



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 168 OF 2000

MARGARET WANJIKU NJOKI.....APPELLANT

-VERSUS-

BROADWAYS BAKERY LIMITED.....RESPONDENT

(Being an appeal from the judgment and resulting decree of Hon. W.O. Lichuma (Mrs.) (Resident Magistrate) delivered on 23rd March, 2000 in Milimani CMCC NO. 2403 OF 1998)

JUDGEMENT

1. Margaret Wanjiku Njoki, the appellant herein, lodged a suit against the respondent by way of the plaint bearing the date 6th April, 1998 in which she sought for both general and special damages plus costs of the suit and interest thereon. The respondent was sued in its capacity as the registered owner of motor vehicle registration number KAD 104W Mitsubishi Canter (“*the subject motor vehicle*”).

2. The appellant pleaded in her plaint that sometime on or about the 8th of October, 1996 while she was travelling aboard the subject motor vehicle as a lawful passenger along Kenyatta Highway near U-shops in Thika, the driver of the subject motor vehicle failed to properly control/manage it, thereby resulting in an accident which left the appellant with serious bodily injuries.

3. The appellant attributed the accident to negligence on the part of the driver who was deemed an agent/servant of the appellant, and set out the particulars thereof in her plaint.

4. Particulars of the injuries sustained by the appellant were similarly laid out in her plaint.

5. The respondent entered appearance and filed its statement of defence dated 15th May, 1998 to refute the appellant’s claim. More particularly, the respondent pleaded that while the accident did occur on the date stated in the plaint, the particulars of negligence were utterly denied with the respondent pleading that it is the appellant’s negligence that resulted in the accident and her injuries, whether solely or substantially.

6. At the trial of the suit, the appellant testified and summoned a medical doctor to give evidence, while the respondent indicated that it would not be calling any witnesses. What followed is that the parties filed and exchanged written submissions.

7. The trial court ultimately entered judgment in favour of the appellant and against the respondent in the following manner:

a. Liability	100%
b. General damages	Kshs.50,000/
c. Special damages	Kshs.1,600/
TOTAL	Kshs.51,600/

8. The aforesaid judgment is now the subject of this appeal, with the appellant putting forth the following two (2) grounds of appeal in her memorandum of appeal dated 6th October, 2014:

i. THAT the learned trial magistrate erred in awarding a low amount of damages.

ii. THAT the learned trial magistrate erred in failing to consider the medical evidence placed before her and therefore arrived at a wrong decision.

9. This court invited the parties to put in written submissions on the appeal. On her part, the appellant submitted that the award of general damages made by the trial court was low and disproportionate to the nature of injuries suffered, adding that the medical report by Dr. Shah which was relied upon by the respondent should not have been considered since the said doctor did not give a proper prognosis of the appellant's injuries.

10. It was also the appellant's argument that the trial court ought to have appreciated that consequent to the injuries suffered, the appellant had a miscarriage of her pregnancy hence it is only fair that she be compensated on that ground as well.

11. In view of the foregoing, the appellant proposed an award of Kshs.5,000,000/ on general damages while quoting the case of **Rose Nduta Muya v Arthur Nelson Munene & Another, HCCC 1377 of 1987** as cited in the case of **Joseph Mavulu Mutua v Samuel Njoroge Mwangi [2003] eKLR** and in which a plaintiff who had suffered various injuries and loss of her pregnancy was awarded Kshs.400,000/ under the same head.

12. The respondent on its part urged this court to dismiss the appeal with costs, contending that the trial court appropriately considered the medical evidence tendered before it, which evidence indicated the appellant's recovery progress. On this note, the respondent submitted that the appellant did not adduce any evidence to support her averments that she was experiencing back problems following the accident or that she suffered a miscarriage thereafter. The respondent cited the case of **Captain Harry Gandy v Caspar Air Charters Limited [1956] 23 E.A.C.A. 139** where it was rendered that any evidence which is a clear departure from the pleadings is irrelevant and ought to be disregarded on that ground alone.

13. It was the respondent's argument that the appellant suffered soft tissue injuries and that the respondent had cited before the trial court authorities constituting similar injuries.

14. I have considered the competing submissions on appeal and the respective authorities relied upon. I have further re-evaluated the evidence placed before the trial court. It is clear that the appeal lies exclusively against the award made on general damages. That being the position, it is only practical for me to address the two (2) grounds of appeal together.

15. It is a well-settled principle of law that an appellate court's authority to interfere with an award of damages made by a trial court is limited to the following circumstances:

a. Where it is shown that an irrelevant factor was taken into account.

b. Where it is shown that 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.

16. In her evidence as PW1, Dr. A.R.D. Patel testified that she examined the appellant on 24th January, 2000 and established that the appellant had slight tenderness on her back, though she did not perform an x-ray on her for the reason that she was pregnant at the time.

17. The doctor termed the appellant's injuries as soft tissue in nature while mentioning that her injuries have since healed save for the backache, and produced the medical report dated 24th January, 2000 as P. Exh 1.

18. On cross examination, it was the doctor's evidence that she had looked at the P3 form and treatment notes in conducting her examination of the appellant, further mentioning that the accident had taken place three (3) years prior.

19. The appellant who was PW2 stated in her evidence that following the accident, she sustained injuries on her face, back and shoulders, and that upon seeking treatment at Thika District Hospital, she was placed on total bed rest for two (2) months.

20. The appellant further stated that at the time of the accident she was expectant and that following the accident, she was unable to either stand or sit for long moments at a time without experiencing pain. She added that soon after the accident, she bled and lost her pregnancy, a position which was restated in her cross examination.

21. In her submissions, the appellant urged the learned trial magistrate to award general damages in the sum of Kshs.380,000/ while citing the cases of **Shaukat Abdul Razak v Salim Mohamed-Civil Appeal No. 6 of 1990 Mombasa** where awards of Kshs.300,000/ and Kshs.70,000/ were made for soft tissue injuries and a back injury respectively, and **Githinji Mwamba v Bernard Kaburu Barine & Another-Nairobi High Court Civil Case No. 398 of 1988** in which the court assessed general damages at Kshs.200,000/ in the instance of a plaintiff who had suffered injuries to the neck, humerus and back.

22. The respondent in turn suggested an award of Kshs.70,000/ based on the judicial authority of **James Kevogio Mole & Anor v K.B.S Ltd-HCCC No. 2163 of 1991** where the plaintiff sustained a cut wound on left eyebrow, soft tissue injury to chest, deep abrasion over left hand and soft tissue injury to the right flank, and was awarded a sum of ksh.30,850/ as well as the authority of **Salome Wanjiru Ng'ang'a v Moses Njoroge Kahamba & Another-HCCC No. 450 of 1990** in which an award of Kshs.80,000/ was made to a plaintiff with mild concussion and a cut wound on the scalp.

23. In her analysis, the learned trial magistrate reasoned that in the absence of any evidence to indicate that the appellant had attended another hospital after Thika District Hospital, it was correct to find that she had recovered fully. The learned trial magistrate then found that the appellant had suffered soft tissue injuries and proceeded to award the sum of Kshs.50,000/ as general damages.

24. From my re-evaluation of the evidence, I took note that the following are the injuries pleaded in the plaint:

- a. Bruises on the face
- b. Bruises on the hands
- c. Blunt injury to the lower back
- d. Soft tissue injury to the left shoulder

25. The above injuries are consistent with those indicated in the medical report produced by PW1 as P. Exh 1; however, the medical report dated 17th August, 1998 prepared by Dr. R.P. Shah and produced as D. Exh 1 by consent of the parties only noted soft tissue injuries to the back and bruising of the arms which corresponds with the injuries indicated in the treatment notes.

26. In the aforementioned medical report, Dr. Shah indicated that whereas the appellant had complained of chronic back pains, the examination done showed no visible abnormalities to her back. The good doctor also mentioned that given the nature of injuries, full recovery had occurred within 1 to 2 weeks of the accident.

27. On the flip side, PW1 in her medical report indicated that though an x-ray would have established whether the appellant had suffered a serious back injury, the same could not be done as she was expectant. The doctor seemed to agree with the earlier prognosis by her counterpart that the injuries sustained by the appellant have healed, though offering a different opinion on the back injury by stating the possibility that the appellant had developed chronic back pain which would require further medical attention.

28. It is apparent from the foregoing that the medical evidence was divergent in terms of whether or not the appellant developed chronic back pain. Needless to say that, PW1 did not in my view demonstrate the basis on which she arrived at the opinion that the appellant had chronic back pain in the absence of an x-ray or other independent test carried out on the appellant. To my mind, the earlier medical report by Dr. Shah and the treatment notes painted a more accurate and consistent picture of the nature of injuries sustained in the present instance.

29. From my study of the impugned judgment, I am of the view that the learned trial magistrate ought to have acknowledged the differing opinions in the two reports as set out hereinabove. Nonetheless, there is nothing to indicate that the learned trial magistrate disregarded the medical evidence which was produced in court and in the end, the learned trial magistrate correctly found that the injuries were soft tissue in nature.

30. This brings me to the subject of the appellant's pregnancy. I took note that the learned trial magistrate in her judgment reasoned that this particular subject was not addressed in the initial treatment card and medical report by Dr. Shah (D. Exh 1) hence she had no reason to consider it.

31. Upon my re-evaluation of the medical evidence, I observed that this subject was only addressed in the medical report which was prepared by PW1 though it would appear the doctor did not carry out any tests on the appellant in that regard. Otherwise, no evidence was brought forth by the appellant to either show that she was pregnant at the time of the accident or that there was a direct link between the injuries sustained and the miscarriage.

32. In view of the foregoing, I am satisfied that the learned trial magistrate was correct in choosing not to dwell on this facet of the appellant's claim.

33. Upon reconsidering the nature of injuries coupled with the medical evidence on record, I have already established that the appellant's injuries were in the category of soft tissue injuries coupled with minor bruising, which did not take long to heal.

34. The question therefore remains whether the learned trial magistrate's award on general damages was inordinately low. On the one hand, I looked at the authorities relied upon by the appellant and I found that they constituted injuries of a more severe nature in comparison to those suffered by the appellant. On the other hand, I am of the view that the authorities quoted by the respondent were similarly decided a number of years back and the awards made thereunder are on the lower side.

35. In addition to the above, I took note that the learned trial magistrate made no mention on the authorities which guided her assessment of general damages.

36. That said, I wish to draw the attention of the parties to the more recent cases of **G4S Security Service (K) Ltd v Jackline Nagome Barare [2017] eKLR** where a plaintiff who has sustained soft tissue injuries to the face, forearm and back was awarded Kshs.150,000/ and which award was upheld on appeal; **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** where an award of Kshs.100,000/ was made to a plaintiff with soft tissue injuries including minor bruising on the back and tenderness of the right leg; and **Mulo Holdings & 3 others v Martin Ogachi Mutundura [2019] eKLR** in which case a plaintiff who had suffered soft tissue injuries to the head, face and legs was awarded a sum of Kshs.150,000/ in general damages.

37. Drawing from the above and considering inflation rates and comparable trends, I am convinced that the learned trial magistrate's award

was inordinately low. I am therefore persuaded to disturb the award of Kshs.50,000/ and substitute it with a more reasonable award of Kshs.150,000/ under this head.

38. The upshot is that the appeal succeeds and the award on general damages is hereby set aside and substituted in the manner indicated hereinabove. For the avoidance of doubt, the judgment on appeal shall now read as follows:

a. General damages	Kshs.150,000/
b. Special damages	Kshs.1,600/
TOTAL	Kshs.151,600/

The appellant 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. The appellant shall also have costs of the appeal.

Dated, Signed and Delivered at Nairobi this 27th day of February, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent