



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 677 OF 2019

JAMES MAINA KIBE.....1ST APPELLANT

PETER MWANGI KABATHA..... 2ND APPELLANT

VERSUS

MARGARET WANJIRU MWANGI.....RESPONDENT

(Being an appeal from the entire judgement and decree of Hon D. A Ocharo

delivered on 25/10/2019 in CMCC No. 5775 of 2018)

JUDGEMENT

1. A brief background of this matter is that the respondent on 21/6/2018 filed a suit in the lower court claiming special and general damages for pain and suffering. She alleged that on or about 10/1/2017 while at Tassia Stage along Outering road the 1st appellant while recklessly driving motor vehicle registration number KAQ 546Q knocked down the respondent and as a result the respondent sustained serious injuries.
2. The appellants in their defence dated 1/8/2018 denied the claims by the respondent and put her to strict proof. They in the alternative contended that if the occurrence is proved by the respondent then it was wholly caused or substantially contributed by the negligence of the respondent.
3. The matter proceeded to trial where 3 witnesses testified. **PW1, PC Hussein Mohammed** of Embakasi Traffic Base told the court that he received a report from James Maina who alleged to be the driver of motor vehicle KAQ 546Q and was driving the said vehicle along outering road when he reached Tassia Stage and knocked down a female pedestrian. PW 1 added that he rushed the victim to Bristol Hospital for treatment and recorded his statement and released him on cash bail as investigations continued.
4. On 27/10/2017 vide OB number 2/10/10/17 Corporal Caroline made a report of Margaret Wanjiru who reported that she was crossing the road and was knocked down by the said motor vehicle which was being driven on the wrong side from Taj mall direction towards Donholm. She was first treated at Bristol Park and referred to Aga Khan University Hospital where she was admitted for 7 days.
5. On investigations PW1 said he established that the motor vehicle was driven on the wrong side against traffic. In cross-examination PW1 indicated that his conclusion was based on the scene visit he had with the driver and the victim.
6. **PW2 Margaret Wanjiru Mbugua** told the court that she recalled that on 12/10/2017 she was involved in a road traffic accident along Tassia Makuti Stage. She alighted from a matatu in town and as she was crossing the road, a matatu coming from the opposite direction knocked her down. She fell on the tarmac and sustained a deep cut on the left side of the face.
7. The 1st appellant was forced to take her to hospital which he did and was administered first aid at Bristol Park Hospital and was later referred to Aga Khan Hospital due to the severity of her injuries.
8. She was admitted at the hospital for one week and was thereafter bedridden for a month. She added that she experiences headaches frequently, cannot drive for long hours as she used to nor can she go for swimming or bend for a longtime.
9. **DW1, James Maina Kibe** told the court that he was not driving on the wrong side of the road because he was driving from Fedha estate headed towards Taj Mall and the road from Fedha was closed and therefore he used a diversion. He said he saw the respondent when the motor vehicle was so close and he tried his best to avoid hitting her. He stopped and took the respondent to hospital and thereafter made a report at the police station.

10. The trial magistrate considered the testimonies and it was his determination that the 1st appellant was wholly liable for the accident. The 2nd appellant being the owner of the subject motor vehicle was found vicariously liable for the acts of the 1st appellant. He awarded Ksh 2750 as special damages and Ksh 400,000 as general damages for pain and suffering.

11. The appellants were aggrieved by the aforementioned determination hence they lodged this appeal proffering the following grounds of appeal;

- a) *That the learned trial magistrate erred in law and in fact in failing to find that the respondent contributed to the cause of the accident by crossing the road when it was not safe for her to cross and without due care and attention for her own safety.*
- b) *That the learned trial magistrate erred in law and fact in failing to find that the respondent as a pedestrian like all other road users had a duty to be on the proper lookout and exercise due care when crossing a busy public road.*
- c) *That the learned magistrate erred in law and in fact in failing to consider relevant case law on quantum furnished by the appellants and instead placed reliance on those supplied by the respondent which were dealing in different and more severe injuries.*
- d) *That the learned trial magistrate erred in law and in fact in making an award which was not within limits of already decided cases of similar nature*
- e) *That the learned magistrate erred in law and fact in awarding the respondent general damages of Ksh. 400,000 which award is inordinately high and excessive considering the injuries sustained by the respondent being soft tissue injuries.*
- f) *That the learned trial magistrate erred in law and in fact in failing to consider that the injuries sustained by the respondent had fully healed without any permanent incapacitation and thereby arrived at an award that is inordinately high and excessive.*
- g) *That the judgement of the learned trial magistrate is against the law and weight of the evidence on record.*

The appeal was dispensed by way of written submissions.

