



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 27 OF 2018

EQUITY BANK LIMITED.....APPELLANT

VERSUS

JOSEPHINE NYABARO NYARURI.....RESPONDENT

{Being an appeal against the Ruling of Hon. B. M. Kintai – SRM – Keroka dated and delivered on the 4th day of December 2018 in the original Keroka Principal Magistrate’s Court Civil Case No. 15 of 2015}

JUDGEMENT

By a judgement delivered on 4th December 2018 the court below awarded the respondent general damages in the sum of Kshs. 1,100,000/= and special damages of Kshs. 13,900/= for injuries sustained in a motor accident that occurred at Chebilat market on 15th February 2013 involving herself and a motor vehicle Registration No. KAZ 667L belonging to the appellant. Being dissatisfied with the judgement the appellant preferred this appeal. The grounds of appeal as contained in the Memorandum of Appeal filed herein on 20th December 2018 are that: -

- “1. The Honourable Magistrate erred in law in awarding damages that were too high in the circumstances taking into account events leading to the accident;**
- 2. The Honourable Magistrate applied the wrong principals in arriving at a decision to award a sum of Kshs. 1,100,000/= in General Damages to the Respondent;**
- 3. The Honourable Magistrate erred in law in awarding damages of the sum of Kshs. 1,100,000/= without any justification or basis of the same;**
- 4. The Honourable Magistrate erred in law in awarding special damages of the sum of Kshs. 13,900/= without any justification or basis of the same;**
- 5. The Honourable Magistrate erred in law and in fact in adopting a multiplicand that was inapplicable or was too high in the circumstances in spite of the laid down principles as regards multiplicand to be adopted.**
- 6. The Honourable Magistrate misapprehended the applicable law in the matter thereby arriving at an excessive award to the Respondent.**
- 7. The Honourable Magistrate erred in law and in fact by taking into account irrelevant and extraneous factors leading to an excessive award to the Respondent;**
- 8. The Honourable Magistrate erred in law in relying heavily on the Respondent’s evidence which was uncorroborated;**
- 9. The Honourable Magistrate erred in fact in failing to take into account the proceedings in the case and discrepancies as put out on behalf of the appellant.”**

By the appeal this court is urged to set aside the judgement of the lower court and dismiss the respondent’s suit in its totality or in the alternative to reassess the quantum of damages awardable to the respondent.

The appeal which is vehemently opposed was canvassed through written submissions which I have considered fully even as I analysed the evidence in the court below so as to arrive at my independent conclusion.

As can be discerned from the grounds of appeal and submissions of Counsel for the appellant, the appeal primarily challenges the quantum of damages. If it was intended to appeal against the trial Magistrate's finding on liability that was abandoned as the same was not raised in Counsel's submissions. There are no submissions on special damages either. Instead it is Counsel's submission that the award of Kshs. 1,100,000/= is inordinately high for the injuries sustained and is also not consistent with past awards. He relied on the following cases: -

- **Jane Muthoni Nyaga v Nicholas Wanjohi Thuo and another [2010] eKLR.**
- **George Okewe Osawa v Sukari Industries Ltd [2016] eKLR.**
- **Muthamiah Isaac v Leah Wangui Kanyingi [2015] eKLR.**

Counsel argued that the court relied on the case of **P N Mashru Limited v Omar Mwakoro Makenge [2018] eKLR** where the injuries were much more severe and in no way comparable to those of the respondent herein. Counsel urged that given the four cases he has cited were determined between the years 2010 and 2016 and the injuries therein were comparable to those of the respondent, an award of between Kshs. 500,000/= and Kshs. 550,000/= would have sufficed.

For the respondent, it was submitted that the trial Magistrate exercised his discretion correctly and there is no justification for this court to interfere. The respondent's Advocate relied on the case of **Kemfro Africa Limited T/a Meru Express Service & Gathogo Kanini v A M Lubia & Olive Lubia (1982 – 88) 1 KAR 727 at Page 430.**

Counsel for both sides have succinctly enunciated the principles that should guide this court in determining this appeal and I need not reproduce them.

The medical evidence adduced by the respondent and which was not controverted confirmed her injuries as a fracture of the pelvis, degloving injury of the right knee and a deep cut wound on the right thigh. According to Dr. Zoga she suffered permanent disability assessed at 30%. The gist of this appeal is that the award of Kshs. 1,100,000/= is excessive as it is not consistent with awards for similar injuries. In arriving at this award, the trial Magistrate relied on among others three cases: -

1. **Edward Mzamili Katana v CMC Motors Ltd [2006] eKLR** where the plaintiff was awarded Kshs. 2,000,000/= for head injuries leading to contusion, cut wound and bruises on the scalp, fracture of the left scapula and compound fracture dislocation of the left elbow and chest injuries.
2. **Mary Pamela Oyoma v Yes Holdings Ltd [2011] eKLR** where Kshs. 900,000/= was awarded for comminuted fracture of the right femur, compound fracture of left tibia and soft tissue injuries of right shoulder.
3. **Bonface Njiru v Tolet Agencies & another [2011] eKLR** where the plaintiff was awarded Kshs. 1,000,000/= for injuries to the head with loss of consciousness for 24 hours, loss of upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right femur.

It is instructive that in the lower court the appellant did not file submissions and so did not cite any authorities. Counsel for the respondent had in support of her submissions cited the case of **P N Mashru Limited v Omar Mwaroko Makenge [2018] eKLR** where the court awarded a sum of Kshs. 1,100,000/= for loss of consciousness, fracture of the femur distal third, fracture of the temporal bone with haematoma, head injury to the frontal parietal bone with brain oedema, left subdural haematoma, loss of memory and 5% incapacity on the limbs. No doubt the injuries suffered by the plaintiff in the Mashru case were much more severe than those of the respondent herein. So too were those of the plaintiffs in the cases upon which the trial Magistrate put his reliance. In the case of **Jane Muthoni Nyaga v Nicholas Wanjohi Thuo & another [2010] eKLR** the plaintiff sustained a fracture of the right superior and inferior rami of the pelvic bone, fracture and dislocation of the right hip joint a big cut behind the right knee approximately 10cm long and other injuries and was awarded Kshs. 300,000/=. In **Muthamiah Isaac v Leah Wangui Kanyingi [2016] eKLR** the plaintiff who sustained a fracture of the right superior pubic ramus, fracture of the right inferior pubic ramus and blunt injury on the left leg had his award reduced from Kshs. 500,000/= to Kshs. 400,000/=. In **George Okewe Osawa v Sukari Industries Limited [2015] eKLR** Majanja J awarded Kshs. 400,000/= to an appellant whose only injury was a fracture of the pelvis. In my view the injuries sustained by the respondent herein are closer in nature to those of the plaintiffs in the cases now cited by Counsel for the appellant as opposed to those in the cases relied upon by the trial Magistrate. The trial Magistrate having based his assessment of the award on cases where the injuries were much more serious hence in no way comparable to those of the respondent herein, this court has good reason to interfere. I note however that those cases were decided one in 2010 and the others in 2015 and this court must therefore take inflation into account. Doing the best I can I accordingly assess the damages awardable to the respondent as a sum of Kshs. 550,000/=. The special damages shall remain undisturbed. The appeal therefore succeeds to the extent that the award of Kshs. 1,100,000/= general damages for pain, suffering and loss of amenities is set aside and is substituted with a sum of Kshs. 550,000/= (five hundred and fifty thousand only) with interest from the date of judgement in the court below and as costs follow the event the appellant shall get the costs of this appeal. It is so ordered.

Signed, dated and delivered in open court this 20th day of February 2020.

E. N. MAINA

JUDGE