



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 97 OF 2013

THOMAS OWITI.....APPELLANT

VERSUS

BARTHOLOMEW SHILLAH MAKONGELE.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. C.M. Wattimah, Resident Magistrate, delivered on 12 July 2013 in Eldoret CMCC No. 601 of 2012)

JUDGMENT

[1] This appeal was filed herein by the Appellant, **Thomas Owiti**, who was the Defendant in **Eldoret Chief Magistrate's Civil Case No. 601 of 2012: Bartholomew Shillah Makongele vs. Thomas Owiti**. He had been sued by the Respondent in connection with injuries suffered in a road traffic accident that took place on **14 April 2012** at Msalaba area along the Kitale-Eldoret Road, and in his **Plaint dated 26 July 2012**, the Respondent had averred that he was a pillion passenger on **Motorcycle Registration No. KMCQ 705W, Focin**, when the Appellant and/or his agent/employee/driver, drove **Motor Vehicle Registration No. KPB 008V, Ford Ranger Pick-up**, so recklessly, carelessly and negligently, that he permitted it to lose control and collide with the said motorcycle.

[2] It was further the assertion of the Respondent that, as a result of the collision, he sustained severe bodily injuries, particulars whereof were supplied in Paragraph 5 of the **Plaint** thus:

- [a] Blunt tender trauma to the scalp;
- [b] Blunt tender trauma to the chest;
- [c] Swollen and tender left shoulder;
- [d] Swollen and tender right hip;
- [e] Swollen and tender right lower limb;
- [f] Comminuted fracture of the right tibia;
- [g] Comminuted fracture of the right fibula mid-shaft;
- [h] Fracture of the right femur mid-shaft; and,
- [i] Severe pains during and after the injury.

[3] It was in the light of the foregoing that the Respondent prayed for general damages for pain, suffering and loss of amenities as well as special damages, interest and costs. The Respondent also asked to be compensated for future medical expenses, especially for surgery for the purpose of removing the orthopaedic implants, plates and screws that were used to fix the fractures.

[4] The Appellant had denied the allegations against him vide his Defence dated **10 September 2012**. His contention was that if indeed the accident took place, which he denied, then the same was wholly and substantially caused and/or contributed to by the negligence of the Respondent. Thus, at Paragraph 3 of the Defence the Appellant has furnished the particulars of the Respondent's negligence thus:

- [a] Riding recklessly, negligently and carelessly along the Kitale-Eldoret Road without due regard to other road users;
- [b] Failing to wear appropriate protective gear such as a helmet;
- [c] Failing to maintain a proper look out in the circumstances;
- [d] Negligently ignoring the safety precautions expected of a pillion passenger;
- [e] Overloading;
- [f] Riding a defective motor cycle.

[5] The record of the lower court shows that, after the Respondent closed his case before the lower court, the parties agreed on a test suit as his case was one in a series of three suits involving the same Defendant on account of the same accident. The test suit was **Eldoret CMCC No. 602 of 2013**, wherein liability was settled at the ratio 50:50 between the Plaintiff and the Defendant. Accordingly, that decision having been adopted in respect of the lower court suit that is the subject of this appeal, the task of the learned trial magistrate was limited to assessment of damages payable to the Respondent; and, having heard the Respondent and **Dr. Samuel Aluda**, the lower court entered judgment in the Respondent's favour in the total sum of **Kshs. 341,500/=** together with interest and costs. The aforesaid sum was computed as hereunder:

[a] General Damages	-	Kshs. 680,000/=
[b] Special Damages	-	Kshs. 3,000/=
Total	-	Kshs. 683,000/=
Less 50% contribution	-	<u>Kshs. 341,500/=</u>
Amount awarded	-	Kshs. 341,500/=

[6] Being dissatisfied with the Judgment and Decree of the lower court on quantum, the Appellant filed this appeal on the following grounds:

- [a] That the learned magistrate erred in law and fact in awarding **Kshs. 683,000/=** as general damages which was not consistent with the injuries sustained, submissions of the Counsel for the parties and the legal precedents.
- [b] That the learned magistrate erred in law and in fact in arriving at the said general damages, an amount not supported by the evidence on record.
- [c] That the learned magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages.
- [d] That the learned magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.
- [e] That the learned magistrate erred in law and in fact in awarding quantum of damages without having regard to the injuries sustained by the Respondent.
- [f] That the learned magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant.
- [g] That the learned magistrate erred in law and in fact in failing to consider the submissions tendered by the Appellant.
- [h] That the learned magistrate erred in law and in fact in applying the wrong principles of law in determining the quantum of damages payable.

[7] Accordingly, the Appellant prayed that the Judgment and Decree in **Eldoret CMCC No. 601 of 2012** on general damages be set aside; and that in the alternative, this Court do make its own independent assessment of the damages payable. He also prayed for costs of the appeal.

[8] Pursuant to the directions issued herein on **25 July 2017**, this appeal was canvassed by way of written submissions; to which end, **Mr. Wanyonyi**, learned Counsel for the Appellant, relied on his written submissions dated **10 October 2017**. He urged the Court to rely on **Rahima Tayab & Others vs. Ann Mary Kiwanu** [1983] KLR 114 for the proposition that comparable injuries ought to attract comparable awards in damages. He stressed the need for a reasonable balance between the need for compensation and the interests of the economy, arguing that very high awards would, in the end, have a deleterious effect.

[9] In particular, **Mr. Wanyonyi** pointed out that, in the Medical Report prepared by **Dr. Aluda (PW1)**, it was noted that the injuries were continuing to heal; and therefore that **PW1** did not apportion any percentage in terms of disability, permanent or otherwise. On that account

he urged the Court to find that the award by the lower court was not only excessive, but was also inconsistent with the injuries sustained and the applicable judicial precedent. He therefore urged for the setting aside of the lower court's award and for the Court to accordingly undertake its own independent assessment.

[10] Counsel for the Respondent, **Mr. Alwang'a** urged the Court to take into account the nature and extent of the Respondent's injuries, the Medical Report prepared by **Dr. Aluda** and the fact that the Respondent was still on crutches at the time his testimony was taken by the lower court. Counsel therefore defended the lower court's award, contending that it was within the existing legal principles and precedents. He made reference to some 8 precedents which he considered comparable, in which the sums awarded ranged between **Kshs. 600,000/=** and **Kshs. 2,400,000/=**. Thus, Counsel urged the Court to find that the learned trial magistrate exercised her discretion judicially; and that no legal principles were violated to warrant interference.

[11] I am mindful that, this being a first appeal, it is my duty to reconsider and re-evaluate the evidence adduced before the lower court with a view of making my own conclusions thereon; while bearing in mind that I did not have the advantage of seeing or hearing the two witnesses who testified before the lower court. Hence, in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123** it was held that:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] With the foregoing in mind, I have given careful consideration to the evidence placed before the lower court in the light of the pleaded injuries. The Respondent's evidence was that he had gone to Soy Market where he met **Wilson Kayeli** and **Thomas Hamisi**. That after doing their shopping they decided to take a ride home on the same motorcycle; and that on reaching **Musalaba**, they got involved in a road traffic accident when an oncoming pick up lost control after overtaking a trailer and hit them. He further told the lower court that he sustained fractures of two bones of the right leg which had to be fixed by two plates at **Moi Teaching and Referral Hospital** where he was admitted for treatment. In support of his evidence, the Respondent produced his treatment documents as exhibits before the lower court, including the Discharge Summary issued at **Moi Teaching and Referral Hospital** and the duly filled P3 Form that he was issued with by the police.

[13] The Respondent called **Dr. Aluda (PW1)**, a private medical practitioner based in **Eldoret Town**, whose evidence was that he examined the Respondent on **7 May 2012**; and that he presented a history of having been involved in a road traffic accident on **14 May 2012**. He confirmed that the Respondent sustained the following injuries which were continuing to heal:

- [a] Blunt tender trauma to the scalp;
- [b] Blunt tender trauma to the chest;
- [c] Swollen and tender left shoulder;
- [d] Swollen and tender right hip;
- [e] Swollen and tender right lower limb;
- [f] Comminuted fracture of the right tibia;
- [g] Comminuted fracture of the right fibula mid-shaft;
- [h] Fracture of the right femur mid-shaft.

[14] **Dr. Aluda** produced his Medical Report as **the Plaintiff's Exhibit 1(a)** along with a receipt for **Kshs. 3,000/=** which he charged the Respondent for his services. The receipt was marked the **Plaintiff's Exhibit 1(b)**. In his opinion, the injuries were "very severe" but were continuing to heal. He took the view that a proper prognosis could not be made at the time. **PW1** further testified that he filled the Respondent's P3 Form and expressed a similar opinion, in addition to classifying the Respondent's injuries as "**grievous harm**". He produced the P3 Form as **the Plaintiff's Exhibit 2** before the lower court.

[15] Granted the foregoing summary of evidence, it is manifest that the only issue for determination in this appeal is the question whether the lower court erred in principle in its assessment of damages. It is to be borne in mind that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award on the ground that it would have arrived at a different outcome. In **H. West & Son Ltd vs. Shephard [1964] AC 326**, for instance, it was held that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[16] Similarly, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores**

Limited [2015] eKLR, the Court of Appeal held that:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the 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 high that it must be a wholly erroneous estimate of the damages." (Also see Butt vs. Khan [1981] KLR 349)

[17] The approach taken by **Hon. Wambilyanga, J.** in HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf, and which I find useful, was thus:

"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[18] And, in Stanley Maore vs. Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus:

"...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

[19] As pointed out in paragraph 11 herein above, there is no dispute that the Respondent suffered a comminuted fracture of the right tibia; a comminuted fracture of the right fibula mid-shaft; and a fracture of the right femur mid-shaft, in addition to multiple soft tissue injuries. It is therefore manifest that the injuries suffered by the Respondent were fairly serious, involving surgical intervention. I have endeavoured to ascertain the current range of judicial thought involving comparable injuries and noted the following:

[a] In Vincent Mbogholi vs. Harrison Tunje Chilyalya [2017] eKLR, the plaintiff sustained a fracture of the left tibia bone along with soft tissue injuries and was awarded **Kshs. 500,000/=** as general damages for pain suffering and loss of amenities. The appellate court declined the invitation to reduce that award, terming it reasonable in the circumstances.

[b] In Alphonza Wothaya Warutu & Another vs. Joseph Muema [2017] eKLR, the plaintiff was awarded **Kshs. 800,000/=** for multiple injuries which included compound fracture of the right humerus and compound fracture of the right tibia. That award was upheld on appeal.

[20] In the light of the foregoing, I am not at all persuaded that the lower court's award was manifestly excessive or erroneous in any way. Consequently, I find no merit in the appeal and would accordingly dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL, 2020

OLGA SEWE

JUDGE