REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 46 OF 2019

JULIE AKOTH ONYANGO.....APPELLANT

VERSUS

DANIEL OTIENO OWINO.....1ST RESPONDENT

EZEKIEL OTIENO OWINO.....2ND RESPONDENT

(Appeal against quantum in the Judgment and Decree of Bondo PM CC No. 141 of 2015 dated 19th June 2019 by Hon S.W. Mathenge, Resident Magistrate)

JUDGMENT

1.This Appeal is against quantum only by both the Plaintiff/Appellant and the Defendant/Respondent/Cross Appellant. Liability had been agreed upon at 20:80 against the Respondent, in favour of the Appellant, before the trial court.

2. In the trial court, the appellant was awarded Kshs. 600,000/= general damages, Kshs 1,100 special damages less 20% contribution leaving Kshs. 480,000/=, from injuries sustained in a road traffic accident. The quantum of damages were assessed from the injuries listed on the Hospital treatment discharge summary, being: ***a compound fracture of the tibia and fibula left leg,*** Based on the decision in **Zakaria Mwangi Njeru Vs Joseph Wachira Kanoga [2014] eKLR** where the Plaintiff sustained ***fracture of the tibia and fibula*** and was awarded Kshs. 400,000/= general damages.

3. The defendant - now cross appellant proposed an award of Kshs. 40,000/= general damages.

4. In the appeal dated 23rd October, 2019, the appellant complains that:

> ***1. The trial magistrate failed to correctly appreciate the plaintiff's injuries and misapprehended the same and thus awarding general damages which are too little in the circumstances;***
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> ***2. The trial magistrate failed to award general damages commensurate to the injuries sustained by the plaintiff;***
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> ***3. The trial magistrate failed to appreciate medical evidence adduced at the trial;***
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> ***4. The judgment as delivered was against the principles as established by precedent.***

5. In the cross appeal dated 2/11/2019 filed by the Respondent/Defendants, they complain that the awarded damages were excessive and that there was no evidence with regard to quantum to enable the court award damages. The defendants/Cross appellants urged the court to dismiss the plaintiff's /Appellant's suit in the lower court for want of proof of injuries. In the alternative they urged the court to award between 300,000/= and 500,000/= general damages at 100% liability.

6. The appellant pleaded the following injuries:

> ***(a) Compound fractures of the right tibia/fibula bones.***
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> ***(b) Compound fractures of the left tibia/fibula bones.***
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> ***(c) Deep cut wounds on both legs.***

(d) Dislocation of the left shoulder joint.

(e) Fracture at the ankle.

7. In her oral testimony, she stated that she sustained the following injuries in the accident:

- ***Fracture on both legs.***

- ***Cuts on both legs.***

- ***Pain on the thighs.***

- ***Pain on the left hand.***

8. She stated that she was taken to Bondo sub county Hospital, admitted on 10/7/2015 and discharged on 30/7/2015 after 20 days. Provisional diagnosis showed a compound fracture of tibia fibula in the left leg.

9. PW2 David Okoth Odero a clinical Officer from Bondo Sub county Hospital testified and produced the appellant's Xray Report and discharge summary and as exhibits. He produced the two exhibits on behalf of his colleagues Dr Ahero and Dr Andrew Odhiambo. He stated that the injury captured in the discharge summary was compound fractures of left tibia fibula and that the Xray form also captured only that injury.

10. P3 Dr Okombo testified and produced the Medical Report for the appellant. It is dated 20.1.2016. The injuries allegedly sustained are as pleaded in the plaint and reproduced above. The Doctor stated that he relied on the treatment notes, Xrays from Bondo Sub county Hospital and history of the patient and his own physical examination of the patient.

11. No Xray films or P3 were produced as exhibits.

12. The Respondents/Defendants closed their case without calling any witness or evidence.

13. The submissions by both parties' advocates focused on whether the appellant proved her in juries allegedly sustained in the accident to warrant the award proposed by the appellant as awarded or whether the award was inordinately low or excessively high. The Appellant's counsel filed written submissions dated 13th February, 2020 on 14th February 2020 and urged the court to enhance the award of general damages from Kshs 600,000 to 1,500,000, based on the pleaded in juries as testified on by Prof Okombo whereas the Respondent's/Cross appellants' submissions dated 29th February 2020 urged this court to dismiss the appellant's case on quantum or in the alternative reduce the damages awarded by the trial court from Kshs 600,000 to between Kshs 300,000 to 500,000 at 100% on liability. The parties' advocates also cited several decisions to guide this court.

Determination

14. Having carefully considered the appeal and cross appeal herein and reviewed the evidence adduced before the trial court and the written submissions, the only issue for determination is whether the appellant proved the injuries pleaded and therefore what damages was she entitled to.

15. Albeit the Respondent submitted that the name of the patient and the plaintiff/appellant were not the same, I dismiss that assertion as there was no contrary evidence adduced that the plaintiff now appellant is Julie Akoth Onyango as testified, albeit the Discharge Summary in handwritten form shows June Akoth. The Respondent had the opportunity at the hearing to question the appellant and establish whether she was the person who was treated for the accident of 10/7/2015 as pleaded. The Xray film was not produced. However, from the appellant's testimony, in my humble view, she proved that she was injured in the following areas:

- ***Fractured left tibia fibula.***

- ***Cuts on both legs, pain in the thighs and pain in the left hand.*** Those and injuries and fractures in my view, kept her in hospital for 20 days.

16. Xray films were not produced but the clinical officer - PW3 testified and produced the appellant's discharge summary from Bondo Sub County Hospital. Her admission number was 82821 which showed that she had fracture (compound) of left tibia fibula and that that was the only injury captured in the discharge summary. Further, PW3 testified that the Xray form also captured that injury. He produced Xray Report exhibit 3 and discharge summary as exhibit.

17. In cross examination, PW3 stated that the patient's Xray request form was for both legs and that provisional diagnosis was to the left leg. He also stated that there was no deep cut wounds on both legs and that there was no fracture of the neck. When the matter was adjourned to call Dr. Amolo, the said Doctor never testified. Instead the Plaintiff was recalled to produce by consent the medical Report by Dr. Okombo.

18. The burden of proof lies on he who alleges. See Section 107-109 of the Evidence Act. It was the duty of the Plaintiff/Appellant to prove that which was pleaded as parties are bound by their pleadings and to prove that she sustained the injuries pleaded, on a balance of probabilities.

19. The Plaintiff having been involved in a road traffic accident and admitted in hospital for that long, and as she contemplated instituting suit for recovery of damages as per her demand notice issued to the Defendants/Respondents herein dated 11/9/2015, it follows that in the event that the discharge summary or Xray Report or treatment notes had inaccuracies in them, she had ample time to return to hospital and inform the doctors who attended to her to confirm her injuries since she had to go back for review for CT SOPC on 31/8/2015 one month after her discharge from the hospital.

20. Even assuming the Plaintiff sustained more serious injuries as tabulated in the medical Report, which injuries were also pleaded and contained in the RITRI Medical Imaging Clinic document dated 12/8/2015 which was one month after the accident, and in the P3 form, the question is why did the appellant only introduce documents for identification and fail to produce them in evidence, and expect the trial court to rely on decided cases that failure to produce treatment notes was not fatal to the Plaintiff's case?

21. In my humble view, the success of Plaintiff's case dependent not on case law but on proof of her injuries as was pleaded. Furthermore, the plaintiff's counsel caused an adjournment to call a doctor to produce some documents but proceeded to close the Plaintiff's case after she was recalled to merely identify Dr. Okombo's Medical Report and to produce a receipt for Kshs 1,500, paid to the said Doctor. She stated that she had no Xrays but that they were with her advocate.

22. Albeit the Respondent did not seek a second medical opinion to prove that the injuries listed in Dr. Okombo's Medical Report were not genuine, the trial magistrate cannot be faulted for finding that the Plaintiff had only proved the injury contained in the discharge summary being a compound fracture of the tibia fibula left leg. This is because those are the injuries which were confirmed by PW3 who produced the discharge summary from hospital. If there were other serious injuries sustained by the appellant, I find no reason why she never sought for review of her medical documents especially the discharge summary as she had been going to hospital for review.

23. This is that type of case where a court of law must resist the temptation to award a Plaintiff based on sympathy. Indeed I sympathize with the plaintiff that she may have suffered more injuries than those proved but the plaintiff's case was in my humble view, poorly prosecuted. The Plaintiff kept saying documents were with her advocate who never showed them to her in court i.e. Xrays.

24. Albeit Dr. Okombo's Medical Report claims to have referred to treatment notes, physical findings and Xrays as well as the history, the trial court in my humble view, had the opportunity to see and hear the plaintiff' testify and therefore in the absence of treatment notes or P3 form revealing scars mentioned in the evidence of Dr. Okombo's medical report, the evidence of PW3 and the Medical report dated 20.1.2016, which scars could have easily been seen by observation, but which the trial magistrate did not observe and make remarks on what he could see; and having failed to make any such observations, it simply means that he was never referred to the said scars for observations. I find that the trial magistrate cannot be faulted for allegedly awarding damages that were too low compared to the injuries sustained by the appellant.

25. I however do not agree with the Respondent/cross appellant's contention that the plaintiff never proved any injury to warrant the award of any damages.

26. Having found that the only injury proved was compound fracture of the left fibula, the next question is whether, as contended by the appellant herein, the award of Kshs. 600,000/= general damages for pain and suffering was inordinately low for not taking into account the serious injuries sustained by the Plaintiff appellant, or whether as contended by the Respondents/cross appellant, the trial court awarded the Plaintiff/appellant damages that were inordinately or excessively high.

27. To answer the twin issue and question, I must refer to the principles applicable in assessing general damages and whether the court on appeal should interfere with the discretion of the trial court in the assessment of general damages. **Leonard Njenga Nganga & Another Vs Lawrence Maingi Ndeta [2018] e KLR** where the Court, per Odunga J citing several other decisions held:

> ***"As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete, Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:***
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> ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."***
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> ***24. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:***
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> ***"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect… A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country."***
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> ***25. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern***

Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

> ***"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated…The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. 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 and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably 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…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."***

28. Based on the above principles, and having found that the appellant only proved that she sustained injuries involving fracture of tibia-fibula of left leg, and the authorities cited by both parties' advocates in the lower court and in this appeal and considering the fact that the injuries sustained by the claimants in the cases cited by the appellant were more serious than what the appellant proved to have sustained, and whereas the injuries sustained by the claimants in the authorities cited by the Respondent were more mild than what this appellant sustained, I find the award of Kshs. 500,000/= general damages for pain suffering and loss of amenities sufficient compensation for the appellant.

29. Accordingly, the appellant's appeal for enhancement of quantum is found to be devoid of merit. The cross appeal on quantum succeeds only to the extent that the Kshs. 600,000/= general damages awarded is hereby reduced to Kshs. 500,000/= at 100% less 20% contribution leaving Kshs 400,000 general damages. The special damages as awarded by the trial court and which were proved are retained but they do not attract any contribution. Interest shall accrue on the general damages from date of judgment in the lower court whereas specials shall have interest calculated from the date of filing suit in the lower court until payment in full.

30. I order that each party do bear their own costs of this appeal.

Orders accordingly.

Dated, signed and Delivered at Siaya, this 29th Day of May, 2020 via skype owing to Covid 19 situation.

R.E. ABURILI

JUDGE

Mr. Geoffrey Okoth Advocate for the Appellant present

Ms. Nishi Pandit Advocate for Respondent/Cross appellant absent

CA: Brenda Ochieng'