



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.174 OF 2016

FRANCIS NZIVO MUNGUTI.....1ST APPELLANT

SOUTH SIOUX FARM LIMITED.....2ND APPELLANT

VERSUS

JOTHAM WANYONYI NAKASANA.....1ST RESPONDENT

FALCON COACH.....2ND RESPONDENT

(Being an appeal from the ruling and Order of Honourable T. Olando Resident

Magistrate in Children Case No. 814 of 2006 delivered on 29th November, 2016).

JUDGMENT

1. The 1st respondent had sued the 1st appellant (1st defendant), 2nd appellant (2nd defendant) and the 2nd respondent (3rd defendant) in the lower court. It was his case that on or about the 29.5.2006 he was travelling as a fare paying passenger in the 3rd defendant's motor vehicle reg. no. KAV 249 K Nissan bus, being driven by the 3rd defendant's driver. The 2nd defendant's motor-vehicle reg. no. KAD 986 U ZB 3262 Merced Benz truck was being driven by the 1st defendant when he caused the same to collide with the Nissan he was travelling in.

2. The 1st defendant was sued as the driver of motor-vehicle registration No. KAD 986 UZB 3262 Mercedes Benz truck and the 2nd defendant was sued as a limited liability company and as owner of motor-vehicle reg. no. KAD 986 U ZB 3262 , whereas the 3rd defendant was sued as the registered owner of motor-vehicle reg. no. KAV 249 K Nissan bus.

3. The 1st respondent particularized negligence on the defendants for causing the accident. He relied on the doctrine of *res ipsa loquitor*, the highway code and the Traffic Act. He alleged that the 2nd and 3rd defendants were jointly and vicariously liable for the acts and omissions of their respective drivers who were acting in the course of their employment. He sustained severe bodily injuries and he suffered loss and damage. He prayed for judgment to be entered against the defendants jointly and severally for general damages, special damages of Ksh2.700/=, costs and interest.

4. The 1st and 2nd defendants filed their defence admitting ownership of motor-vehicle reg. no. KAD 986 U ZB 3262.They admitted the occurrence of the accident on 29.5.2006 involving the said two vehicles but denied the same was as a result of the 1st and 2nd

defendants' negligence. They denied the plaintiff was travelling as a passenger in motor-vehicle registration No. KAV 249K. It was their defence that the accident was wholly caused by the 3rd defendant and or his driver, and attributed negligence on them. Further the doctrine of *res ipsa loquitor* was applicable to the 3rd defendant, and the plaintiff was invited to strict proof. Finally, they prayed for dismissal of the plaintiffs case.

5. There is no defence by the 3rd defendants in the record of appeal.

6. The matter proceeded to hearing and the court delivered judgment. Liability had been determined in other suits whereby the South Sioux farm and Falcon coaches were jointly and severally held 100% liable for occurrence of the accident. In this case, on general damages, the court awarded Ksh.1,000,000/=and special damages of Ksh2,700/= plus costs and interest.

Appeal

7. The appellants were aggrieved by judgment on quantum and appealed against it. The following issues were raised in the memorandum of appeal:

- a) That the learned trial magistrate erred in law and fact in awarding damages that were manifestly excessive as to amount to an erroneous estimate of loss actually suffered by the respondent.
- b) That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced in court in determining the damages.

The appellant prayed the court to re-assess the general damages.

8. Parties agreed to canvass the appeal by way of written submissions.

Appellants' submission

9. It was their submission that the 1st respondent had enumerated the following injuries in the plaint.

- i. Head injury-brain contusion during the accident.
- ii. The forehead was swollen and tender with a deep cut wound on the left side of about 15cm long
- iii. The right forearm was swollen and tender
- iv. A fracture on the right radius and ulna lower third
- v. The leg was swollen and tender with a deep cut wound 8cm
- vi. A fracture on the proximal phalanx of the 5th right toe.

10. The 1st respondent and a clinical officer from Moi Teaching and Referral hospital testified. This court is under a duty to re-evaluate the evidence and come up with its own conclusion, as to whether the award was premised on the known principle of law given the injuries sustained.

11. The 1st respondent had testified that he sustained two fractures, on his right hand and on the toe. He was admitted for two days at the hospital. He had stated that he has healed and this was also captured in Dr. Aluda's medical report which was produced as P-ex no. 5. The 1st respondent never produced any document such as x-ray films. He could still use his right hand.

12. It was the evidence of PW2 that the 1st respondent was received at Moi Teaching and Referral Hospital on 29.5.2006 and was discharged the following day on 30.5.2006. He was neither the treating doctor nor did he prepare the discharge summary (Pex no.4). He only filled a p3 form. On cross-examination he stated that the 1st respondent had sustained fracture of the radius and ulna but not fracture of the right toe. The discharge summary did not indicate that **he had been unconscious for one hour.**

13. There was variance between the discharge summary and the p3 form which was filled two months later. The same raises suspicion. Dr. Aluda's medical report also indicated a fracture of the right toe which was not captured in the discharge summary form. He was not the treating doctor and therefore relied on what he was told.

14. It was their submission that the injuries listed in the plaint could have been fabricated to aid the 1st respondent. Since the 1st respondent had failed to conform to *Section 107* of the *Evidence Act* by providing all the evidence, this court was urged to re-assess and make an award of Ksh. 200,000/= as sufficient compensation. The court was referred to the case of **Muraya v. Mwangi [2004]eklr and Kiwanjani hardware ltd v. Laban Kiilu Muthoka [2008]eklr.**

1st respondents submission

15. The 1st respondent through his counsel, strongly opposed the appeal. The court was notified of an error that the appellant had failed to file a certified copy of the decree as provided for by *Section 79G* of the *Civil Procedure rules* which states as follows:

“Every appeal from a subordinate court to the high court shall be filed within a period of 30 days from the date of the decree or order appealed against.”

16. The importance of a decree is provided for under *Order 42 rule 2* of the *Civil Procedure Rules* which provides for filing of certified copy of the decree or order being appealed against. Under *Order 42 rule 13(4)* a party could not overlook the proviso. In **Ndegwa Kamau t/a Sideview Garage v. Fredrick Isika Kalumbo(2016) eklr**, the court while considering the failure to provide a decree appealed from, struck out an appeal and held that such failure is fatal to the appeal and failure to comply with the mandatory statutory and procedural provisions

renders an appeal incompetent and of no consequence. The appellant had failed to demonstrate he had applied for decree being appealed against. It was their submission that this appeal was incompetent and ought to be struck out with costs.

17. The award was a reasonable sum compared to the injuries sustained. The medical report by Dr. Aluda indicated the injuries

sustained by the 1st respondent, and the doctor's opinion was that the injuries were severe and had healed save for occasional headaches and pain and that the scars would remain as a permanent feature in his body. *Dr. Rono* from Moi Teaching and Referral Hospital testified and said the injuries were of grievous nature. The court considered this evidence as against the appellant's contention.

18. It was a general rule that the trial court had the discretion to award a sum for general damages. This court could only interfere with the findings of the court if the award by the trial court was based on wrong principles or took account of irrelevant factors, or left out of account a relevant factor or the amount was inordinately high leading to an erroneous estimate. See *Akamba Public Road Service Ltd v. Tabitha Kerubo Omambia* (2013) eKLR. It was urged that this court finds the trial court did not err in making such an award. See also *Fatuma Abdalla v. Tusks Restaurant Ltd & Anor, Nairobi HCCC no. 1727 of 1999*, *Thomas Muendo Kimilu v. Anne Maina & 2 Ors, Machakos HCCC no. 6 of 2007* and *Michael Njagi Karimi v. Gideon Ndungu Nguribu & Anor, Nairobi HCCC no. 889 of 2004*.

Analysis and determination

19. The issues that arise for determination are whether the trial court made an award that was in excess compared to the injuries sustained, whether the court considered the evidence on record and whether it was fatal for the appellant not to annex a certified copy of decree.

20. The appellant only appealed on quantum. This being a first appeal, this court is duty bound to review the whole matter, reconsider the evidence and arrive at own conclusions but being mindful that I did not hear the witnesses nor observe their demeanour, as was held in *Mwanasokoni v. Kenya Bus Services Ltd (Mombasa Civil Appeal No. 35 of 1985 (ur))*. In *Peters v. Sunday Post Ltd* [1985] EA 424, sir Kenneth O'Connor expressed himself as under:

“it is strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses, but the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

21. The 1st respondent raised an issue that the appellant did not annex a copy of certified copy of decree they intended to appeal against. That they had failed to demonstrate the effort put forward to get a certified copy of decree. Section 79G of the civil procedure rules provides as follows:

“every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”

22. The appellant, in the record of appeal dated 9.8.2019 did not attach a copy of the certified copy of decree. However, there are two letters dated 23/5/2017 and 24.9.2018 requesting for typed proceedings and judgment. Therefore, the 1st respondent is not right when he says the appellant has not demonstrated any effort they made to obtain the same. In the supplementary record of appeal the appellant has attached a certified copy of decree dated 14.11.2019.

