



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 18 OF 2017

A.O BAYUSUF & SONS.....APPELLANT

-VERSUS-

PATRICIA MUTHOKA MUTUNGA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. D.M Ndungi (SRM) in the Principal Magistrate's Court at Makindu, Civil Case No.439 of 2015, delivered on 2nd March 2017).

JUDGMENT

1. The Respondent filed a suit in the lower court seeking general damages for personal injuries sustained from a road accident on 20/12/2013 along the Nairobi-Mombasa road near Kiboko parking bay. She also prayed for special damages, costs of the suit and interest.

2. The Respondent filed a statement of defence denying all the averments in the plaint. After the preliminaries, the parties consented on liability in the ratio of 80:20 in favor of the Respondent and the matter proceeded for assessment of damages. The learned trial Magistrate in his judgment awarded damages as follows;

Special damages.....Kshs.3,500/=

General damages.....Kshs.800,000/=

Total.....Kshs.803,500/=

Less

20% contribution.....Kshs.160,700/=

Net award.....Kshs.642,800/=

3. Aggrieved by the decision, the Appellant filed this appeal and listed 3 grounds as follows;

- a) *The learned trial Magistrate misdirected himself and erred in law and fact by awarding general damages for pain and suffering that are so manifestly excessive as to be erroneous.*
- b) *The learned trial Magistrate misdirected himself and erred in law and fact in failing to properly consider the medical reports in record and hence arrived at an award that is so manifestly excessive as to be erroneous.*
- c) *The learned trial Magistrate misdirected himself and erred in law and fact by failing to properly consider the defendant's submissions on record thus arrived at an erroneous finding on quantum.*

4. Parties agreed to dispose of the appeal by way of written submissions which they did.

The Appellant's submissions

5. M/s Wangai Nyuthe for the Appellant submits that according to Dr. Musyoki and Dr. Wambugu, the Respondent sustained fractures of finger bones on hands, fracture iliac bone and injury to the chest. She contends that none of the doctors other than Dr. Ndeti mentioned a fracture of the left femur and as such, the award of Kshs.800,000/= was inordinately high as to be erroneous. She relies on the following case law;

a) **Nakuru Civil Appeal No. 105 of 2018 S.D.V Transami K. Ltd –vs- Scholastica Nyambura (2012) eKLR** where the plaintiff sustained; compound fracture of the right tibia and fibula, deep cut wound on the left leg and multiple cut wounds on the right leg. An award of Kshs.300,000/= was reduced to Ksh.250,000/=.

b) **Nairobi Cause No. 98 of 2011; Kennedy Mutinda Nzioka –vs- Basco Product (Kenya) Ltd (2013) eKLR** where an award of Kshs.210,000/= was given to a claimant who had sustained a crush injury with fracture of the middle phalanx right finger and total permanent incapacity of 2%.

6. The Appellant submits that the above authorities are recent and should guide this court in finding that an award of Kshs.350,000/= is adequate compensation.

The Respondent's submissions

7. Mr. Mochama for the Respondent has decried the omission of his trial court submissions from the record of appeal as well as supporting medical documents. He submits that Dr. Wambugu awarded a 2% permanent incapacitation which is a clear indication that the injuries were severe and as such, the award is justified. He further submits that there is no cogent evidence, rebutting the suffering of the femur fracture, to warrant interfering with the award.

Analysis and determination

8. It is now settled that the duty of a first Appellate court is to analyze and re-evaluate the evidence on record in order to

reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Another –vs- Associated Motor Boat Company Limited & Others (1968) E.A 123:**

9. The Respondent's counsel raised issue with documents not included in the Record of Appeal. Firstly, that is an issue he ought to have raised when the appeal first came for directions after service of the Record of Appeal. I however, wish to reassure him that the original record is before me with ALL the annexures and exhibits.

10. Having considered the grounds of appeal, the rival submissions and entire record, I find the following issues to arise for determination;

- a) Whether the Respondent sustained a fracture of the left femur.
- b) Whether the quantum of damages should be disturbed.

Issue no. (a) Whether the Respondent sustained a fracture of the left femur

11. The injuries sustained were pleaded as follows;

- a) Blunt injury to the chest
- b) Multiple fractured bones of both hands
- c) Fractured left femur
- d) Blunt injury to the lower back.

