



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 19 OF 2019

PATRISIA ADHIAMBO OMOLO.....APPELLANT

VERSUS

EMILY MANDALA.....RESPONDENT

(Appeal from the judgment and decree of Hon E.N. Wasike, SRM in Bondo PM CC No. 93 of 2017 on 23rd May 2019)

JUDGMENT

1. The Appellant herein **Patrisia Adhiambo Omolo** was the Plaintiff in the lower court in **Bondo PM CC Civil Suit No. 93 of 2017** whereas the Respondent herein **Emily Mandala** was the Defendant.

2. Vide a Plaint dated 10th October 2017, the appellant sued the Defendant for general damages, costs of the suit and interest, arising from a road traffic accident which occurred on 13/8/2016 involving the Plaintiff/appellant herein who was a pedestrian along Opoda - Ndira Road when the Respondent Motor vehicle Registration number KCH 702K knocked her from behind thereby injuring her seriously. The appellant blamed the Respondent, her driver and or agent for the accident by setting out the particulars of negligence.

3. The Appellant also enumerated the injuries that she sustained as follows:

- a) Fracture of the left forearm radius and ulna bones.*
- b) Colles fracture of the left forearm.*
- c) Swollen deformed distal aspect of the left forearm.*
- d) Multiple bodily injuries.*
- e) Injuries on the left forearm with swelling.*

4. The Respondent filed a defence dated 2nd January 2018 denying the claim and in the alternative, attributing the accident to the negligence of the appellant herein.

5. She also denied particulars of negligence and the injuries pleaded by the appellant.

6. A third Party Notice was issued and on 30.8.2018 directions were given that liability of the third party be determined at the hearing and determination of the main suit.

7. A hearing was conducted interpartes on 13/12/2018 with the plaintiff testifying and producing all documents. The defendant however, never attended court at the hearing so the Plaintiff closed her case and filed submissions.

8. Vide a judgment delivered on 23/5/2019 Hon. E.N. Wasike, SRM found the defendant wholly liable for the accident and awarded her Kshs. 180,000/= general damages.

9. Aggrieved by the award of damages, the appellant / plaintiff filed this appeal vide Memorandum of Appeal dated 29th May 2019, setting out the following grounds of appeal:

1. The Learned trial magistrate erred in law and in fact in awarding the appellant damages which were inordinately low and not commensurate with the injuries suffered by the appellant.

2. The learned trial magistrate erred in law and fact in writing a judgment which is at variance with the pleadings, against the weight of evidence and contrary to precedents:

3. The learned trial magistrate erred in fact by failing to appreciate the degree, extent and long term effect of the appellant's injuries thereby awarding the appellant damages which were too low/little in the circumstances.

10. The appellant prayed that this court sets aside the assessment of quantum of damages in Bondo PMCC No. 93 of 2017, make its own findings on quantum based on the pleadings, evidence on record and submissions of the parties and provide costs of this appeal.

11. This appeal was admitted to hearing on 22/7/2019 and on 27/11/2019 directions were issued to the effect that the appeal be canvassed by way of written submissions. Only the appellant's counsel filed written submissions on 11/12/2019 and judgment date was fixed for 23/3/2020 but due to Corona Virus 19 situation the court re-scheduled the delivery of all pending judgments hence this date and both parties' advocates were advised on phone on 6/5/2020 and the judgment date rescheduled to 29/5/2020.

12. In the written submissions dated 10/12/2019 the appellant's counsel set out the grounds of appeal, the duty of this court being the first appellate court as spelt out in **Sielle V Associated Motor Boat Co. Ltd [1968] EA 123** and the principles applicable in assessing damages as stated in various judicial pronouncement among them, **Kemfro Africa Ltd I/A Meru Express Service & Gathogo Kanini V A.M. Lubia & Olive Lubia (1982-88) 1 KAR 727** citing other decisions; **Gicheru V Mortar and Another [2005]2 KLR 333**; **Major General Peter M. Kariuki V. Attorney General CA 79/2012**; **P.N. Mashru Ltd V Omar Mwakoro Makege [2018]eKLR**.

