



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL APPEAL NO. 65 OF 2019

EDWARD KITSU KARABU.....1ST APPELLANT

JAMES KARISA IHA.....2ND APPELLANT

-VERSUS-

JOHN SIFA BAYA.....RESPONDENT

(An Appeal from the judgment of Hon. C. N. Ndegwa, Senior Principal Magistrate, delivered on 11th March, 2019 in Mombasa Principal Magistrate's Court Civil Suit No. 363 of 2018).

JUDGMENT

1. The suit against the appellants in the lower Court was that on or about 7th November, 2017 at about 11.00 a.m., the respondent was a lawful pedestrian standing well off the Mombasa-Malindi Road, outside Shanzu Teachers' Training College when motor vehicle registration No. KAV 282U, Toyota Town Ace was so negligently and/or carelessly and/or recklessly driven by the 2nd appellant at extremely high speed that it suddenly veered off the Mombasa-Malindi highway and violently hit the respondent, knocking him down as a result of which he sustained serious bodily injuries and suffered pain, loss and damages.

2. It was the respondent's case that the said motor vehicle registration No. KAV 282U, Toyota Town Ace was owned by the 1st appellant. The accident and subsequent severe injuries suffered by the respondent were attributed to the negligence and carelessness of the 2nd appellant.

3. The appellants filed their statement of defence dated 10th April, 2018, where they denied all the averments contained in the amended plaint dated 12th March, 2018. Put more specifically, the 1st appellant denied being the beneficial and/or registered owner of motor vehicle registration No. KAV 282U Toyota Town Ace. The appellants also denied that an accident occurred on 7th November, 2017 at about 11.00 a.m., involving the respondent. They also denied liability for any injuries sustained by the respondent.

4. The appellants further denied that the respondent incurred special damages. They averred that if any accident occurred, then the same was not occasioned by reason of negligence on the part of the appellants but was occasioned wholly and/or was substantially contributed to by the respondent's own negligence and/or carelessness.

5. In the lower Court, judgment was delivered on 11th March, 2019 in favour of the respondent as against the appellants jointly and severally. Judgment on quantum was entered for the sum of Kshs. 900,000/= in general damages and Kshs. 19,200.00 for special damages making a gross award of Kshs. 919,200.00 in damages. The respondent was also awarded costs of the suit and interest at Court rates.

6. The appellants were dissatisfied with the decision of the Trial Magistrate and on 5th April, 2019, they filed a memorandum of appeal raising the following grounds of appeal-

i. That the Honourable Trial Magistrate erred in law and fact in disregarding vital evidence adduced by the defendants/appellants in arriving at her decision and as such arriving at a wrong finding particularly, the Hon. Trial Magistrate disregarded the inconsistencies of the plaintiff's testimony;

ii. That the Honourable Trial Magistrate erred in law and fact in failing to correctly evaluate the testimony of the plaintiff's witnesses thereby making and arriving at a wrong quantum and awarding an inordinately/astronomically very high award to the plaintiff/respondent who failed to prove his injuries;

iii. That the Honourable Trial Magistrate erred in both law and fact by disregarding and/or failing to evaluate the evidence adduced by both the plaintiff and the defendants putting in mind the entirety of the circumstances;

iv. That the Honourable Trial Magistrate erred in both law and fact as he failed to consider the entirety of the circumstances of the case; and

v. That the Honourable Trial Magistrate delivered judgment based on wrong principles of law and fact.

7. The appellants prayed for this Court to allow the appeal, set aside the judgment delivered by the Trial Magistrate and dismiss the suit against the them.

8. This appeal was canvassed by way of written submissions. On 15th December, 2021, the law firm of Machuka & Co. Advocates filed written submissions on behalf of the appellants. The respondent's submissions were filed on 25th January, 2021 by the law firm of J.N. Matara & Co. Advocates.

9. Ms. Machuka, the appellants' learned Counsel relied on the case of **Kemfro Africa Ltd vs Lubia & another** [1987] KLR 30, where Kneller JA held that an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by the Trial Judge must be satisfied that either the Judge in assessing the damages, took into account an irrelevant factor and left behind the relevant one or that the amount is so inordinately low or high that it must be wholly an erroneous estimate of the damage.

10. The learned Counsel for the appellants submitted that the Trial Magistrate arrived at a wrong quantum by making an inordinately high award against the appellants. She submitted that the 2nd medical report indicated that the respondent had recovered with no permanent incapacity. She further submitted that the learned Magistrate disregarded vital evidence produced by the appellants such as the respondent's 2nd medical report that was more recent, which indicated that the respondent had recovered with no disability. She thus contended that the respondent failed to prove his case on a balance of probability in convincing the Court that he had not fully recovered. The appellants' Counsel cited the case of **Kenya Power & Lighting Limited v Nathan Karanja Gachoka & another** [2016] eKLR, where the Court held that a plaintiff must prove its case on a balance of probability whether the evidence is unchallenged or not.

