



PUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 65 OF 2019

MAKUENI COUNTY GOVERNMENT.....APPELLANT

-VERSUS-

GRACE DAVID MWELU.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment in Makueni Principal Magistrates' Civil Case No. 39 of 2019 wherein the trial court on 8th August 2019 delivered judgment in favour of the Respondent in the following terms –

“Final judgment for the Plaintiff is now entered against the defendant in the sum of Kshs.2,156,071/= made up as follows –

Liability: 85% against the defendant

Quantum-

Damages for pain and suffering Kshs.1, 000,000.00

Loss of amenities: Kshs. 600,000.00

Less 15% i.e. $15 \times 1,600,000 / 100 =$ Kshs. 240,000.00

Subtotal Kshs. 1, 360,000.00

Special damages Kshs. 796,071.00

Total Kshs. 2, 156,071.00

The plaintiff is also awarded costs and interest at court rates.”

2. Dissatisfied with the decision of the trial court, the appellant who was the defendant in the trial court, has come to this court on appeal on the following amended grounds of appeal –

1) The learned trial magistrate erred in law and in fact by failing to subject the award of special damages Kshs.796,671 to the 15% contributory negligence when the respondent wanted the sum reduced by 15%.

2) The trial magistrate erred in law and in fact by making an award of Kshs.1,000,000/= as general damages which was manifestly excessive.

3) The learned trial magistrate erred by making an award of Kshs.692,323/= as special damages which figure was not supported by admissible evidence.

4) The learned trial magistrate erred in law and in fact by making an award that was manifestly excessive on the loss of earning capacity of the respondent of Kshs. 600,000/=.

5) *The learned trial magistrate erred in law and in fact by instead of delivering judgment and after close of hearing and submissions made by the parties, allowing the respondent to adduce further evidence and to go and pay revenue stamp for receipts without revenue stamps.*

6) *The learned magistrate erred in law and fact by being biased against the appellant in the following ways –*

i. Denied the appellant a chance to file its defence by producing the 2nd medical report.

ii. Allowing the respondent to adduce inadmissible evidence and allowing the same without cross examination by the appellant after the full hearing had been done.

iii. Allowing execution to be done against the appellant's properties when she knows the properties cannot be attached in law being a County Government whose assets are protected by law.

iv. Refusing to certify the application for stay ex-parte and subsequently dismissing the application for want of prosecution and allowing illegal execution to be done.

7) *The learned magistrate erred in law and in fact by allowing auctioneers to do execution against the appellant's property which is protected by the County Government Act and the same be set aside and auctioneers charges be paid by the respondent or the respondent's lawyer who knows the law.*

3. On the basis of the above grounds, the appellant has asked this court to allow the appeal with costs and set aside the judgment of 8/8/2019 and substitute the award of Kshs.2,156,071/= with an award that is just to grant, and also order that the execution that was illegal and the auctioneers charges be paid by the respondent or her advocate.

4. The appeal proceeded by way of filing written submissions. Both the appellant's counsel M/s Manthi Masika & company and the respondent's counsel M. M. Uvyu & company filed written submissions and further submissions. I have perused and considered the submissions on both sides

5. This being a first appeal, I have to start by reminding myself that I am required to re-examine the evidence on record and come to my own independent conclusions bearing in mind that I did not have the benefit of hearing witnesses testify in order to determine their demeanor – see **Selle & Another –vs- Associated Motor Boat Co. Ltd and Another (1968) E.A 123.**

6. At the trial, the respondent who was the plaintiff called two (2) witnesses and produced a number of documents as exhibits. The witnesses were Pw1 Dr. Athman Lugogo and Pw2 Grace Mwelu David the respondent herein. The appellant on their part closed their case without calling any witness.

7. I note that, in their further submissions both the appellant and the respondent raised issues on wrongful execution authorized by the trial court. I have however not been availed the record of proceedings on the execution as well as the ruling thereto. In my view, the execution if wrong should have been challenged separately, not through this substantive appeal, as execution of a decree or judgment is initiated under specific provisions of the Civil Procedure Act and Rules, and can be challenged whether or not there is an appeal filed against the judgment. I cannot deal with the execution as the proceedings thereon and ruling is not before me.