13. On quantum of damages that the appellant was entitled to, the appellant's counsel reproduced the injuries allegedly sustained by the appellant and cited the cases of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko Nairobi HCCA 203/2001**; **Peris Mwikali Mutua V Peter Munyao Kimata Machakos HCCA 28/2007**; **Philip Musyoka Mutua V Leonard Kyalo Mutisya - Machakos HCCA 149/2009** and **Issa Transporters Ltd V. Chengo Panga Tsawa Mombasa HCCA 151/2017**, and urged this court to award the appellant Kshs. 600,000/= General Damages as reasonable compensation.

14. This being a first appeal, this court is inclined to reassess and re-evaluate the evidence adduced in the lower court on quantum of damages and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the Plaintiff /appellant as she testified.

15. This is the principle which is espoused in **Section 78 of the Civil Procedure Act** in **Sielle Vs Associated Motor Boat Co. Ltd** (supra) where the court stated:

“The court must reconsider the evidence, evaluate 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 that respect.”

16. In particular, the court is not bound necessarily to follow the trial judge's finding of fact of it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

17. Revisiting the evidence adduced in the trial court, the appellant testified as the sole witness and closed her case after producing several documents as exhibits in support of her claim. She stated that she was Patricia Adhiambo Omolo from Ajigo, and a farmer. She produced her identity card number 1055807 as PEx1 and adopted her witness statement filed in court as her evidence in chief. She stated that she was involved in the pleaded accident and sustained the pleaded injuries and she was taken to hospital where she received treatment. She stated that she had not healed. The injuries that she particularized in her plaint and witness statement are:

a) Fracture of the left forearm radius and ulna bones.

b) Colles fracture of the left forearm.

c) Swollen deformed distal aspect of the left forearm.

d) Multiple bodile injuries,

e) Injuries on the left forearm with swelling.

She produced as exhibits:

- Inpatient/outpatient continuation chit dated 13/8/2016 as PEx 2(a).

- Treatment note from Bondo District Hospital dated 13.8.2016 as PEx 2(b).

- Treatment note dated 13.9.2016 as PEx 2(c).

- 2 Xray Request Forms as PEx 2(d) and PEx2(e).

- *Treatment Book from Gobes Health Centre as PEx 3.*

- *P3 form dated 22.8.2016 as PEx4.*

- *Police Abstract dated 18.8.2016 as PEx 5.*

- *Copy of Certificate of Insurance as PEx 6.*

- *Demand letter dated 7.9.2017 as PEx 7.*

18. In his judgment, the trial magistrate considered the injuries pleaded and the medical documents produced as exhibits and found that the pleaded injuries were exaggerated as the P3 form showed that the Plaintiff sustained a swollen deformed left wrist joint (radio ulna) and Xray showed fracture of radio-ulna and that all the other medical documents basically resonated with the P3 form.

19. He therefore awarded the Plaintiff Kshs. 180,000/= general damages for pain and suffering. It is worth noting that apart from the P3 form, Xray Request forms and Treatment notes, no Medical Report was produced.

20. It is the above judgment and award which the Plaintiff was dissatisfied with and which is being challenged in this appeal which is not opposed.

DETERMINATION

21. Having considered the grounds of appeal, the evidence before the trial court and the submissions in support of this appeal, in my humble view, the main issue for determination is whether this court should interfere with the award of general damages by the trial court.

22. In **Kemfro Africa Ltd T/A Meru Express Service & Gathogo Kanini V A.M. Lubia & Olive Lubia (supra)** the Court of Appeal stated: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either 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 this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages suffered.”

23. In **Gicheru V Morton and Another (2005)2 KLR 333** the Court of Appeal further stated:

“In order to justify reversing the trial judge’s decision on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.

24. In **P.N. Mashru Ltd V Omar Mwakoro Makenge [2018] eKLR**, the court restated the principles stated above and added that courts have a responsibility to keep themselves apprised of recent authorities, taking into account inflations which has taken a toll on the value of Kenyan Shilling.

25. The appellant in her ground 1 of the Memorandum of Appeal claims that the trial court awarded her damages which were inordinately low and not commensurate with the injuries suffered.

26. Applying the above stated principles to this ground of appeal, the question is whether the award of Kshs 180,000 was so inordinately low that it must be a wholly erroneous estimate of the damages.

27. As earlier stated, the appellant testified as per her witness statement adopted as evidence in chief and produced several medical documents as exhibits onto the injuries sustained by the appellant, it was her duty to prove that she sustained those injuries as pleaded and stated in her witness statement.

28. The accident occurred, undoubtedly on 13/8/2016 at about 12.30 pm along Bondo - Opoda - Ndira murram road - From the Police abstract, two other pedestrians Brigida Agutu and Susan Akinyi died while the appellant herein sustained serious injuries.

29. In the lower court, the appellant’s counsel submitted proposing Ksh. 600,000/= general damages relying on the authority of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros Vs Augustine Munyano Kioko (supra)** where the High Court upheld an award of Kshs. 300,000/= general damages for pain and suffering and loss of amenities where the injuries to a 61 year old Agostino Munyao Kioko involve: Xray showed fracture left radius and ulna bones, he had multiple bleeding bruises on the forehead; deep cut - palm of left hand about 10cm long, 1 cm deep bleeding profusely and a deformed swollen tender left forearm. He was left with deformed painful weak left arm, weakness left hand and contractures of the 1st, 2nd and 3rd fingers on the left hand. A second medical report confirmed the above injuries. It is true that the authority relied on is quite old, decided on 28/7/2006, now close to 14 years ago.

30. Nonetheless, the question is t the appellant proved that she sustained all the injuries as pleaded? According to the initial treatment notes

dated 13/8/2016 obtained from Bondo District, the appellant was received with swollen deformed distal aspect of the radio-ulna wrist joint - left. Xray showed fracture of radio - ulna, and that all other systems were normal. The Xray Request forms of the ulna Radial-left at page 34 of the Record of Appeal shows the report to be colles fracture of the left arm.

31. Colles fracture is defined in medical terms to be a fracture occurring as a result of falling onto wrists in extension. It is a term used for all distal radius fractures. In other words, it is a type of fracture of the distal forearm in which the broken end of the radius is bent backwards.

32. The P3 form shows the injury sustained by the appellant to be fracture of radio-ulna as shown by Xray. The swelling was found to be in the fracture site. The left wrist joint which is the colles fracture. What the assessment above of the injuries sustained by the appellant is that she had one injury which was a fracture in the left wrist joint involving the radius and ulna bones.

33. The other injuries which were disclosed in the initial treatment notes dated 13/8/2016 are "multiple bodily injuries but as to which parts of the body these multiple injuries were and the extent of the said injuries, no disclosure was made.

34. In her evidence in chief, apart from adopting her witness statement and stating that she sustained injuries and that she was taken to hospital where she received treatment, the appellant never disclosed any specific injury by way of emphasis of any of the injuries allegedly suffered.

35. In my own assessment, the only injuries which the appellant sustained and proved are fracture of the left forearm radius and ulna bones also known as colles fracture of the left forearm as demonstrated by swollen and deformed distal aspect of the forearm. These are the injuries which can be generally classified as injuries on the left forearm with swelling.

36. I observe that the appellant cunningly narrated 4 types of injuries as if they are different injuries when those injuries are one and the same.

37. The only other injuries that are different from injuries a, b, c and (e) are (d) which were pleaded being multiple bodily injuries. Regrettably, the appellant was unable to prove the existence of those other "multiple bodily injuries." There is no evidence of where those multiple bodily injuries could be found. For that reason, I find that the trial magistrate did not err when he found that the only injury which resonated with the treatment notes as contained in the P3 form produced as an exhibit is the swollen deformed left wrist joint (radius-ulna) fracture of the radio-ulna bones otherwise known as colles fracture. The swelling of the same part was only but a manifestation of the inner injuries which are proven by Xray report.

