



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 12 OF 2019

EDWARD SHOBOI GAMBO.....APPELLANT

VERSUS

FATMA OSMAN AHMED

OSMAN SAID NUR.....RESPONDENTS

(An appeal from the Judgment of Hon. R. K. Ondieki, Senior Principal Magistrate, delivered on 28th February, 2019 in Kilifi Senior Principal Magistrate's Court Civil Case No. 83 of 2016).

JUDGMENT

1. Through a plaint filed on 7th April, 2016, the plaintiff (appellant) claimed general damages, special damages, lost earnings, costs of the suit and interest following injuries he sustained when working as a conductor aboard motor vehicle registration No. KBD 184W. The vehicle collided with motor vehicle registration No. KBQ 153W which was owned by the 1st defendant (1st respondent). The latter vehicle was being driven by the 2nd defendant (2nd respondent) at the time of the accident.

2. The respondents filed a statement of defence on 7th June, 2016 denying liability. They attributed negligence to the plaintiff and the driver of motor vehicle registration No. KBD 184W. The respondents however did not take out 3rd party proceedings against the owner of the said motor vehicle.

3. In a Judgment delivered on 28th February, 2019, the Hon. Magistrate awarded the plaintiff Kshs. 300,000/= as general damages, Kshs. 2,000/= as special damages and Kshs. 28,000/= for lost earnings. The plaintiff was also awarded costs of the suit and interest. The appellant being dissatisfied with the said award filed a memorandum of appeal on 7th March, 2019 raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in law and fact in awarding the appellant Kshs. 300,000/= as general damages for pain and suffering which award was inordinately low in the circumstances in view of the injuries he sustained;

(ii) That the Learned Trial Magistrate erred in law and fact by awarding the appellant only Kshs. 28,000/= as lost earnings for the period 29th September, 2015 to 31st January, 2016; and

(iii) That the Learned Trial Magistrate erred in law and fact by delivering a Judgment on quantum in total disregard of provisions of the law.

4. The appellant prayed for the appeal to be allowed and for the awards on general damages for pain and suffering as well as lost earnings to be enhanced. He also prayed for costs of this appeal to be borne by the respondents.

5. The appellant relied on his Record of Appeal filed on 27th May, 2019 and a supplementary Record of Appeal filed on 20th June, 2019. The appeal proceeded by way of written submissions. The appellant's Counsel filed submissions on 20th June, 2019. The respondents' Counsel filed his on 2nd August, 2019.

EVIDENCE TENDERED BEFORE THE LOWER COURT

6. The evidence adduced on behalf of the plaintiff in the lower court was by PW1 who was Doctor S. K. Ndegwa. He testified to having examined the appellant on 24th November, 2015 following a road traffic accident on 28th September, 2015. His findings were that the

appellant sustained a comminuted fracture of the right distal tibia and blunt injury to the right hip. At the time he was examined, he complained of pain in his ankle joint. The Doctor noted that the appellant was walking with a limp. He stated that the fractures had clinically united and there were soft tissue injuries. It was his evidence that the appellant suffered permanent disability at 6%. The Doctor was paid Kshs. 2,000/= for the medical report which he produced. He also produced a receipt for the medical examination and court attendance.

7. The appellant testified as PW2 in the lower court. It was his evidence that on 28th September, 2015 he was traveling along the Malindi-Kilifi road. On reaching Chumani -Tezo a motor vehicle from the opposite side of the road collided with motor vehicle registration No. KBD 184W in which he was working as a conductor. He stated that the accident happened in the lane on which the motor vehicle he was in, was being driven.

8. PW2 further testified that he sustained a fracture at the right ankle and blunt injury on the right hip. He was treated at Kilifi County Hospital and a plaster of Paris was applied, which was removed after 40 days. As at the time he testified before the Trial Court, he indicated that he had not fully healed as he felt pain when he walked for a long time. He stated that he reported the accident at Kilifi Police Station. He was examined by PW1 whom he paid Kshs. 2,000/=. He indicated that he was earning Kshs. 800/= per day, as a conductor.