8. The respondent has conceded that the trial magistrate should have subjected special damages to the agreed contributory negligence of 15% assigned to the respondent. That is the correct position in law. Once contributory negligence was agreed or determined, the said contribution applies cross the board to general and special damages. I will thus reduce the special damages awarded by 15% contributory negligence of the respondent.

9. I now turn to the issue of determination of the amount of special damages awarded. The appellant's counsel has complained that the amount of special damages awarded was excessive because the magistrate did not rely on the expert evidence by Dr. Lugogo. I note on this issue that several medical documents were produced by both Pw1 Dr. Lugogo and Pw2 the respondent without any objection thereto from the appellant. In addition, though counsel for the appellant had indicated that they would produce their client's medical report, they did not do so. In my view therefore, all the medical reports produced at the trial were evidence which had to be considered by the trial court. I also do not see any evidence that the magistrate denied the appellant a chance to produce medical documents as exhibits as the appellant's counsel was given the chance but later opted to close their case. Thus the magistrate did not err in any way in her findings on injuries suffered, and relying on the medical documents produced by the respondents. The amount of special damages awarded was not excessive.

10. With regard to transport expenses, I note that the magistrate awarded Kshs.141,120/= and not the amount alleged by the counsel for the appellant in submissions. I find no error committed by the trial court on this award.

11. I now turn to loss of earning capacity. The appellant's counsel has argued strongly that the respondent was not entitled to an award for loss of earning capacity firstly, because she was not in regular employment but was a businesswoman, and secondly, since she suffered no incapacity. On incapacity, I note that from the trial court's record, the respondent came to court in crutches after undergoing several medical procedures. Thus the injuries were more serious than what the appellant's counsel has suggested. Counsel for the appellant has thus no basis for saying that the appellant did not suffer incapacity and in my view, the trial court was entitled to find incapacity suffered.

12. With regard to employment, loss of earning capacity, awards can be granted by the court to both employed people and self-employed people including business people like the respondent. In this regard, in **Mumias Sugar Co Ltd –vs- Francis Wando (2007) eKLR** the court stated as follows:-

“The award for loss of earning capacity can be made both when the Plaintiff is employed at the time of trial and even when he is not so employed”.

13. I thus find that the magistrate was not in error in awarding damages for loss of earning capacity.

14. With regard to quantum of general damages awarded, such awards are granted in exercise of discretionary powers of trial courts. Appellate courts are slow to interfere with such awards, except on specific reasons which courts have restated over and over again. In the case of **Mbogo & Another –vs- Shah (1968) E.A 93** the Court of Appeal stated as follows –

“an appellate court will interfere if the exercise of discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration relevant matters and in doing so arrived at a wrong decision.”

15. In the present case, I do not see any reason to interfere with the trial court’s discretion on award of general damages, as I find no error or misdirection committed by the trial court, in assessing the general damages awarded herein.

16. With regard to the magistrate allowing additional evidence after the closure of the case, I note that the magistrate entertained an application to allow the respondent to produce receipts, which had earlier been proposed to be produced, but this time with tax (revenue) stamps. In my view, that was an error because the trial magistrate should have made the decision to allow revenue receipts earlier in the proceedings and also give the appellant’s counsel a chance to have access to the same for verification and cross-examination. However, the appellant’s counsel abandoned this ground of appeal as no such receipts were produced. I mark the ground as abandoned.

17. To conclude, I allow the appeal partially by finding that the 15% contribution applies to the amount awarded as special damages. In this regard, the special damages will be reduced by 15% which is Kshs.796,071 x 15/100, which is Kshs.119,410. Thus Kshs.119,410/= will be deducted from the special damages awarded. Parties will bear their respective costs of the appeal.

Delivered, signed & dated this 28th day of July, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE