/= in general damages which award was inordinately high.

2. THAT the Learned Magistrate erred in law and in fact in assessing damages and failed to apply the trite principles in awarding damages and specifically on general damages and comparable awards for analogous injuries.

3. THAT Learned Magistrate erred in law and in fact in failing to consider relevant authorities and submissions by the appellant.

20. The Appellant prayed that the Appeal be allowed, the decision of the Learned Magistrate Court be quashed, judgment delivered thereby be set aside and costs of the appeal be provided for by the Respondent.

21. The Appeal was admitted for hearing and directions issued on **2nd November, 2020** that the same be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **28th January, 2021** while the Respondent filed theirs on the **27th November, 2020 and further submissions on the 2nd February, 2021.**

22. Both Counsel for the parties opted to rely on their written submissions in their entirety.

THE APPELLANT'S SUBMISSIONS

23. The Appellant has submitted that the Respondent contributed to the occurrence of the accident as he was not careful while walking along the road and was therefore the author of his misfortune.

24. It has also been submitted by the Appellant that their driver was not negligent as he had avoided hitting a child when he was hit by an unknown motor cycle which was the main cause of the accident as was confirmed by PW3. The Appellant has urged the court to apportion liability on a percentage of contributory negligence at a ratio of **50% : 50%** as against the parties.

25. In relying on the cases of **David Kiplangat Sang –vs- Richard Kipkoech Langat & Another [2006]eKLR; Pyramid Packing Ltd – vs- Humphrey W. Wangala [2012]eKLR;** and **Mbaka Nguru & Another –vs- James George Rakwar [1998]eKLR,** the Appellant has urged this Court to reassess the award of general damages of **Kshs. 1,600,000** which it believed to be inordinately high to an award of **Kshs. 800,000/=** considering that the Respondent was admitted for 5 days, and at the time he gave his testimony, he could walk unaided and his permanent disability was assessed at 16%.

THE RESPONDENT'S SUBMISSIONS

26. The Respondent has submitted that the trial court had found the Appellant 100% liable, a fact that was not disputed. It noted that the Appellant did not call any witnesses to rebut the evidence that was adduced by the Respondent and his witnesses.

27. It has also been submitted that the Appeal lacks merit as the trial court took its time and looked at the medical report, treatment notes, viva voce evidence and evidence by parties before arriving at the decision that was delivered on the **4th February, 2018**.

28. According to the Respondent, they had pleaded for a sum of Kshs. 3,500,000/= as general damages and had relied on the cases of **Sabrina Nyakenya Mwangi –vs- Patrick Kigoro & Another [2015]eKLR** and **Gabriel Mwashuma –vs- Mohammed Sajjad & Another [2015] eKLR**, wherein the parties were awarded Kshs.3,000,000/= for similar injuries to those of the Respondent.

29. The Respondent has thus stated that considering the above cited cases, the amount of Kshs.1,600,000/= was not inordinately high as the nature of injuries and damages suffered by the Respondent was considered. To add to that, the Respondent submitted that the Appellant has not demonstrated how the award of Kshs.1,600,000/= is manifestly high nor shown that the Judgment as delivered was based on wrong principles of law.

30. The Respondent has further submitted that the Appellant should not be allowed to raise new issues at this stage of appeal and that the determination of the Appeal should strictly be against the award of damages as there was no ground of Appeal on the issue of apportionment of liability. For this, the Respondent relied on the cases of **Civil Appeal No.219 of 1998 Galaxy Paints Company Ltd –vs- Falcon Guards Ltd** and **Ndugu Transport Company Limited –vs- Barrack Musumba Olouch [2020]eKLR**.

31. Finally, the Respondent has stated that the Appeal lacks merit and prays that the same be dismissed in its entirety with costs.

ANALYSIS AND DETERMINATION

32. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying to observe their demeanour. (See the Court of Appeal case of **Gitobu Imanyara & 2 Others –vs- Attorney General [2016] eKLR**).

33. I have carefully considered the pleadings and submissions filed herein. The issues for determination are as follows: -

i. Whether the trial court failed to consider the trite principles in awarding general damages comparable to the injuries, and as a result the award for Kshs.1,600,000/= was inordinately high;

ii. Whether the trial court failed to consider relevant authorities and submissions by the Appellant.

i. Whether the trial court failed to consider trite principles in awarding general damages comparable to the injuries, and as a result the award for Kshs.1,600,000/= was inordinately high.

34. The Appellant's contention is that the trial court failed to consider trite principles in awarding general damages comparable to the injuries of the Respondent and therefore making the award of Kshs.1,600,000/= that is manifestly high.

35. According to the medical report of **Dr. Ajoni**, the Respondent sustained the following injuries: -

- ***A fracture of the left femur thigh bone with an 18 cm scar;***
- ***Fracture of the right tibia and fibula leg bones which were operated on and fixed with metal implants. He was discharged on a wheel chair and walked with the aid of crutches four months after being discharged.***
- ***Neck vertebral bone traumatic disc prolapse (C6) that was operated on and had a scar and was stiff in all directions;***
- ***Cut on the left knee that had a 3 cm scar and was stiff;***
- ***Head injury; and***
- ***Blunt object injury to the chest and right shoulder.***

36. The medical report explained that the Respondent was discharged on a wheelchair and at the time of examination he was walking with the aid of crutches. Dr. Ajoni further explained that the Respondent was re-admitted to remove the metal implants and that he suffered a 16% disability.

37. The Respondent relied on the cases they did before the trial court being: **Sabrina Nyakenya Mwangi –vs- Patrick Kigoro & Another [2015] eKLR** and **Gabriel Mwashuma –vs- Mohammed Sajjad & Another [2015]eKLR** and urged this court not to maintain the award of Kshs.1,600,000/=.

38. The Appellant proposed an award of Kshs. 800,000/= relying on the cases of: -

i. David Kiplangat Sang v Richard Kipkoech Langat & Another [2006] eKLR, where the Plaintiff suffered severe head injuries with loss of consciousness for 4 days, blunt injury to the chest with fracture of 2 ribs, fracture of the left tibia/fibula, left acetabulum hip dislocation and fracture of the left medial malleolus. The Plaintiff's injuries healed with a resultant permanent post traumatic arthritis with permanent disability assessed at 30%. General damages were awarded at Kshs. 550,000/=.

ii. Pyramid Packaging Ltd v Humphrey W. Wangala [2012] eKLR, where the Plaintiff sustained traumatic amputation of 3 fingers on the left hand and 15% permanent disability and was awarded Kshs. 650,000/= for pain and suffering.

39. The trial court in the case herein relied on the authorities as were provided by parties and stated that the decisions brought forth by the Respondent were more applicable. In his discretion, the Learned Magistrate in assessing the injuries of the Respondent found an award of Kshs. 1,600,000/= to be a favorable.

40. It is trite law that the assessment of damages is at the discretion of the trial court and in assessing general damages, courts must have the presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A party's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents. This was stated in the case of Kigaragari –vs– Aya [1985] Klr, 273, where the Court of Appeal stated: -

“...Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford...”

41. It is further well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low or that a trial court had proceeded on the wrong principles or misapprehended the law.

42. The Court of Appeal in the case of Kigaragari –vs- Aya (supra) held: -

“...In order for the appellate court to interfere with the High court award on general damages, it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred...”

43. The Court in the case of James Thiongo Githiri –vs- Nduati Njuguna Ngugi [2012] eKLR where the plaintiff suffered fracture of the right leg in three places and fracture on the left leg in one place, was admitted in hospital for two months and the fractures fixed with metal rods, was awarded general damages of Kshs. 4,000,000/= million in 2012. Further the Court in the case of P W v Peter Muriithi Ngari [2017]eKLR awarded the Appellant Kshs. 1,600,000/= for a fracture of the left femur which was operated on and fixed with metallic plate, fractures of the left fibula and tibia malleoli which were operated and fixed with K-wires and plates and blunt injuries causing fractures to the pelvis

44. The Appellant herein has not shown to this court any wrong principles that was applied to arrive at an award of Kshs.1,600,000/=. I have further looked at the decisions of Sabrina Nyakenya Mwangi –vs- Patrick Kigoro & Another [2015] eKLR and Gabriel Mwashuma –vs- Mohammed Sajjad & Another [2015] eKLR which the Respondent further relies on in this Appeal and I find that they are applicable.

45. Considering the serious nature of the injuries where the Respondent sustained multiple fractures, 16% permanent disability, was in a wheelchair and had several operations to remove metals, I find the award of Kshs.1,600,000/- was a comparable award for comparable injuries.

46. The court agrees with the submission of the Respondent on the issue of liability, that the same was not raised as a ground of appeal and since parties are bound by their pleadings, the Appellant is not allowed to raise new issues in its submissions.

ii. Whether the trial court failed to consider relevant authorities and submissions by the Appellant.

47. One of the Grounds of Appeal as raised by the Appellant was that the trial court did not consider their submissions and authorities relied on therein. The Appellant, however, did not address this ground in their submissions as filed before this court.

48. I have looked at the Judgment of the Trial Court and find that the court did consider the Appellant's submissions. The Trial Court specifically on the issue of quantum, the trial court refers to submissions by both parties and more specifically notes that the Appellant 'submitted that an award of Kshs.800,000/= as being appropriate as general damages'.

49. Further, the trial court in considering the authorities as relied on by the Appellant cited the same in its Judgment and found that the injuries were the same save for the fracture of left tibia and fibula and blunt injury on the chest.

50. I, therefore, find that the trial court did consider the submissions and authorities as was relied on by the Appellant, and the Appellant has not shown this court otherwise. This ground of Appeal hence fails.

DISPOSITION

51. The upshot of the above is that, I find no reason to tamper with the decision of the lower court, as the Appeal lacks merit and the same is hereby dismissed. I find no reason to tamper with the decision of the trial court.

52. Costs to the Respondents.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MAY, 2021.

D. O. CHEPKWONY

JUDGE