



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 107 OF 2018

SAMWEL MARTIN NJOROGE KAMUNYU..... APPELLANT

VERSUS

MILDRED OKWEYA BARASA..... RESPONDENT

(Being an appeal from the judgment and decree of Honourable N. Mosei Resident Magistrate in Eldoret Civil Case No. 96 of 2015 delivered on 14th August, 2018).

JUDGMENT

The respondent filed a suit against the appellant in the lower court in which he claimed that on or about the 28th day of November 2014, the appellant by himself or through his agent so negligently and carelessly drove, managed and or controlled motor vehicle registration number KBU 314W, a Toyota NZE, along Eldoret-Nakuru road, and at Ngeria area caused it to hit or ran onto a motor tractor registration number KAV 428, thereby occasioning injury to the respondent who was a lawful passenger in motor vehicle registration No. KBU 314W, Toyota NZE.

The appellant was held 80% liable for the accident when the matter proceeded to trial and the respondent was awarded kshs. 450,000/= as general damages and kshs. 4,500/= as special damages. The appellant being dissatisfied with the decision filed the present appeal.

APPELLANT'S CASE

The appellant submitted that the trial magistrate erred in fact and in law in awarding kshs. 450,000/- as general damages which was excessive in the circumstances. The award was not supported by any reasoning as the court merely expressed its opinion at page 74 of the record of appeal at para. 1 and 2. The amount awarded should be reasonable compensation and it is eminently desirable that they be comparable awards. He relied on the case of **Brian Kieya Mokuva v Christopher Komen [2015] EKLr and Butt v Khan (1977) KAR.**

In her plaint at paragraph 7, the respondent pleaded the particulars of injuries as;

- a) Two deep cut wounds on the forehead horizontally
- b) Bruises and lacerations on the right cheek
- c) Blunt injury to the shoulder and chest
- d) Blunt injury to the pelvis
- e) Deep cut wounds on right and left legs

The respondent called PW2, Dr. Rono who was not the treating doctor and the author of PExh1 and he did not know who signed the document. PW2 testified that he classified the degree of injury as soft tissue. PW3, the plaintiff, testified that she was involved in a road accident on the material date while travelling aboard motor vehicle registration No. KBU 310W and she sustained injuries on the forehead, two bruises on the right chest, blunt injury on the right shoulder and chest, blunt injury to the pelvis and deep cut wounds on the right and left legs. However, the doctors' medical report which was prepared by *Dr. Sokobe* and produced as PExh3(a) indicates that the plaintiff sustained the same injuries as those which were pleaded in the plaint. He indicated that the plaintiff sustained soft tissue injuries which were healing well.

It is for the soft tissue injuries that the magistrate awarded kshs. 450,000/- as general damages. He did not give sufficient reasons for arriving at the decision. Based on the testimonies and the evidence submitted, the respondent should have been awarded kshs. 60,000/-. The appellant

submitted that an award of kshs. 75,000/- is sufficient. He cited the case of Mumias Sugar Company Ltd. Vs Benea O. Mwanbayi [2015] ECLR and the case of Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] ECLR.

The trial court erred in failing to consider the submissions of the appellant. The magistrate relied on the case of Lucy Njihuka v Bernard Mutwori where the plaintiff was awarded general damages of kshs. 500,000/- of which was submitted by the respondent. The injuries in that case were more severe than those suffered by the respondent. The court ignored the authority of Mumias Sugar Company Ltd. Vs Benea O. Mwanbayi [2015] ECLR. The failure by the trial magistrate to give reasons for arriving at the decision was fatal since it contravenes *Order 21 rule 4* of the *Civil Procedure Rules*.

It is clear that the trial court failed to take into account relevant evidence on record, pleadings and submissions before it. The exercise of discretion was in violation of principles of awarding damages and was therefore not exercised judiciously.

RESPONDENT'S CASE

The respondent filed her submissions on 19th December 2019.

She submitted that comparable injuries ought to be compensated by an award of comparable damages. The passage of time and inflationary trends ought to be considered. The plaintiff relied on the case of Meru HCCA No. 17 of 1983 - Lucy Njihuka v Bernard Mutwori and Kisumu CA No. 4'B' of 2009 – Robert Ghonzi Kimani vs David Dwire Khisa & Another where the plaintiffs suffered comparable injuries and were awarded kshs. 500,000/- and kshs. 400,000/- respectively. The sum awarded is not inordinately high as to amount to an erroneous estimate.

ISSUE FOR DETERMINATION: -

1. Whether the general damages awarded were inordinately high.

The injuries sustained by the plaintiff as per her plaint were;

- a) Two deep cut wounds on the forehead horizontally
- b) Bruises and lacerations on the right cheek
- c) Blunt injury to the shoulder and chest
- d) Blunt injury to the pelvis
- e) Deep cut wounds on right and left legs

The injuries were confirmed by the P3 form and Dr. Sokobe's medical report. It is trite law that in awarding general damages the court looks at awards for comparable injuries for guidance.

In the case of Butt vs Khan (1977) 1KAR Law JA stated that

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”

In Highlands Mineral Water Company v Purity Wambui Muriithi [2014] eCLR the court held that an award of kshs. 700,000/- for soft tissue injuries was excessive and substituted it with an award of kshs. 150,000/-. On appeal, the court of appeal upheld the decision of the high court.

In Channan Agricultural Contractors Ltd vs Fred Barasa Mutayo [2013] eCLR; the respondents sustained injuries to the chest, cut wounds on the head and left leg which were summarized as moderate soft tissue injuries; the trial court awarded Kshs. 250,000/- as general damages which was reduced to Kshs. 150,000/- on appeal.

The respondent in this case sustained soft tissue injuries and upon weighing comparable awards and factoring in inflation, an award of kshs. 300,000/- is fair and adequate compensation to her as general damages.

For special damages it was specifically pleaded and proven. I make no adjustment.

The appeal therefore succeeds to the said extent.

Each party to bear own costs of the appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET via EMAIL TO THE ADVOCATES this 30th day of April, 2020