



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.16 OF 2017

CAROLYNE ODENYO.....APPELLANT

VERSUS

DENNIS NYANGAU *alias* DENIS GETANDA OMATO.....RESPONDENT

(Being an appeal from the Judgment and decree of the Principal Magistrate's Court at Sotik. Hon. Omwanga in Sotik PM CC No.5 of 2016)

JUDGMENT

1. The Plaintiff/respondent filed a suit on the 11th day of January 2016 by way of a plaint seeking general and special damages for injuries he sustained through a road traffic accident which occurred on 2nd October 2015 along the Kisii – Sotik road at a place called Chepilat Trading Centre involving the Plaintiff and motor vehicle registration No.KCC 861N, Mitsubishi Lorry that was driven, controlled and owned by the defendant/appellant when the said motor vehicle lost control and hit the Plaintiff/respondent who was a pedestrian walking on the side of the road.
2. Liability was by consent apportioned in the ratio of 70:30% in favour of the Plaintiff and against the Defendant.
3. After full hearing and determination, the learned magistrate entered judgment in favour of the Plaintiff in the sum of Kshs.850,000/- as general damages and kshs.130,000/- as special damages less 30% contribution.
4. The Appellant being dissatisfied with the Judgment lodged this appeal on quantum. The gist of the appeal is that the sum of kshs.850,000/- as general damages was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.
5. In the Court of Appeal Case of **Bashir Ahmed Butt –vs- Ahmed Khan (1982-88)KAR**, it was held;

“An appellate court will not disturb an award of damages unless if it's so inordinately high or low as to represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence on some material respect and so arrived at a figure which was rather inordinately high or low...”

6. According to the medical report prepared by Dr. Ogando Zoga, the Plaintiff sustained;

- 1) Fracture of the left tibia fibula
- 2) Degloving injury to the head
- 3) Deep cut wound on the face
- 4) Injury to the kidney
- 5) Contusion in the right arm with loss of power

7. The Appellant has framed three issues for determination by this court which are:-

i. Whether the learned trial magistrate erred in law and fact in awarding the Respondent a sum of kshs850,000/- as general damages that was excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent.

ii. Whether the learned magistrate erred in law and fact by awarding a sum of kshs 130,000/- as special damages that were

not supported by evidence or proved to the stand and in law.

iii. Whether the learned trial magistrate erred in law and fact in failing to consider the appellant's written submissions and legal authorities and over relying on the Respondent's submissions thereby arriving at a decision that was plainly wrong.

8. Issue No.1: Is the award of kshs 850,000/- excessive as to amount to an entire erroneous estimate? Counsel for the appellant places reliance on the Case of **Sheikh Nashtag Hassan –vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) eKLR**. Where it was held;

“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 county.”

9. It is submitted that comparable injuries should be compensated by comparable awards.

10. On issue No.2. Special damages of kshs130,000/-

Counsel for the appellant has cited the Case of **Francis Muchene Nthiga vs David N. Waweru (2014) eKLR** where it was held;

“Special damages must be specifically pleaded and strictly proved.”

11. It is the contention by the Appellant that an amount of kshs80,000/- was allowed being treatment costs at Tenwek Hospital and kshs 50,000/ for future medication.

12. It is submitted that kshs.3,000/- being the amount spent in gathering medical report and a receipt for same be allowed as it was strictly proved. That kshs 77,000/- was not strictly proved and therefore should be set aside. It is submitted that awarding damages for future medical costs is irregular and outside the known and established heads of damages under the law of torts.

13. Issue No.3: Failure to consider Appellant's submissions and legal authorities.

It is submitted that the learned trial magistrate over-relied on the Respondent's submissions and arrived at an award which was excessive.

14. The Appellant places reliance in the Case of **Selle& Associated Motor Boat & Co. Ltd & Others (1968) EA 123** and Order 21 Rule 4 of the Civil Procedure Rules. It is submitted that the Respondent has a case on a balance of probability on quantum and special damages.

