



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 48 OF 2016.

PHILIP KIPKIRUI KOSKEL.....APPELLANT

VERSUS.

PHILIP KIPRONO.....RESPONDENT

[An appeal from the Judgment and decree in Original Webuye SPMCC 56/2015 delivered on 22.7.2016 by C.N. Oruo – Resident Magistrate].

JUDGMENT.

The appellant who was the Plaintiff in the Magistrate Court sued the Respondent/defendant by Plaint dated 27.3.2015 seeking general damages for pain and suffering from injuries sustained in a road traffic accident involving Motor vehicle KBQ 198R / ZE 6008 Renault Tipper on 20.7.2014. The Respondent/Defendant filed statement of defence denying the claim. The sum was set down for having on 1.3.2015 but while the plaintiff attended court, the defendant did not. The hearing proceeded in absence of the defendant. Upon hearing the Appellant/Plaintiff evidence, the trial magistrate found the defendant to 100% liable. The trial Magistrate in her Judgment then stated;

In the end will enter Judgment in favour of the Plaintiff against the Defendant as follows;

Liability 100% in favour of the Plaintiff against the Defendant

General Damages Kshs.180,000/=

Add Special Damages Kshs.47,750/=

Total Kshs.227,750/=

The appellant was dissatisfied with the quantum of damages awarded and preferred this appeal on the following grounds;

1. **THAT** the learned magistrate erred in law and fact by awarding damages not commiserate to the injuries suffered by the appellant.
2. **THAT** the learned magistrate erred in law and fact awarding the appellant damages which are too low in comparison to the serious and severe injuries the appellant had suffered.
3. **THAT** the learned trial magistrate erred in law and in fact and failed to apply the principals of the assessment of damages in injury cases.
4. **THAT** the learned magistrate erred in law and failed to appreciate the submissions of the Appellant and Respondent in arriving on decision on damages payable to the Appellant.
5. **THAT** the learned magistrate after considering the evidence before him including the medical report and medical notes of the Appellant arrived at wrong decision.

By Consent the appeal was canvassed by written submissions. Both parties filed their respective submissions. Mr. Mwebi for appellant submitted in the accident the appellant sustained two fractures on the right and left leg and a dislocation of the knee joint. He submits that these injuries are supported by the Medical report. He submitted that in view of the injuries sustained an award of Kshs.180,000/= as general damages was too low. He urged the court to award Kshs.200,000/= as general damages. He relied on several authorities including;

1. In the case of

JAMES KATUA PETER -Vs- SIMON MUTUA MUASYA

2. In the case of

JAMES JIMBI DUME -Vs- KISAUNI YOUTH VILLAGE POLYTECHNIC

3. MASH KOMBO -Vs- NICHOLAS NYAYE & ANOTHER

M/s Karuga for Respondent submitted that the appellant sustained of tissue injuries and that award of Kshs.180,000/= was at the trial court discretion and an appellate court cannot disturb the award unless it is so manifesting high or low as to represent an erroneous estimate.

In this appeal, from the submission by the parties, there is no contestation that the Respondent was held 100% liable. Liability therefore is not subject to this appeal. The only issue is on assessment of quantum of damages. It is now settled that the assessment of quantum of damages is a issue for the discretion of the trial court. An appellate court will not disturb the award unless it is shown that it is so inordinately high or low as to reflect an erroneous estimate of damage suffered; or that the trial court proceeded on wrong principles or took into account factors he ought not to have taken into account or failed to consider relevant factors. The principles of assessment of general damages by court are now well settled in;

(5) Authority on principles of assessment of damages.

In personal or bodily injury claims the court in awards general damages for pain and suffering. The court takes into account not only the suffering which a plaintiff had immediately after the accident but the suffering which he will have through his life if the injuries are such that its effect will last for a long time. That is the reason why court should consider the nature of the injuries and the extent of the suffering that one will undergo as a result. It is only then that a fair assessment of the compensation can be assessed.

In this appeal the appellant sustained the following injuries;

a) *Blunt injury to the chest*

b) *Right open ankle fracture*

c) *Left tibia/fibula fracture*

d) *Dislocation of the left knee joint*

These are the injuries confirmed by both the plaintiff evidence and the medical report. Indeed Dr. Cleopas Kubasu upon examining the Plaintiff formed opinion that the injuries were both soft injuries and also bone injuries. His prognosis is that the plaintiff's lower limbs will have chronic pain due to the nature of injuries which will necessitate chronic use of analgesics.

The trial Magistrate in her assessment of damages was guided by the decision ***in Wilfred Moses Nyaudi -Vs- Petroleum and Industrial Ltd. Kisumu HCC 183/2010*** where a plaintiff with similar injuries was awarded Kshs.180,000/= general damages in 2014.

While the principal of Assessment is that similar injuries be compensated by similar award, court must be in determining the assessment take into account inflation trends and time when the authority they seek to rely on was made; in this case the trial magistrate failed to take into account the inflation trends and since the award relied on was made in my view their was a misdirection which this court can remedy. I therefore set aside the award of Kshs.180,000/= general damages. Considering the injuries sustained and the long term effect it will have on the appellant as per the Medical report, I award the appellant Kshs.400,000/= general damages and Kshs.47,000/= proved special damages all totaling to Kshs.447,000/= and costs of the suit in the lower court and this appeal.

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

S.N.RIECHI

JUDGE