12. In their submissions the appellants argued that both parties were to blame for the accident. The respondent admitted to disembarking from a vehicle and crossing the road without ensuring it was safe to do so while the appellant tried to swerve in order to avoid an accident but the respondent was hit by the cars side mirror.

13. On quantum the appellants contended that the respondent suffered mild head injury, deep cut wounds on the fore head, multiple abrasions on the arms, cut wound to the left wrist and bruises right shoulder. The injuries were soft tissue injuries and the appellants believed that an award of Ksh 400,000 was too excessive and suggested an award of Ksh 100,000 and in support they provided the following authorities among others;

- a) In **Lamu Bus Services & another v. Caren Adhiambo Okelo [2018]** where the high court made an award of Ksh 130,000 to a claimant who had sustained a dislocation of the left shoulder joint, a deep cut wound on the left thigh and a blunt injury to the left thigh.
- b) In **Philip Musyoka Mutua v. Mercy Ngina Syovo [2018] eKLR** the court made an award of Ksh 120,000 to the claimant who had sustained a blunt injury to both shoulders, blunt injury to the ribs, deep cut wounds on both ankle joints and a cut on the right knee.

14. The respondent in their submissions argued that the appellant was wholly to blame for the accident as the 1st appellant admitted to driving on the wrong side of the road because the road was under construction. It was the respondents argument also that if indeed the 1st appellant was driving at a slow speed the impact of his side mirror to the respondent would not have caused the injuries that she suffered.

15. On damages the respondent argued that the injuries that the respondent suffered were termed as grievous by the doctors. The impact to her head was so severe that she fell unconscious for several hours, temporarily lost her speech and had to undergo extensive tests at Aga Khan hospital and still suffers from severe migraines and has a permanent scar on the forehead. In support of their argument, the respondents cited the following authorities among others;

- a) In **James Mutingi v David Muasya Ndeleva Civil Appeal No. 250 of 2011** the claimant in the case suffered severe closed head injury, deep cut wound on the left side of the face, cut wound on the right leg, deep cut wound on the left parietal scalp head and the court upheld an award of ksh 500,000
- b) In **Joseph Nthia v Fredrick Moses Katuve Civil Appeal No. 122 of 2017** where the claimant suffered injury to the left face, loose teeth, loss of 2 teeth, blunt chest injury and blunt back injury and was awarded Ksh. 500,000 which was upheld by the court of appeal.

16. This being a first appeal, this Court is enjoined to re-evaluate and consider the evidence afresh with a view of making its own independent findings and conclusions but giving regard that the Court did not have the advantage of seeing the witnesses testify. (See *Selle v. Associated Motor Boat Co. Ltd [1968] EA 123*).

17. On the issue of liability it is the respondent's argument that the 1st appellant was solely to blame for the accident. This was because he was driving at a high speed and was also driving on the wrong side of the road. This was corroborated by the testimony of PW1.

18. It is this court's view therefore that indeed liability falls on the 1st appellant because he was solely to blame for the accident. There was no way the respondent would have anticipated that a car would be driven on the wrong side of the road and taken extra precaution to avoid being injured consequently liability remains 100% on the appellants.

19. On quantum, the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

‘An appellate court will not disturb an award for general damages unless it is so 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...’

20. From the trial court's record the appellant sustained a mild head injury, trauma to the chest, trauma to the lower incisor teeth as evidenced by looseness and according to the report by Dr. A. O Wandugu, the respondent suffered grievous harm.

21. From the evidence adduced in court, it is not in dispute that the respondent sustained the injuries listed on the Medical report produced. In assessing general damages, courts are guided by past decisions over similar injuries sustained. A plaintiff's compensation ought to be comparable to awards given by other courts for comparable injuries.

22. This court has considered the decisions cited by both parties to establishing whether or not the Learned Trial Magistrate applied the correct principles in awarding the Respondent general damages for pain, suffering and loss of amenities.

23. In the case of **Jitan Nagra vs. Abednego Nyandusi Oigo [2018] eKLR**, the appellant had sustained lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, and a segmental distal fracture to the right femur. The trial court awarded Kshs. 1, 000, 000.00 general damages, which were reduced on 12th October 2018 to an award of Kshs. 450, 000.00 on appeal.

24. In the case of **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** - where there was depressed fracture of skull, loss of consciousness, scars of the left tempo-parietal area and bruises of left leg; the award was Kshs 500,000/=

25. From the review of the recent decisions in respect of comparable injuries, it would appear that the trial court did not fall into any error in the manner it assessed general damages for the injuries sustained. I am not persuaded that I should interfere with the outcome of the trial court. As a consequence of the above, the appeal herein fails, and it is hereby dismissed. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellants

..... for the Respondent