



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 11 OF 2018

DAVID MWANGI WACHIRA.....APPELLANT

VERSUS

ANESTAR SECONDARY SCHOOL.....RESPONDENT

(Being an Appeal against the Judgment of the Hon.D. Nyaboke Sure (RM

delivered on 29th January, 2018 in PMCC No. 47 of 2017 - Wanguru)

BETWEEN

DAVID MWANGI WACHIRA.....APPELLANT

VERSUS

ANESTAR SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment delivered in PMCC's at Wanguru Civil Case No. 47 of 2017. In the case the appellant had filed a plaint on 11th day of April, 2017 seeking general and special damages, costs and interest against the defendant on account of injuries he sustained as a result of a road traffic accident which occurred on 17th June, 2016 along Embu Mwea Road while travelling as a passenger in motor-vehicle registration number **KBP 403 A** which is owned by the defendant/respondent.

2. The appellant in the plaint had claimed that the accident occurred owing to the negligence of the defendant as the particulars of negligence pleaded in the plaint. As a result of the accident the plaintiff sustained bodily injuries.

Which include;

(a) Trauma to the left upper arm as evidenced by pain.

(b) Trauma to the right hand as evidenced by pain

(c) Trauma to the left knee as evidenced by pain

3. The claim was opposed by the defendant who though admitting the occurrence of the accident denied any negligence on his part.

4. In the Judgment of the trial magistrate delivered on 29th January, 2018 the defendant was adjudged to be 100% liable for the accident. She proceeded to award the appellant Kshs; 70,000/= in general damages for injuries that the plaintiff/appellant had sustained.

5. Aggrieved by the Judgment the appellant lodged this appeal in Memorandum of Appeal dated 3rd February, 2018 and raised the following grounds;

(i) That the learned magistrate erred in law and in fact by failing to consider the evidence tendered by the plaintiff

(ii) That the learned magistrate erred in law and in fact in awarding general damages of Kshs; 70,000/= an amount that was inordinately very low in the circumstances.

(iii) That the learned magistrate erred in law and in fact in failing to consider the nature and serious of the injuries suffered by the Plaintiff.

(iv) That the learned magistrate erred in law and in fact in failing to consider the Plaintiff's submissions.

6. The appellants raised that the Judgment of the lower court be set aside and be substituted with an award on quantum as proposed in the appellant's submission dated 9th January, 2018. She proposes that the appeal be allowed and that the court re-assesses the general damages awarded.

7. The appeal was opposed by the respondents who filed written submissions dated 15th February, 2019. I have considered the appeal and the submissions filed by the parties.

8. The issue which arises for determination is:

(i) Assessment of damages for the applicant.

It is submitted that the learned magistrate assessment of general damages was inordinately low and the same ought to be interfered with by this court in the interest of justice.

It is submitted that it is trite law that the trial court was under a duty to assess the general damages payable to the appellant even after dismissing the suit.

He has relied on the case of; **Mordekai Mwangi Nandwa -versus - Bhogals Garage Limited CA No. 124 of 1993** Reported in **1993 (KLR 4448)** where the court held that damages be assessed even if the case is dismissed does not imply writing an alternative judgment.

That the learned trial magistrate did assess the general damages payable to the plaintiff however, it is our considered view that the stated award in Kshs; 70,000/= is inordinately low in the circumstances.

He has relied on the case of; **Butt -vs- Khan Civil Appeal No. 40 of 1997**, Law, J.A pronounced himself that:

“ 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 misrepresented the evidence in some material respect, and so arrives at figure which was either inordinately high or low.

Further, in the case Kemfro Africa Limited and Another -versus- A.M. Lubia & Another (1982 -1988) KLA the Court of Appeal rendered itself that;

“ in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court, an appellate court must be satisfied that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”

9. He submits that the trial magistrate did not consider the injuries that the appellant sustained and an award of Kshs; 70,000/= bearing in mind the seriousness of the injuries and the rate of inflation in the country, and she prays that she be awarded Kshs; 200,000/= in general damages.

He relies on the case of; **Catherine Wanjiru Kingori and 3 others -versus- Gibson Theuri Gichuhi (2005) eKLR** where the plaintiff were awarded between **Kshs; 100,000 up to 350,000/=** for similar injuries.

10. For the respondents, he submitted that:

Damages are awarded as a compensation and not meant to punish the offending party or to enrich the aggrieved party but the same are reasonably to compensate an injured party for the injuries sustained.

Pain cannot be quantified and hence any award is a token at an attempt to put back the injured party to its previous status before the accident.

The sum awarded must be in proportion to awards in other cases of those who have suffered injuries of comparable severity.

11. He submits that the appellant had sustained soft tissue injuries and he testified in court that he was injured on the left leg ankle and usually gets pains when walking for long or doing heavy work. and they urged the court to uphold the Judgment of the Trial court as the same was arrived at having considered all the relevant factors, including but not limited to the injuries suffered and sums

awarded in other cases, where similar or comparable injuries were suffered.