12. In the consent recorded on 22/12/2016, the parties agreed *inter alia* to attach the supporting documents, mentioned in their lists of documents, to their written submissions. The following documents were attached by the Respondent;

- a) Discharge summary from Makindu sub-county hospital.
- b) Treatment chits from Makindu sub- county hospital.
- c) Medical Report by Dr. Titus Ndeti & receipt.
- d) P3 form.

13. After going through the record of appeal, I realized that the above documents were not omitted but misplaced. They appear between pages 25 and 32 of the record. This clearly calls for more diligence in preparation of the records.

14. The Respondent was discharged from Makindu district hospital on 23/12/2013 and the discharge summary shows that x-rays of the pelvic and metacarpals were conducted and the Respondent given a follow up orthopedic clinic. She was sent to the hospital for the P3 form on 23/04/2014 and it was filled by Dr. Musyoki. The same is dated 25/04/2014 and the injuries are indicated as; tenderness over the chest, multiple fractures both hands and fracture of the left iliac bone.

15. Dr. Ndeti's medical report dated 26/08/2015 shows the injuries as pleaded (*par. 11 supra*) and his reference was the discharge summary, the P3 form and X-ray films. On 27/09/2016 the Respondent was re-examined by Dr. Wambugu who also relied on the X-rays from Makindu hospital. According to him, the injuries sustained were; fracture left index finger proximal phalanx, fracture right 5th metacarpal, fracture left iliac bone and blunt chest trauma.

16. It is therefore evident that the three doctors who examined the plaintiff relied on the X-ray films from Makindu hospital and none of them conducted an independent X-ray. In any case, they all examined her after a considerable passage of time since the accident.

17. The **Cambridge English dictionary** defines 'Iliac' as; '*the widest of the three bones that form the pelvis*'. On the other hand, 'femur' also known as the thighbone is defined as '*the long bone in the upper part of the leg*'. Looking at these definitions in light of the X-rays conducted and observations made by Dr. Musyoki and Dr. Wambugu, the Respondent sustained a fracture of the left iliac bone and not left femur. Indeed, this issue was substantially addressed by the Appellant in its submissions before the trial court.

18. Accordingly, the injuries sustained by the Respondent are;

- a) Blunt injury to the chest
- b) Multiple fractured bones of both hands
- c) Fractured left iliac bone
- d) Blunt injury to the lower back.

Issue no. (b) Whether the quantum of damages should be disturbed

19. Award of damages is largely a question of discretion and the principles which should guide an Appellate court in deciding whether to interfere with such an award are well settled. The appellate court should be satisfied that in assessing the damages, the trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so

inordinately low/high as to amount to a wholly erroneous estimate.

20. In his submissions before the trial court, the Respondent relied on **Mombasa HCCC No. 210 of 1990; Yawa Tsuma –vs- Highway Carriers Ltd** where the Plaintiff was a 28-year-old jua kali worker at the time of the accident. He suffered fracture of the shaft femur of the right leg and fracture mid of the right humerus. He was hospitalized for about 2 months during which period the right arm was fixed in a plaster and the right leg put on traction.

21. He continued with treatment as an outpatient. The fracture of the right leg healed with a resultant leg shortening 3” resulting in osteoarthritis development; fracture of the humerus healed in malunion due to angulation of bone fracture with no functional incapacity. He was awarded Kshs.450,000/= for pain and suffering.

22. Having found that the Respondent did not sustain a fracture of the femur, I have looked at awards in decisions where the claimants sustained a fractured iliac bone.

a) In **Kiru Tea Factory & Another –vs- Peterson Watheka Wanjohi [2008] eKLR**, Kshs. 800,000/- was awarded for a degloving injury on the right hand with extensive skin and muscle loss on the forearm, fractures of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest, but without any fractures, indicating soft-tissue injuries. Treatment involved surgical toilet of the wound and, later, skin grafting. The fractures were fixed by plating.

b) In **George Njenga and Another v Daniel Wachira Mwangi NYK HCCA No. 1 of 2015 [2017] eKLR** the Appellate court affirmed Kshs.800,000/- as general damages awarded to the plaintiff who sustained a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterior aspect of the left leg.

23. I find the above decisions to be more relevant compared to the ones cited by the parties. They reflect the trend in awards where claimants have sustained pelvic fractures. Despite substituting '*fractured femur*' with '*fractured iliac bone*', the award herein was not inordinately high so as to be an erroneous estimate for this court to interfere with it.

24. The result is that the appeal lacks merit and is dismissed with costs.

Orders accordingly.

Delivered, signed & dated this 27th day of February, 2020 in open court at Makueni.

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H. I. Ong'udi

Judge