



00REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 291 OF 2019

NOLFASON OBADIAH BARONGO.....APPELLANT

-VERSUS-

BEATRICE KINYA.....RESPONDENT

(Being an appeal against the judgment and decree delivered by G.A. Mmasi (Mrs.)

(Senior Principal Magistrate) on 3rd May, 2019 in Milimani CMCC no. 2911 of 2017)

JUDGMENT

1. The respondent herein filed a suit against the appellant by way of the plaint dated 28th April, 2017 and sought for both general and special damages in the amount of Kshs.1,139,142/ plus costs of the suit and interest thereon.
2. The respondent pleaded in her plaint that sometime on or about the 8th day of August, 2016 she was lawfully walking along Mbagathi Way near Total Petrol Station when motor vehicle registration number KCH 992L (“the subject motor vehicle”) being owned by the appellant at all material times, lost control and knocked down the respondent, causing her to sustain grave injuries as particularized in the plaint.
3. The respondent attributed the accident to negligence on the part of the appellant, by setting out the particulars in her plaint.
4. Upon service of summons, the appellant entered appearance and filed his statement of defence to deny the allegations set out in the plaint.
5. At the hearing of the suit, the parties herein recorded a consent on liability in the ratio of 65%: 35% in favour of the respondent, and the matter proceeded for hearing on quantum, with the respondent testifying and calling an additional witness whereas the appellant closed his case without calling any witness.
6. Upon filing of submissions, the trial court delivered judgment in favour of the respondent and against the appellant in the

following manner:

a) General damages	Kshs.3,500,000/
Less 35% contribution	Kshs.1,225,000/
Net total	Kshs.2,275,000/
b) Special damages	Kshs.226,126/

TOTAL

Kshs.2,501,126/

7. The aforementioned judgment is now the subject of the appeal before this court. To challenge the aforesaid judgment, the appellant has put forward the following grounds of appeal vide his memorandum of appeal dated 28th May, 2019:

i. THAT the learned trial magistrate erred in law and fact by holding and finding that the respondent had proved her claim against the appellant.

ii. THAT the learned trial magistrate erred in law and fact in failing to appreciate that the claim pleaded by the respondent in her plaint departed materially from the one sought to be proved by the respondent in her testimony given in court.

iii. THAT the learned trial magistrate erred in law and fact in failing to find that the evidence presented by the respondent could not sustain the pleaded claim.

iv. THAT the learned trial magistrate erred in law and fact in holding and finding that the respondent's injuries were of such grievous nature as to merit an award of Kshs.3,500,000/.

v. THAT the learned trial magistrate erred in law and fact in awarding Kshs.226,126/ as special damages when the same were not pleaded and proved as required by law.

vi. THAT the learned trial magistrate erred in law and fact in making an award of damages that was manifestly excessive and unsupported by the evidence before him.

vii. THAT the learned trial magistrate erred in law and fact in making an award of damages that was unwarranted, grossly excessive and inconsistent with the evidence and/or case law.

viii. THAT the learned trial magistrate erred in law and fact in not appreciating the evidence adduced and arriving at the conclusion reached.

ix. THAT the learned trial magistrate erred in law and fact in holding and finding for the respondent.

8. This court directed the parties to file written submissions on the appeal. On the part of the appellant, it is submitted *inter alia*, that the award of damages made by the trial court is manifestly excessive and therefore ought to be interfered with.

9. The appellant further submits that the trial court did not consider comparable awards made previously and also did not adequately consider the medical evidence tendered at the trial.

10. The appellant is of the view that an award of between Kshs.800,000/ and Kshs.1,000,000/ would suffice in respect to the award on general damages and cites the case of **Ali Issa Ali v East African Portland Cement Company [2016] eKLR** in which the court enhanced an award of Kshs.380,000/ to that of Kshs.600,000/ on general damages at the instance of a plaintiff who had sustained a subdural haematoma, and the case of **Samuel Hure Murage v Moses Kiiru Kamau & Anor Nairobi HCCC No 6779 of 1991 (Unreported)** where the court being faced with a plaintiff who had suffered multiple injuries namely cuts on shoulders; loss of consciousness; subdural haematoma; severe head injuries; and hypertonic and respiratory embasment, was awarded general damages in the sum of Kshs.450,000/.

11. In reply, the respondent contends that the issue of liability was settled before the trial court by way of a consent and hence the appellant cannot purport to challenge the same on appeal.

12. On quantum, the respondent is of the view that the award made on general damages is commensurate to the injuries sustained. To this end, the respondent has quoted *inter alia*, the case of **A.A.M V Justus Gisairo Ndarera & Another [2010] eKLR** where the court made an award in the sum of Kshs.2,500,000/ on general damages to a plaintiff with various injuries including fracture of the left temporal lobe, left temporal lobe extradural hematoma with no midline shift, intracerebral haemorrhage and diffused brain oedema.

13. The respondent further contends that the special damages awarded by the trial court were pleaded and proved, therefore urging this court to uphold the awards made by the trial court.

14. I have considered the appellant's written submissions on appeal. Moreover, I have re-evaluated the evidence which the trial court had the opportunity to consider.

15. From my reading of the grounds of appeal it is apparent that the appellant is challenging both the findings on liability and quantum.

16. On the issue of liability, upon my re-examination of the record and as noted hereinabove, I note that the parties settled the subject on liability by recording a consent in the ratio of 65%: 35% in favour of the respondent thereby causing the remaining issue for determination to be that of assessment of damages. There is nothing to indicate that the said consent has been challenged or set aside, and hence the appellant cannot purport to resurrect the said issue of liability on appeal.

17. I am therefore inclined to restrict myself to the issue of quantum. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** quoted by the appellant in his submissions:

a) *Where an irrelevant factor was taken into account.*

b) *Where a relevant factor was disregarded.*

c) *Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

18. The above position was echoed by the court in the case of **Butt v Khan (1977) 1 KAR** which both parties cited before this court.

19. It is apparent that the appellant has sought to challenge the awards made on general and special damages. I will therefore address the damages under the respective heads.

a) **General damages for pain and suffering and loss of amenities**

20. The respondent testified at the trial that following the accident, she suffered injuries to the head and left clavicle, leading to her admission at Nairobi West Hospital for a few weeks.

21. The respondent also testified that as at the time of giving her testimony, she had not fully healed and continued to experience pains on her head when it gets cold. Her testimony was echoed by that of PW2, Jonah Gitonga Ngera who is her father.

22. At the submission stage, the respondent suggested an award of Kshs.4,000,000/ under this head and cited the authority of **John Maseno Ngala & Another v Dan Nyanamba Omare [2006] eKLR** where the court upheld an award of Kshs.2,000,000/ made to a plaintiff with severe head injury, fractures of the base of the skull with moderate brain damage and severe neck trauma with damage to the roots of the left brachial plexus resulting in complete paralysis of the left shoulder and left arm muscles; and the authority of **Collins Omondi Muganda v Oceanic Oil Ltd & another [2017] eKLR** in which the plaintiff who had sustained multiple injuries namely head injury with cut wound and loss of consciousness, facial injury, injury to chest, injury to right leg with fracture and injury to right ankle joint with fracture was awarded a sum of Kshs.1,000,000/ on appeal.

23. On his part, the appellant suggested a sum of Kshs.800,000/ and cited the cases of **Ali Issa Ali v East African Portland Cement Company (supra)** and **Samuel Hure Murage v Moses Kiiru Kamau & Anor (supra)** which were also cited in his submissions before this court.

24. The learned trial magistrate settled for an award of Kshs.3,500,000/.

25. Upon my re-examination of the pleadings and material, I note that the nature of injuries pleaded is supported by the medical evidence tendered at the trial and is as follows:

i. Severe head injury with subdural hemorrhage in the bilateral occipito-temporal region and fractures of the left ethmoid and temporal region.

ii. Bilateral postero-basal pulmonary contusion and comminuted fracture of the lateral aspect of the left clavicle.

26. Nevertheless, while the medical evidence produced by the respondent classified the respondent's injuries as grievous harm in nature, the medical report prepared by Dr. P.M. Wambugu and dated 2nd August, 2017 classified them as blunt, soft tissue injuries. The doctor went ahead to assess permanent incapacity at 4%.

27. I note that the authorities cited by the appellant were decided years ago. I find the case of **Collins Omondi Muganda v Oceanic Oil Ltd & another (supra)** cited by the respondent to be the most comparable in terms of injuries. I similarly considered the case of **Yobesh Makori v Elmerick Mobisa Bota [2021] eKLR** where the court awarded a similar sum of Kshs.2,000,000/ in the instance of a plaintiff with injuries including head injury; deep laceration on the scalp; left clavicle fracture. In my view and upon considering the above authorities, I am convinced that the award made by the learned trial magistrate fell on the higher side. I will therefore substitute it with a more reasonable award of Kshs.2,000,000/.

b) Special damages

28. Under this head, the respondent sought for a total sum of Kshs.1,139,142/ whereas the learned trial magistrate awarded a sum of Kshs.226,126/ which sum was also proposed by the appellant in his written submissions placed before the trial court.

29. Upon my re-examination of the evidence, I find that the award made by the learned trial magistrate in this respect is supported by the documents tendered at the trial. I am therefore satisfied that the learned trial magistrate conformed to the law on special damages and I see no reason to interfere with the award made under this head.

30. Consequently, the appeal partially succeeds. The trial court's award of Kshs.3,500,000/ made under the head of general damages for pain, suffering and loss of amenities is hereby set aside and is substituted with an award of Kshs.2,000,000/.

31. For the avoidance of doubt, the judgment on appeal is as follows:

a) General damages	Kshs.2,000,000/
b) Special damages	Kshs.226,126/
Gross Total	Kshs.2,226,126/
Less 35% contribution	<u>Kshs.779,144.10</u>
Net Total	<u>Kshs.1,446,981.90</u>

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full.

Costs to the respondent.

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 Appellant

.....for the Respondent