They rely on the case of: **Eastern Produce Kenya Limited -versus- Joseph Mamboleo Khamadi (2015) eklr** where Justice Kimondo awarded Kshs; 50,000/= for injuries which were more serious than the ones sustained by the plaintiffs. In the case of; **Joseph Agwenyi -versus- Samuel Ochillo (2010) eklr** where Justice A. Makhandia awarded Kshs; 50,000/= for injuries that were more severe than the ones that were suffered by the plaintiff herein.

12. This is a 1st appeal and this court has jurisdiction to consider both facts and law. The court is called upon to evaluate the evidence which was tendered before the trial court and draw an independent conclusion. See the Case of; **SELLE -vs- Associated Motorboat Company limited (1968) EA 123.**

The court is supposed to leave room for the fact that it neither saw nor heard the witnesses testify before the trial court.

13. The plaintiff David Mwangi Wachira testified before the lower court that he was injured on the left side of the leg, and right hand, was treated at Kibibi hospital and he told the court that: he usually gets pain when walking for long or doing heavy work.

Medical report by Doctor A. O. Wandugu stated that;

- The injuries have resulted in a chronic disabling pains in the affected areas, a source of chronic ill health which Might need medication on and off.
- The injuries by their effects in connective tissues have resulted in permanent weakness of the Right hand.
- The injuries by their effects in connective tissues have resulted in Permanent Weakness of the left arm.
- The injuries by their effects in knee joint have resulted in Permanent Weakness of the left leg.

The plaintiff was treated with anti-biotics and analgesics (NSAIDS) and allied management according to such injuries.

14. The award of damages is an exercise of discretion by the trial magistrate or Judge and as a general rule the court will not normally interfere with the award of damages unless the award is so high or inordinately low or founded on wrong principles as stated in the case of; **Butt -vs- Khan (supra) and Kenfro Africa Limited & another -vrs- Lubia & another (supra)** so as to be an obvious erroneous assessment of damages.

In the case of: **Arrow Car Limited -versus- Elijah Shamara Bimomo & 2 others(2004) eklr C.A.** The court stated “**the principle to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages awarded by a trial judge are that it must be satisfied that either the trial judge in assessing damages took into account an irrelevant factor or left out of account a relevant one or short of this the amount is so inordinately low or high that It must be a wholly erroneous estimate.**“

15. In this case the appellant had sustained soft tissue injuries which were not very severe and only left the appellant with some pain which he occasionally experiences.

Considering the authorities cited by the appellant, I find that the case cited by the appellant **Catherine Wanjiru Kingori & 3 others -versus- Gibson Theuri Gichobi** is a persuasive decision which is not binding on this court.

16. It is trite that damages awarded in cases where a party has sustained injuries, are meant to compensate the party for the pain and suffering as a result of the injuries but are not meant to enrich the party and in assessing the damages the court will look at the injuries sustained and comparable awards as awarding of damages is a matter of discretion of the court.

In this case the issue at hand is not whether the appellant is entitled to damages, rather it is the quantum of damages to be awarded.

17. There is no dispute that the appellant suffered trauma to the left upper arm, trauma to the right hand and trauma left knee. The injuries were not severe and according to the plaintiff he only experiences occasional pain on the leg which he did not state has hindered him from performing his duties as a pastor and a farmer.

In the case of; **Eastern Produce Kenya limited -versus- Joseph Mamboleo Khamadi (2015) eklr** a decision of the High court which was delivered in 2015, where the plaintiff had sustained an injury involving a cut on the finger, which I consider more severe, the plaintiff was awarded general damages of Kshs; 50,000/=.

In the case of; **Joseph Agwenyi -versus- Samuel Ochillo (supra).** The plaintiff had sustained deep cut wounds on the back, bruises on both legs, chest contortion, bruises to both hands and cerebral coercion and pain to the back. The court awarded some Kshs; 70,000/= in general damages.

This injuries were more severe than those sustained by the appellant herein.

18. It is Trite that the established methods of assessing damages is that comparable injuries should as far as possible be compensated by

comparable awards.

In assessing the general damages the trial magistrate stated that Doctor Wandugu opined that injuries resulted in permanent weakness, what I find curious despite this prognosis she never noted any walking difficulties.

Wachira also held the Christian Bible with the right hand to take oath and never observed any weakness, the only presumption is the “**permanent nature**” had changed as at 20th November, 2017 while Wachira and testified while standing.

I have considered the above authorities vis-a-vis Dr. Wandugu’s documented injuries and find an award of **Kshs; 70,000/=** will suffice.

19. From the fore-going I find that the trial magistrate did not take into consideration irrelevant factors or failed to take into consideration relevant factors which are the grounds upon which the court would set aside an award of damages.

The award is not erroneous, and is based on a consideration of facts which she observed when the appellant appeared before her.

Considering the injuries sustained, the award by the trial magistrate was in line with awards in comparable injuries.

The award is a fair assessment of the injuries of damages in line with the injuries sustained and they cannot be said to be inordinately too low or inordinately high.

IN CONCLUSION:

- I find the award was sufficient in the circumstances.
- I find no reason to interfere with the exercise of discretion of the trial magistrate in assessing the award of damages.
- The upshot is that this appeal is without merit and is dismissed.
- Each party to bear its own cost in the appeal and in the lower court.

Dated, signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE