



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO.104 OF 2017

(FORMERLY HCCA.36/2017)

(Appeal Originating from Nyahururu CM's Court Civil Case No..105of 2015

by: Hon. O. Momanyi – S.R.M.)

JOHN KAINDO NGUGI.....1ST APPELLANT

NYANDARUA COUNTY GOVERNMENT.....2ND APPELLANT

- V E R S U S -

ALICE WANJIKU NJOROGE.....RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Hon. Momanyi SRM which was delivered on 8/3/2017 in C.M.C.105 of 2015.

Alice Wanjiku Njoroge, the respondent (formerly plaintiff) brought this suit against John Kaindo Ngugi and Nyandarua County Government, the appellants (formally defendants) seeking the following reliefs against the appellants:

- (1) General damages for pain suffering and loss of amenities;*
- (2) Kshs.4,500/= per month from March, 2015 for employing a house-help;*
- (3) Special damages pleaded at Kshs.8,300/=;*
- (4) Costs of the suit plus interests at court rates;*
- (5) Any other relief that this court may deem just and fit to grant.*

The claim arose from injuries that the respondent sustained as a result of an accident which occurred on 27/2/2015 involving the appellant's motor vehicle and the respondent. The respondent blamed the occurrence of the accident on the negligence of the 1st defendant.

On 12/10/2016, the parties settled the issue of liability which was apportioned at 75% - 25% in favour of the respondent. The only issue that the trial court addressed was quantum. The court awarded the respondent Kshs.950,000/= in general damages subject to apportionment. That is the subject of this appeal.

The grounds of appeal are as follows:

- 1. That the magistrate erred in both fact and law when he awarded Kshs.950,000/= as general damages in favour of the plaintiff/respondent against the defendant/applicant;*
- 2. That the trial magistrate erred in law and fact in awarding Kshs.950,000/= as general damages as the same is excessively high and also in failing to find that the nature of injuries sustained by the respondent did not warrant such an award;*

3. That the magistrate erred both in law and fact in failing to take into account the submissions of the appellant's counsel whilst making the award;
4. That the learned trial magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by the laws of natural justice;
5. That the magistrate erred both in law and fact in making an award on quantum which is too high and was not supported by relevant authorities and or commensurate with the injuries suffered by the plaintiff;
6. That the learned trial magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by case law with similar facts;
7. That the learned trial magistrate erred in law and in fact in applying the wrong principles and failing to appreciate and be guided by the prevailing range of comparable awards in cases of similar nature;
8. That the award on general damages was against the weight of the evidence before the court and was without any consideration to the submissions of the defence counsel whilst making the award.

The respondent sustained the following injuries as evidenced by the P3 form and Doctor Mburu E.N.'s report dated 28/5/2015:

- (1) Segmental fracture of the left Humerus, oblique mid shaft fracture of the humerus and a fracture just below the head of the humerus;
- (2) Soft tissue injuries to the right knee with a wound;
- (3) Soft tissue injuries to the right ankle joint;
- (4) Bruises on the head and lower limbs.

The respondent produced in evidence the P3 form, Medical Report by Dr. Mburu dated 28/5/2015 and the Medical Report dated 3/10/2016 prepared by Dr. Kalande which was produced by consent of the parties.

The appellant contends that the trial court applied the wrong principles in assessing the quantum of damages and hence arrived at the wrong decision by awarding damages that are inordinately high. The courts have over the years developed set principles that the courts will take into account when awarding damages. The court will not readily interfere with the award of damages being an exercise of the court's discretion.

In Kenya Tea Development Agency v Augustine Gori Makori (2014) eKLR the court adopted the decision in Kipkebe Ltd v Moses Kauni Masaka HCAP.127/2004 (Kisii) where the court observed:

"It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards for similar injuries and such other relevant factors."

The court further set out the principles that must be observed by an appellate court in an appeal against an award of damages. In Kemfro Africa Ltd T/A Meru Express & another v A.M. Lubia & another (2) 1985 eKLR (CA.21/1984) the court held:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial Judge were held by the former court of Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

See also Butt v Khan [1978] eKLR (CA.40/1977), the court also held that the court should not disturb an award of damages unless it is inordinately high or low so as to represent an erroneous estimate.

In Osman Mohamed & another v Saluro Bundit Mohamed C.A.30/1997, the court observed that the court must be guided by decided cases with comparable injuries.

The court said:

"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees."

In Rahima Tayab & others v Anna Mary Kinanu CA.29/1988 [1983] KLR the court adopted the holding in H. West and son Ltd v Shephard [1964] where the court held:

“Money cannot renew a physical frame that has been battered and shattered. All the Judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional.”

As held above, in making an award, the court should not try to put the victim in the shoes he/she was in before the injury but give a reasonable compensation for the injuries sustained.

In this case, Dr. Mburu found that the respondent suffered soft tissue injuries, two fractures on the humerus which failed to unite conservatively which necessitated a surgical operation. Plates were affixed at the fracture sites; that the muscles of the left shoulder joint were adversely affected as the respondent is unable to abduct the shoulder while other movements are severely limited. He assessed the injury as grievous harm amounting to 25% permanent injury. Dr. Kalande who was appointed by the appellant and saw the respondent later on 3/10/2016 confirmed the injuries that the respondent sustained and concluded that the respondent suffered significant trauma limiting the use of the left upper limb comesis of the limbs is lost and will not achieve full shoulder function and is liable to suffer early osteoarthritis of the shoulder.

The appellant’s counsel urged that an award of Kshs.450,000/= was reasonable and relied on Agroline Hauliers Ltd & another v Edwin Ochieng MGR.HCA.1/2014 where the claimant sustained a head contusion, contused neck and chest, fracture of the right mandible, fracture of the left humerus and bruises of the lower limb and an award of Kshs.800,000/= was reduced to Kshs.450,000/= on appeal in 2015. Counsel also cited Agility Logistics Ltd v John Wambua Musau (2077) eKLR where the claimant suffered a fracture of the humerus and the court awarded Kshs.500,000/= in favour of the plaintiff in 2017.

On the other hand, the respondent’s counsel urged that the court should not interfere in the award and relied on the decision of:

(1) H.CA.23/2010 Embu Kirinyaga Dist. Co-operative Union v Eustace Macheru C.A.23/2010.

Where the claimant suffered a compound fracture of the right elbow joint, traverse fracture of the upper 1/3 right joint and dislocation of the right hip joint. An award of Kshs.1.4 million was made.

(2) HCC.202/2019 NKU Michael Maina Gitonga v Serah Njuguna

Where an award of Kshs.1.5 million was made on 28/5/2012 for multiple fractures of the pelvis, displaced fractures of right acetabulum and fracture of right tibia and fibula and lastly

(3) HCC.159/2012 Benjamin Muela v Daniel Kipkirong & another

Where an award of Kshs.600,000/= was made for a closed fracture of the right femur with no disability anticipated.

I have considered the medical reports that both counsel relied upon. I find that the authorities cited by the appellant were more comparable, though the respondent suffered more serious injuries than those suffered by the claimants. I have also considered the incidence of inflation. I find that the award was inordinate in the circumstances and I hereby set it aside.

In my view, a reasonable award in the circumstances is Kshs.700,000/= general damages. The special damages were not contested. The respondent will have judgment for Kshs.700,000/=. Subject to apportionment as agreed in the consent on liability. The appellant will have half of the costs on appeal. The appeal succeeds to that extent.

Dated, Signed and Delivered at Nyahururu this 25th day of February, 2020.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. W. Muriithi for respondent

Muli Advocate for appellant – absent

Erick – Court Assistant