



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.12 OF 2015

WILSON KIPKORIR MARITIM.....APPELLANT

VERSUS

SAGOO MOTOR SERVICE LIMITED.....1ST RESPONDENT

EMMANUEL MIYOGA.....2ND RESPONDENT

(From the judgment in Kericho CMCC No.32 of 2013 dated 2nd March 2015 – E. A. Ayuka RM)

JUDGMENT

1. This is an appeal from the decision of the magistrate's court in which the trial court awarded the appellant general damages of Kshs.650,000/=. The appellant Wilson Kipkorir Maritim, who was the plaintiff, being dissatisfied with the decision of the trial court has come to this court on appeal on the following grounds –

1. The learned magistrate erred in law and fact by awarding general damages of Kshs.650,000/= for pain and suffering which are not commensurate to the nature of injuries sustained by the appellant.
2. The learned magistrate erred in law and fact by failing to put into consideration awards in similar recent decided cases.
3. The learned magistrate erred by not putting into consideration the current rate of inflation in deciding the amount of general damages.
4. The learned magistrate erred in not awarding costs to the appellant.

2. The appeal proceeded by way of filing of written submissions. The appellant's counsel M/s Onesmus Langat & Co. filed written submissions on 23rd October 2019, but the respondents did not file any written submissions to the appeal though they were served. Ms. Sitati who appeared in court for the appellant adopted the written submissions filed.

3. This is an appeal on quantum of damages awarded, as well as on costs. It is trite that the award of damages in a case is an exercise of the discretionary power of the trial court and an appellate court will be slow to interfere with such award unless it is inordinately high or inordinately low or that the court took into account irrelevant factors or failed to take into account relevant factors. In the case **Kemfro Africa Ltd & Another – vs – A M Lubia & Another (1982 – 1988)KAR**, the Court of Appeal stated as follows –

***“An appellate court will not disturb an award of damages unless it is so 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 so arrived at a figure which was either inordinately high or low.*”**

4. I have perused the trial court proceedings and judgment. The appellant testified as PW1 and said that he was a passenger in a Toyota Probox vehicle KLH 437 which was involved in a traffic accident and sustained injuries and became unconscious and was admitted and treated at Tenwek hospital. He also produced treatment notes, and a medical report and police abstract as evidence. He stated that he suffered injuries on the hip right inferior ramus. He did not call the medical practitioner, nor the police as witnesses. The suit was undefended.

5. The trial court admitted all the evidence of the appellant and documents/exhibits produced by him, and found that the plaintiff suffered comminuted fracture of the right acbular, fracture of the right inferior public ramus, fracture of the superior and inferior remus on the left leg, and posterior hip dislocation.

6. In considering the award of general damages the trial court had this to say –

“I have perused the pleadings on record. I have also carefully considered the submissions filed on behalf of the plaintiff. The injuries suffered by the plaintiff in the instant case are not comparable at all with the ones sustained by the plaintiffs in the cited authorities (where) plaintiffs sustained more severe injuries with consequential implications. In the present case, the plaintiff was admitted for about a month only. The injuries healed well. The medical report file (sic) by the plaintiff does not indicate disability incurred. The doctor only opines that the plaintiff will require the use of a walking aid for a long period. No further medication is required.”

7. I have considered the written submissions of counsel for the appellant. There is no allegation of permanent injury or incapacity or loss of earning capacity in either the evidence or submissions. Counsel however asks for general damages of Kshs.1,800,000, special damages of Kshs.94,487/= and costs of appeal and costs in the lower court.

8. With regard to costs of the lower court proceedings, it is not correct to say that the magistrate did not award costs. The magistrate did award costs, and I uphold the same.

9. With regard to special damages, the law is that special damages have to be pleaded specifically and proved. The magistrate found that the special damages were not proved. I note that in the plaint the plaintiffs pleaded special damages of Kshs.104,778/=, while in the evidence, he talked of special costs of Kshs.94,487/=. Though nobody from Tenwek Hospital testified, the plaintiff produced a costs sheet from Tenwek Hospital as P Exhibit 2 which the court accepted in evidence, which was not controverted. In my view therefore, this figure of special damages was awardable since the trial court accepted it in evidence. It was thus a relevant factor which should have been taken into account by the trial court. I will award Kshs.94,487/= as special damages.

10. With regard to general damages, I have perused the cases relied upon by the appellant’s counsel; especially the case of **SBI International Holdings (AG) Kenya – vs – William Ambuga Ongeru (2018)eKLR** and the case of **Kennedy Ooko Ouma Dachi – vs – Joseph Maina & Another [2018]eKLR**. In both these cases, the victims suffered some degree incapacity. In the present case, there was no evidence of incapacity suffered by the appellant. I am thus not persuaded to interfere with the award of the trial court on general damages. In my view there was no misdirection on the part of the magistrate I thus uphold the decision of the trial court on general damages.

11. I thus uphold the decision of the trial court on the award of general damages, costs and interest. I set aside the decision of the trial court on special damages and award special damages of kshs.94,487/=. I award costs of the appeal to the appellant.

Dated this 23rd day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat Court Assistant, Mr. Musyoka ICT Officer and Mr. Onesmus Langat for the appellant.