23. On whether the trial court failed to consider the evidence on record thus making an excessive award, the 1st respondent testified and his witness *Dr. Rono* from Moi Teaching and Referral hospital. The 1st respondent testified that he was admitted at Moi Teaching and Referral hospital for 2 days, he was informed he had sustained a fracture on his right hand and on the right toe; he also had injuries on his head which were stitched. His medical card was filled by Dr. Aluda (deceased). Invoice of ksh. 4,813/= was produced as Pex no. 8. On cross-examination he stated that he had two fractures on his right hand and toe of the right leg. Dr. Aluda confirmed that his fractures had healed. He had not gone back to MTRH for any treatment save for Lugulu mission hospital where he attends. He is a driver and uses his right hand, and he confirmed to be working well. He confirmed that he had not produced any X-ray films from MTRH. In re-exam, he testified that he is able to use the left hand after the accident.

24. *Dr. Rono* (PW2) testified that the 1st respondent was admitted on 29.5.2006 and discharged on 30.5.2006, he had sustained fracture of the right ulna and fifth toe on the right foot, had a cut wound on the left side of the head measuring 15cm long and had lost consciousness. He had classified the injuries as grievous; he had filled the P 3 form and classified the injuries as serious. On cross-examination he stated that he never prepared the discharge summary. He referred to the patients file while preparing the P3 form. Further from the case summary he had sustained a fracture of the right hand radius and ulna. There was no indication for a fracture of the toe on the right foot. He did not produce any x-ray films.

25. In re-exam he stated that there was consultation request for fracture of the right ulna and he had sustained fracture of the 5th right toe.

26. The summary discharge from MTRH indicated diagnosis of the 1st respondent as fracture of the right radius/ulna, fracture of proximal phalanx at the 5th toe of the right foot. On summary it indicates that the 1st respondent sustained multiple cuts on the forehead, right leg and foot which were all stitched. An x-ray was done and it revealed fracture of the radius/ulna with displacement reduction done and plaster of paris (POP) was applied. This is the initial treatment chit and the doctor who treated him was better placed to tell the kind of injuries sustained.

27. The issue on fracture of toe of the right leg was not revealed when x-ray was done. The consultation request indicated the diagnosis as fracture of the distal radius/ulna.

28. The P3 form which was filled by Dr.Rono indicates cuts on the frontal side of the head was stitched 5 times and it was 15cm, fracture of the right ulna and radius at the lower 1/3 displacement, cut on the lower side which was stitched 8 times. Dr. Rono in his evidence said he got this information from the patients file, yet the p3 form has many cancellation creating a doubt on whether he was getting information from the patient file or not.

29. Dr. Aluda's medical report has injuries not contained in the summary form. He indicated that there was an x-ray done for the right toe which revealed a fracture, yet the discharge summary does not indicate so. His report indicates the 1st respondent lost consciousness for one hour, which is not indicated on the summary discharge.

30. From the three documents produced in court, one can infer that the injuries sustained were:

- i. Fracture of the right radius/ulna
- ii. Multiple cuts on the forehead, right leg and foot which were stitched.

31. The appellants suggested that an award of Ksh200,000/= would suffice for the injuries sustained, whereas the 1st respondent stated that the award by the trial court should not be disturbed. The award by the court should only be a reasonable compensation since one's body part cannot be fully restored to its original condition. Lord Morris of Borth-y-Gest had occasion to comment on the above concept in the case of **H. West and Son Ltd v. Shepherd (1964) AC.326** and stated thus:

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

The court of appeal in **Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR** opined that:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".

32. The authority relied upon by the appellant in **Muraya v. Mwangi[2004] eKLR**, was a 2004 case and the accident had occurred in 1999. The case in **Kiwanjani hardware ltd v. Laban Kiili(supra)**, the injuries were slightly minor compared to the instant appeal.

33. Considering the injuries sustained by the respondent and the relied on decisions, I do find that an amount of 600,000/- is fair and sufficient compensation as general damages. Special damages were pleaded and proved and I make no alteration. To the said extent the appeal succeeds with no orders as to costs.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF MARCH, 2020

In the presence of:

Miss Wahome for the appellant

Mr. Wafula for the respondent

Mr. Eululo – Court assistant

Miss Wahome – I pray for 30 days stay.

COURT:

30 days stay is granted as prayed.

SIGNED

S.M GITHINJI

JUDGE