The Respondent's submission is that the respondent did produce during the trial, a discharge summary from M.P Shah Hospital, treatment notes from St. Claire Kaplong Mission Hospital, Kapkatet Hospital, P3 form and medical reports by Oganda Longa. That the Respondent was hospitalized for four weeks. Permanent degree of incapacity was assessed at 50% and the award of kshs 850,000/- was adequate compensation.

15. It is submitted that it is not correct to state that the learned magistrate did not consider the submissions and authorities by the Appellants and in particular points to the page 109 of the record of appeal where the trial court said both submissions were taken into account.

16. As regards the issue of quantum, it is the Respondent's contention that the award was fair and reasonable. Reliance is placed on the Case of **Nachari Tewologe t/a Nachari Transporters Ltd –vs- Danu Muasya Maingi Machakos HCCA No.190 of 2008** where for the Respondent sustained blunt injury to the chest, fracture of 3 right ribs and haemothorax, blunt injury to the abdomen and that of the liver, deep cut wound on the right upper limb with friction burns, fracture of the right scapula and committed fractures of right tibia and fibula with fracture of the ankle. The trial court awarded kshs.1,500,000/- as general damages and was upheld by the appellate court.

17. The counsel for the Respondent also relies on the case of **Joseph Musee Kaka –vs- Julius Mbogo Musee & 2 Others** where the Plaintiff suffered injury to the left leg, head and face, left leg tibia and fibula were fractured, two broken upper jaw health, chest injury, right shoulder injury, soft tissue injuries and was awarded kshs1,300,000/- in the year 2013.

18. The Respondent also relies on the Case of **Ahmed Mzee Famau t/a Najaa Coach Ltd &Ano. -vs- Veronica Ngii Malindi HCCA No.10f 2015** where the Plaintiff had sustained fracture of the lower jaw (right mandible), deep cut wound on the left forearm, blunt injury to the right ear, chest was awarded kshs.500,000/- in the year 2017.

19. Reliance is also placed on the Case of **Rural Electrification Authority -vs- Shason Ole Leura Narok HCCA No.10 of 2017**. The Plaintiff suffered degloving injury to the scalp, deep cut on the left shoulder, blunt injury to the left knee and dislocation of the left knee and was awarded kshs.500,000/-.

Analysis and Conclusion

20. This is first appeal. It is the duty of the court to re-evaluate and consider afresh the evidence on record. In **Butt -vs- Khan 1977 1KAR** the principles were laid down upon which an appellate court would disturb an award for damages thus:-

“An appellate court will not disturb an award for damages unless it is 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 on

some material respect and so arrived at a figure which was rather inordinately high or low.”

21. It is the contention by counsel for the appellants that the learned trial magistrate failed to take into account their submissions and authorities, as regards the issue of quantum and therefore arrived at an excessive award.

22. A perusal of the judgment by the learned magistrate pg. 109 of the Record of appeal whereby he had this to observe;

“I have considered the authority which the court was provided with by both parties to enable the court to come to a fair assessment of damages, besides, I have considered the suggestions of the Plaintiff which I find to be the high and also that of the Defendant which I find to be too low.”

23. The appellants had submitted for an award of kshs.180,000/- which was found to be too low. Likewise the Respondent had submitted for an amount which was found to be too high. From the above, it's clear that the learned magistrate did bear in mind the submissions by both counsel.

24. I have evaluated the evidence on record and I find that in the circumstances of this case, the award of kshs. 850,000/- being general damages was not inordinately so high as to represent an erroneous estimate.

25. There is no good reason to disturb it. As regards special damages, it is trite that they ought to be strictly pleaded and proved. I am satisfied that the learned magistrate correctly found that they were proved.

25. This appeal has not merit and it is dismissed with costs to the Respondent.

Judgment delivered dated and signed this 4th day of August 2020.

A. N. ONGERI

JUDGE