38. Accordingly, I decline to find that the trial magistrate erred in fact in failing to appreciate the degree, extent and long term effect of the appellant's injuries. This is so because the appellant never produced any medical report showing the progress or long-term effect of the injuries sustained. She also never testified on how the said injuries had affected her, and albeit she stated that she had not healed at the time she was testifying on 13.12.2018 about 2½ years after the accident on 13/8/2016, she never produced any treatment notes to show that she had been to see a doctor for treatment or follow up after 19/8/2016 when she was seen at Gobei Health Centre when the P3 form was filled on 22/8/2016 at Bondo District Hospital.

39. From the initial treatment notes dated 13/8/2016 the appellant was treated as outpatient and the fracture is indicated as soft tissue injury, albeit the P3 form clarifies the degree of injury as harm, which is erased without a counter signature, and replaced with main.

40. For the above reasons, I do not agree with the appellant in her ground No. 1 of appeal that the trial magistrate awarded damages which were inordinately low or not commensurate with the injuries suffered by the appellant or that the judgment is at variance with the pleadings, against the weight of evidence and contrary to precedents.

41. Even considering the authority cited by the appellant, in my humble view, a proposal for Kshs. 600,000/= for such grossly exaggerated injuries was excessively high. In the said quoted case of **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V. Augustino Munyao Kioko (supra)**, the Plaintiff Respondent had proved that she sustained the following injuries and he also produced a medical report which showed the progress and after effects of the said injuries: see page 2 of 11 of the judgment of the Court of Appeal.

"1. Multiple bleeding bruises on the forehead.

2. Deep cut palm of the left hand about 10 cm long, 1 cm deep,

3. Deformed, swollen tender left forearm,

4. Fracture of left radius and ulna bones. He cannot do any work with the left hand."

42. It was on the basis of the above injuries that the trial Judge awarded Kshs. 300,000/= general damages for pain, suffering and loss of amenities. In the said judgment, the trial Judge also awarded the appellant damages for loss of earning capacity and damages for future medical expenses as well as damages for loss of business. Furthermore, the Plaintiff in the said authority was found to have been admitted in hospital for one week. He was left with some restriction in pronation (internal rotation movement of the left forearm and was unable to make a full fist, which are permanent disabilities. The degree of permanent disability was also assessed to be 20%.

43. In the said cited authority, the appellant's counsel had cited **Narkiso Nyandara V John Nganga Mwaura HCC 5152/88** where Mbogholi J awarded Sh. 100,000 general damages for a cut wound on the left supra orbital region, deformed sublecn left wrist and deep cut on the wrist, fracture of the left ulna and radius lower third. In my humble view, the above authority of **Narkiso Nyandara V John Nganga Mwaura HCC 5152/88** related well with the injuries sustained by the appellant herein. There was no evidence that the appellant sustained

very serious injuries to warrant an award of Kshs. 600,000/= sought by the appellant.

44. I find the award of Kshs. 180,000/= compensation for pain and suffering, adequate compensation, taking into account inflation and time lapse since the other awards in in the cited authorities were made, and considering that in the **Kimatu Mbuvi case (supra)** the Plaintiff sustained more serious injuries that attracted an award of Kshs. 300,000/=.

45. For all the above reasons, I find this appeal challenging quantum of damages awarded by the trial court, being Kshs. 180,000/= for pain and suffering not merited.

46. I dismiss this appeal and uphold the judgment and award by the trial court.

47. As the Respondent did not participate in this appeal, I order that there shall be no orders as to costs.

48. Orders accordingly.

Dated, signed and delivered this 29th Day of May 2020 via Skype due to COVID-19 situation, in the presence of Mr. G. Okoth Advocate for the appellant.

R.E. ABURILI

JUDGE