



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 124 OF 2019

(Being an appeal from the original judgment and decree of Hon. RN Akee,

Resident Magistrate, of 3rd May 2018, in Kakamega CMCCC No. 360 of 2018)

ROBERT WESONGA OTINGA.....APPELLANT

VERSUS

WEST KENYA SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The suit at the primary court, in Kakamega CMCCC No. 360 of 2018, was initiated by the appellant herein against the respondent, for general and special damages, arising from a road traffic accident, which had occurred on 13th April 2017, where a motor vehicle, belonging to the respondent, hit the appellant, who was a pedestrian along the Emutaho-Emulama Road, occasioning on grave injuries. The appellant attributed negligence on of the respondent.

2. The respondent filed a defence, in which it denied liability and accused the appellant of being the sole cause of the accident or having contributed to it by his own negligence.

3. At the oral hearing 4 witnesses for the appellant testified. The appellant, PW1, described how he was knocked down by a motor vehicle that was coming from behind him, and the injuries that he sustained. PW2, Dr. Charles Andai, presented a medical report on the injuries sustained by the appellant, and of the nature of treatment that he received, and on his condition post-treatment. His disability was described as at 20%, and it was said that he still needed a further operation, whose cost was estimated to be Kshs. 180, 000.00. PW3, Police Constable Francis Odhiambo, produced the police occurrence book, with respect to the report made after the accident. PW4, Titus Kiptangai, was a passenger on the accident vehicle. He described how it veered off the road and hit the appellant. The defence did not offer any evidence.

4. After reviewing the evidence adduced at the trial and other material on record, the trial court found the respondent liable at 100%, and awarded damages as follows:

(a) General damages Kshs. 700, 000.00;

(b) Special damages.....Kshs. 16, 100.00;

(c) Future medical expensesKshs. 180, 000.00;

TOTAL Kshs. 896, 100.00

5. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 16th June 2019, is that the trial court awarded damages that were inordinately low in the circumstances, and failed to apply the principles that govern assessment of general damages in cases of this nature.

6. The appeal was canvassed by way of written submissions, filed by both sides.

7. The appellant's written submissions are dated 17th February 2021. The appellant argues that the judicial authority relied on by the trial court to award damages reflected injuries that were a lot lesser in seriousness compared with those suffered by the appellant. The decision in question was *Catherine Wanjiru Kingori & 3 others vs. Gibson Theuri Gichubi* [2005] eKLR (Khamoni J), where the injuries, the subject of

the award, were multiple soft tissue injuries, injury to left elbow joint and injuries on both ankles, and an award of Kshs. 350, 000.00 was made. The appellant submits that he had suffered an abrasion to the back, compound fracture of the left medial malleolus, fracture of the left fibula and a dislocation of the left ankle. He was admitted in hospital for 2 months and had a 20% permanent disability. He submits that whereas the respondent suggested an award of Kshs. 250, 000.00, it did not cite any authority; while his authority, in *John Kuria Mbure vs. Magari Hire Purchase Ltd & 2 others* [2019] eKLR (Wendoh J), an award of Kshs. 2, 000, 000.00, loss of income of Kshs. 80, 000.00, future medical costs of Kshs. 100,000.00 and diminished earning, had been made. The injuries in that matter were comparable to his, the appellant submits, for there was a permanent disability at 20%, a compound fracture of the right tibia and a compound fracture of the right medial and lateral malleolus with dislocation of right ankle joint. It is submitted that the nature and extent of the injuries of the appellant were not taken into account. He proposes that the award made by the trial court be set aside and substituted with an award of Kshs. 3, 000, 000.00.

8. The respondent, on its part, submits that the award made was reasonable compensation in the circumstances of the case. It is averred that the trial court had considered all that needed to be considered. It is submitted that in *Godfrey Wamalwa Wamba & another vs. Kyalo Wambua* [2018] eKLR (Kamau J), the court awarded Kshs. 700, 000.00 for similar injuries; and so did the courts in *Wakim Sodas Limited vs. Sammd Aritos* [2017] eKLR (J. Ngugi J) and *Akamba Public Road Services vs. Abdikar Adan Galgalo* [2016] eKLR (Kamau J). It is urged that the court ought to uphold the judgment figure.

9. The injuries pleaded in the plaint are: an abrasion to the back, compound fracture of the left medial malleolus, fracture of the left fibula and dislocation of the left ankle joint. These were lifted from the medical report by Dr Andia. There was a second medical opinion by Dr PW Oketch, which identified similar injuries, except that it put disability at 10%. The authority that the appellant relies on, *John Kuria Mbure vs. Magari Hire Purchase Ltd & 2 others* [2019] eKLR (Wendoh J), reflects injuries that a little more serious, two compound fractures, as opposed to his, which are one compound fracture and one simple future. Disability in the instant case is put at 10% to 20% in the medical reports, while that in *John Kuria Mbure vs. Magari Hire Purchase Ltd & 2 others* [2019] eKLR (Wendoh J) was 30%. Of course, the decision relied on by the trial Court, *Catherine Wanjiru Kingori & 3 others vs. Gibson Theuri Gichubi* [2005] eKLR (Khamoni J), is dated, having been delivered on 1st July, 2005. The injuries reflected in *Godfrey Wamalwa Wamba & another vs. Kyalo Wambua* [2018] eKLR (Kamau J), a case relied on by the respondent are lesser than those suffered by the appellant; one compound fracture of right distal tibia/fibula and multiple cut wounds, and there is no mention of permanent disability. In *Wakim Sodas Limited vs. Sammd Aritos* [2017] eKLR (J. Ngugi J), the injuries were a simple fracture of the 4th left rib and a compound fracture of the left tibia/fibula, with no mention of permanent disability. *Akamba Public Road Services vs. Abdikar Adan Galgalo* [2016] eKLR (Kamau J), the injuries were reflected as a simple fracture of the right tibia/fibula and blunt injury to the right ankle. Permanent disability was assessed at 3%. Overall, the authorities cited by the respondent show less serious injuries compared with those suffered by the appellant, while the authority the appellant relies on reflects slightly more serious offences. I am persuaded, though, *John Kuria Mbure vs. Magari Hire Purchase Ltd & 2 others* [2019] eKLR (Wendoh J), comes closer than the authorities relied on by the respondent.

10. The award by the trial court is not commensurate with the injury sustained by the appellant. I shall set it aside, and substitute it with an award of Kshs. 1, 500, 000. 00 general damages, for pain and suffering. See *Francis Ndungu Wambui & 2 others vs. CK (suing through next friend and another MCWK)* (2019) eKLR (Muchemi J). The appeal is disposed of in those terms. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST 2021.

W. MUSYOKA

JUDGE