11. Ms. Machuka submitted that whoever wishes the Court to believe in the existence of a particular fact must prove its existence or truth, since the burden of proof cannot shift. She argued that the Trial Magistrate failed to consider that the authorities that had been cited by the respondent were not relevant to the facts of the present case as they relate to more serious injuries. She was of the view that the said Magistrate erred by holding that the authorities cited by the appellants were relatively old and may not reflect the current trends for amounts being awarded for the type of injuries sustained by the respondent.

12. She also relied on the case of **Telkom Orange Limited vs I.S.O (Minor suing through next friend and mother)** J.N [2018] eKLR, in which the Court set aside an award of general damages of Kshs. 950,000.00 made by the subordinate Court and substituted it with an award of Kshs. 500,000/=.

13. She cited the case of **Civicon Limited v Richard Njomo Omwanja & 2 others** [2019] eKLR, where the respondents had sustained multiple compound injuries. She submitted that in that case, the 1st appellate Court found that the Trial Magistrate did not consider the authorities cited in light of the injuries sustained by the 3rd respondent that constituted multiple injuries. She submitted that the Court found that the award of Kshs. 1,300,000/- was excessive and taking into account the degree of disability reduced the award to Kshs. 500,000/=. She stated that the Court also reduced the awards for the 1st and 2nd respondents from Kshs. 1,000,000/= to Kshs. 450,000/=.

14. Ms. Matara, learned Counsel for the respondent similarly relied on the case of **Kemfro Africa Ltd vs Lubia & another** (supra) and submitted that the principle held in the said authority is not applicable in the instant appeal as the award made by the Trial Magistrate herein was commensurate with the injuries sustained by the respondent. She indicated that the respondent and his witness, Doctor Ajoni Adede were constant and consistent in their evidence on the nature of injuries sustained by the respondent as a result of the accident. She further submitted that in his conclusion, Dr. Ajoni Adede stated that the respondent's chance of future head injury related health complications was high and was carried throughout life. She stated that the Doctor assessed the permanent disability sustained by the respondent as 4.5% due to the skull fracture sustained by the respondent, which remains a weak point for life, even if the bones unite and that the Doctor indicated that fractures accelerate bone wear and tear.

15. It was submitted by the respondent's Counsel that the medical report by the appellants' doctor was shallow, neither thorough nor credible since it did not disclose the documents the Doctor relied on, when examining the respondent. Ms Matara was of the view that the medical report was not a true reflection of the nature and extent of the injuries sustained by the respondent. She submitted that the Trial Magistrate took proper and due consideration of all the facts and evidence presented for both the respondent's and appellants' case before arriving at the Judgment. She urged this Court to dismiss the instant appeal in its entirety with costs to the respondent.

ANALYSIS AND DETERMINATION

16. This Court has re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this Court is obligated to analyze and re-evaluate the evidence adduced before the Trial Court and make its own conclusion. It must however bear in mind that a Trial Court, unlike the appellate Court had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. The duty of the first appellate Court was espoused in the cases of **Selle vs Associated Motor Boat Company Ltd** [1968] EA 123 and **Peters vs Sunday Post Limited** [1985] EA 424, where in the latter case, the Court rendered itself thus-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the

advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. Although the appellants raised several grounds of appeal, having considered the submissions made by Counsel for both parties, it is clear to this Court that the only issue for determination is whether or not the quantum that was awarded by the Trial Magistrate was so manifestly excessive and/or inordinately high in the circumstances requiring interference by this Court. An appellate Court will only interfere with a lower Court's judgment if the same is founded on wrong principles, or on no evidence and/or there has been misapprehension of the evidence. This was the holding by the Court of Appeal in *Mkuba vs Nyamuro* [1983] LLR 403-415 at 403, where *Kneller JA & Hannon Ag JA* held that-

"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

18. Similarly, in *Butt vs. Khan* [1977] 1 KLR, the Court held as follows-

"An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".

19. It was the appellants' contention that the award of Kshs 900,000/= as general damages is excessive and was awarded without basis as the Trial Magistrate disregarded vital evidence produced by them. In their view, the sum of Kshs. 500,000/= would be sufficient to compensate the respondent herein for the injuries that he sustained.