9. The appellant testified that he did not work for 4 months after the accident due to the injuries he sustained, while before that, he used to work 6 days per week as a conductor and would rest on Sundays. He blamed the Driver of motor vehicle registration No. KBQ 153W for the accident when he failed to control it by leaving his lane and colliding on their lane. The appellant produced several exhibits in support of his case.

10. No. 82129 PC Philip Isanga testified as PW3. It was his evidence that an accident happened on 28th September, 2015 at Tupendane area along the Kilifi-Malindi road involving motor vehicle registration No. KBQ 159W which was being driven by one Osman Said Noor (2nd respondent) from Kilifi direction heading to Malindi direction. He stated that the said Driver tried to overtake a lorry thereby colliding with motor vehicle registration No. KBD 184W in which the appellant was. The latter suffered injuries and PW3 issued him with a P3 form and a police abstract. PW3 produced the said documents in court. He stated that the driver of the motor vehicle which caused the accident was charged vide Tr. No. 78 of 2016 which was pending before court. PW3 further stated that the probox caused the accident on the lane of the matatu which was heading to Kilifi from Malindi.

11. The submissions filed by Counsel for the appellant were to the effect that the sum of Kshs. 300,000/= awarded as general damages for pain and suffering was inordinately low taking into account the severity of the injuries sustained by the appellant. In making reference to the report dated 24th November, 2014 by Doctor Ndegwa, the appellant's Counsel submitted that the appellant sustained severe injuries and suffered immense pain. He also lost many working hours and 6% permanent disability was expected. It was also submitted that at the time the appellant testified on 22nd February, 2017 he had not fully healed and had to use pain killers every now and then. It was therefore argued that the award of Kshs. 300,000/= in general damages was made in total disregard of the law as far as quantum was concerned.

12. The appellant's Counsel made reference to the decisions he had relied on, in the lower court in **John Njenga Maina v Humphrey Kinyua Rukeria** [2016] eKLR and **Clement Gitau v GKK** [2016] eKLR where courts made awards of Kshs. 750,000/= and Kshs. 600,000/=, respectively, in general damages to claimants who had suffered some fractures and soft tissue injuries.

13. While taking into consideration the above authorities, the appellant's Counsel submitted that the Hon. Magistrate erred by not making a comparison of the injuries suffered by the appellant herein and the claimants in the above cases. Further, that he erred in not taking cognizance of the passage of time since the above decisions were made and the prevailing rate of inflation.

14. Counsel for the appellant relied on the case of **Ziro Chimba Ziro v Jarson Wario Elema & Another** Mombasa HCCA No. 42 of 2013, to demonstrate the factors that a Trial Court should take into account in assessing damages for pain, suffering and loss of amenities. He also cited the case of **Juma Salim Mwamaneno v Joshua Ndirangu Kiboi** [2017] eKLR, where Judge P.J. Otieno relied on the case of **Ugenya Bus Services v James Kongo Gachohi** CACA 66 of 1981, where Madan JA stated that the days of small and stingy awards were long gone. The appellant's Counsel prayed for enhancement of the award made from Kshs. 300,000/= in general damages to Kshs. 800,000/=.

15. The award of Kshs. 28,000/= for lost earnings for the period 29th September 2015 to 31st January, 2016 was challenged for being too low as the appellant had testified that he used to earn Kshs. 800/= every day, for 6 days in a week. It was argued that the Hon. Magistrate picked the sum of Kshs. 300 per day which he used to calculate lost earnings, from the air. The appellant's Counsel maintained that an award of Kshs. 76,800/= should have been made to the appellant as lost earnings. It was submitted that the Hon. Magistrate erred by stating that he was of the opinion that a sum of Kshs. 300/= could do as the daily wage, as conductors could not earn more than professionals per day. He argued that the Hon. Magistrate failed to elaborate on the professionals he was referring to. It was also contended that he did not lay a basis when he arrived at the figure of Kshs. 300/= as the appellant's daily wages. The appellant's Counsel therefore prayed for enhancement of the award for lost earnings from Kshs. 28,000/= to the amount that was pleaded and proved in the sum of Kshs. 76,800/=.

16. The respondents' Counsel opposed the appeal and relied on the case of **Kemfro Africa Limited t/a Meru Express Services & Another v A. M. Lubia & Another** (No. 2) (1982-88) KAR 727, where the Court of Appeal stated that an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at the first instance.

17. It was submitted by the respondents' Counsel that in awarding damages, the sum so awarded must be proportionate to awards made in similar cases to persons who suffered injuries of comparable severity. It was argued for the respondents that the injuries suffered by the claimants in the cases relied on by Counsel for the appellant were not comparable to those suffered by the appellant herein. It was thus stated that the said authorities were distinguishable and clearly different. In his view, the award of Kshs. 300,000/= made as general damages was adequate to compensate the appellant.

18. On the claim for loss of earnings, the respondents' Counsel cited the case of **Hahn v Singh** Civil Appeal No. 42 of 1983, which states

that special damages must not only be specifically claimed but also strictly proved for they are not the direct natural probable consequence of the act complained of and may not be inferred from the act.

19. The respondents' Counsel in challenging the claim for Kshs. 800/= that had been made by the appellant as his daily wages stated that no letter of employment was produced to connect him to the alleged job. It was also submitted that the appellant did not demonstrate that he was earning the said amount per day, by way of salary vouchers, bank or Mpesa statements or books of accounts. It was contended that the appellant did not show that he was qualified to do the task he claimed he was engaged in.

20. This court was urged not to interfere with the awards made by the lower court as the appellant had failed to demonstrate any irrelevant factor that the said court put into consideration, or that the sum awarded was inordinately low or that it was wholly an erroneous estimate of damages or a wrong principle of law was applied.

21. It was submitted by the respondents' Counsel that the appellant did not meet the requirements of Sections 107(2) and 109 of the Evidence Act. He prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

22. The duty of the first appellate court was well stated in the case of **Peters v Sunday Post Limited** (1958) EA 424 where Sir Kenneth O'Connor stated as follows:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.....”.

23. The appellant's main complaint was that the awards made in general damages and for lost earnings were inordinately low. The respondents were of a different position. There is no doubt that the appellant suffered the following injuries as a result of an accident which occurred on 28th September, 2015 which was occasioned by the 2nd respondent-

- (i) Comminuted fracture of the right distal fibula;
- (ii) Displaced fracture of the right distal malleolus; and
- (iii) Blunt injury to the right hip.

24. At the time the appellant was examined by Doctor Ndegwa (PW1), he was complaining of pain and swelling on the right ankle joint. On being examined, the appellant's right leg was swollen and the ankle was stiff. The Doctor's opinion was that the appellant sustained severe injuries, suffered immense pain and lost many working hours. The Doctor noted that the appellant was healing but a permanent disability of 6% was expected as a result of:-

- (a) The multiple weak bone unions that could easily fracture over future minor traumas;
- (b) Chronic pains; and
- (c) Stiffness deformity of the right ankle joint and the expected post traumatic arthritis of the joint which would compound the chronic pains.

25. In this appeal, the appellant's Counsel relied on the same authorities he had cited in the lower court. One of them was the decision in **John Njenga Maina v Humphrey Kinyua Rukeria (supra)**. The appellant therein suffered the following injuries -

- (i) Compound fractures of the right tibia and fibula;
- (ii) Fracture of the distal 1/3 of the left tibia and fibula;
- (iii) Laceration of the scalp;
- (iv) Friction burns on the left hand and elbow;
- (v) Bruises on the left knee;
- (vi) Blood loss; and
- (vii) Physical and psychological pains.

26. The appellant's Counsel in the Trial Court also relied on the case of **Clement Gitau v GKK (supra)**. In the said case, the respondent

suffered the following injuries:-

- (i) Comminuted fracture of the left distal tibia and fibula;
- (ii) Bruises on the neck;
- (iii) Blood loss; and
- (iv) Physical and psychological pains.

27. In the lower court, the respondents' Counsel did not cite any authorities on quantum but submitted that the sum of Kshs. 100,000/= would have been an adequate award for general damages, subject to contribution. It was submitted then that the appellant had failed to prove his daily earnings and as such, no award should be made to that end.

28. In the lower court, the appellant's Counsel maintained that the appellant was entitled to wages in the sum of Kshs. 800/= per day, for 6 days a week for the 4 months he was out of work due to the accident.

29. Since the respondents' Counsel did not cite any authorities, the Trial Court should have gone further to look for authorities in which claimants suffered injuries which were comparable to those suffered by the appellant herein.

30. I do agree with the appellant's Counsel that the award made by the Trial Court in the sum of Kshs. 300,000/= in general damages was not supported by any decided cases. At the same time, I do concur with Counsel for the respondents that the injuries sustained by the appellant in the case of **John Njenga Maina v Humphrey Kinyua Rukeria** (supra), were more severe than those which were suffered by the appellant herein.

31. In the case of **Akamba Public Road Services v Abdikadir Adan Galgalo** [2016] eKLR, the claimant sustained a fracture of the right tibia leg bone malleolus and right fibula bone and a blunt injury to the right ankle. He sustained a permanent partial disability of the right tibia and fibula due to the fracture. The fracture site was a weak point. The permanent partial disability was assessed as 3%. The claimant was awarded Kshs. 500,000/= in the year 2016.

32. The authority cited by the appellant's Counsel of **Clement Gitau v GKK** (supra) is applicable in this case as the claimant therein suffered injuries which are almost comparable to those sustained by the appellant herein. In the said case, apart from the injuries suffered by the claimant, according to Dr. Theophilus Wangata, he also suffered 20% incapacity. The claimant was awarded Kshs. 600,000/= in the year 2016.

33. In the present case the appellant suffered 6% permanent disability with the risk of future arthritis of the right ankle joint. The Hon. Magistrate failed to address the issue of the 6% permanent disability suffered by the appellant. It is this court's view that if the Hon. Magistrate had done so, he would not have arrived at the sum of Kshs. 300,000/= he awarded as general damages.

34. The respondents did not testify or call any witnesses. In **Elgin Finedays Ltd v Webb 1947 AD 744**, it was stated at 745 as follows:-

“... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ...”.

35. The lower court case in this appeal was determined on 28th February, 2019. Taking into consideration the injuries suffered by the appellant, the 6% permanent disability he has to live with and the element of inflation since the cases which were cited by the Counsel for the parties herein were determined, I hereby set aside the award of Kshs. 300,000/= in general damages. I hereby substitute the same with an award of Kshs. 650,000/= as general damages.

36. On the award of damages for lost earnings, the appellant failed to produce evidence to prove that his daily earnings were Kshs. 800/=. In the said circumstances, this court resorts to the regulation of Wages (General) (Amendment) Order 2015, Legal Notice No. 117 of 20th May, 2015, which set the daily wages of a general labourer as Kshs. 296.20. This court's finding therefore is that rounded off to the nearest figure, the amount arrived at by the Hon. Magistrate of Kshs. 300/= as the daily wage for the appellant, was reasonable. The appellant produced his work identity card to show that his occupation was that of a conductor. He was cross-examined by the respondents' Counsel and it was never contested that he was not a conductor. The said issue cannot be raised on appeal. I decline to interfere with the award for lost earnings.

37. The appeal herein succeeds with regard to the quantum of general damages which this court has enhanced to the sum of Kshs. 650,000/=. The appellant is awarded the costs of the lower court case and this appeal. He is also awarded interest at court rates.

DELIVERED, DATED and SIGNED at MALINDI on this 28th day of February, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Shujaa holding brief for Mr. Lewa for the appellant

Mr. Siminyu holding brief for Mr. Matini for the respondents

Mr. Samuel Kabue – Court Assistant