20. It must be understood that money can never really compensate a person who has sustained any injuries as no amount of money can extinguish the pain that a person goes through no matter how small an injury may appear to be. It would be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a Court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

21. In the case of *Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another* [2013] eKLR, the Court therein cited with approval the case of *Kigaragari vs Aya* [1982-88] 1 KAR 768 where it was stated as follows:

"Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee"

22. Further in the case of *P N Mashru Limited v Omar Mwakoro Makege* [2018] eKLR, the Court made the following observation-

"In assessing general damages, courts must have 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 plaintiff's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents."

23. In determining general damages, Courts have a responsibility to keep themselves apprised of recent authorities and bear in mind inflation which has taken a toll on the value of the Kenya Shilling. The Trial Magistrate at page 3 of the judgment noted that after consideration of the rival proposals and the authorities cited by each side, the authorities cited by the defence were relatively old and may not reflect the relevant trends for the injuries that were sustained by the respondent in this case.

24. This Court concurs with the observation that was made by the Trial Magistrate since from the appellants' submissions dated 5th March, 2019, it is evident that the defence was relying on authorities delivered in the years 1998 and 1999, which did not assist the Court in establishing the recent awards for persons who have suffered injuries comparable to those sustained by the respondent in this case.

25. In the case of *Sukari Industries Limited v. Maxwell Omondi Otieno* [2017] eKLR, the Court affirmed an award of Ksh. 700,000/- where the respondent sustained a deep cut wound on the left part, swollen limbs, a depressed skull fracture of left tibia and blunt chest injury, dislocation of the left ankle joint and where examination also revealed the residual effect i.e. a scar on the left ankle joint which had limited movement and he walked with a limping joint.

26. In the case of *Nyota Tissue Products v Charles Wanga Wanga & 4 Others* [2020] eKLR, the Court set aside an award for general damages in the sum of Ksh. 1,200,000/- for pain and suffering and loss of amenities, and substituted it with an award of Ksh. 500,000/= where the plaintiff had suffered a head injury with an open frontal fracture.

27. In the case of *GA (Minor suing thro' her father and next friend BZ) v Paul Muthiku* [2020] eKLR, the Court made an award of Kshs. 500,000/= where a child sustained multiple fractures of frontal left orbital roof (comminuted), right temporal bones (petrous), bleeding in the skull airspaces (haemosinus), cut on the head (frontal) and cut on the chin.

28. Having considered the medical report dated 9th February, 2018 by Doctor Ajoni Adede which was relied upon by the respondent herein, it is evident that the Doctor assessed permanent partial disability at 4.5% due to skull fracture. He stated that the fracture site remains weak points for life even if the bones unite and that fractures accelerate bone wear and tear. The Doctor further observed that the chance of future head injury related health complications is high and is carried throughout life.

29. A second medical report dated 19th April, 2018 was relied on by the appellants, where Doctor Udayan R. Sheth made an observation that the respondent had fully recovered and that he had no deformity and or permanent incapacity. In reconciling the 2 medical reports, this Court notes that the examination conducted by Doctor Ajoni Adede was more detailed and he relied on CT scan and skull x-ray reports to arrive at his findings. The said Doctor noted that as a result of the accident, the respondent suffered loss of consciousness for 30 minutes, confusion, right double vision (6th nerve paralysis), fracture of the skull (frontal bone), blunt object injury to the neck and chest, blunt object injury to the head (peri-orbital region). On the other hand, Dr. Udayan's medical report does not show if he relied on any x-ray or CT scan reports done after the respondent was examined by Dr. Adede. For the said reason, I am inclined to go by the medical report by Dr. Adede whose findings are backed by other medical documents. His report is thus more comprehensive as compared to the one by Dr. Udayan.

30. This Court notes that the Trial Magistrate did not rely on any relevant decided cases when making the award of Kshs. 900,000/= in general damages. Having borne in mind the decisions I have cited and based on the principle of comparable awards, for comparable injuries, I set aside the Trial Court's award of Kshs. 900,000/= in general damages and substitute it with an award of Kshs. 700,000/=. The latter award takes into consideration the nature of the injuries sustained by the respondent, permanent partial disability at 4.5% due to skull fracture, with the fracture site remaining weak points for life even if the bones unite. This Court has also considered Doctor Adede's statement that fractures accelerate bone wear and tear. Inflationary trends have also been taken into account in making the said award.

31. For the reasons explained above, I find that the appeal herein is well merited. I hereby make the following orders-

- i. That the judgment of the lower Court delivered on 11th March, 2019 on general damages is hereby set aside and substituted with an award of Kshs. 700,000/=;
- ii. Special damages of Kshs. 19,200.00 are hereby upheld; and
- iii. The respondent shall have costs of the lower Court case and the appellants are awarded the costs of this appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED

BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL, 2020 AND SUBSEQUENT DIRECTIONS, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of –

Ms Machuka for the appellant

Ms Matara for the respondent

Mr. Oliver Musundi – Court Assistant.