



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 34 OF 2018

AAA GROWERS LTD.....APPELLANT

-VERSUS-

JAMES GOTINI MOSIGISI.....RESPONDENT

JUDGMENT

AAA Growers Ltd (the appellant) who was the defendant in CMCC 271/2016, is dissatisfied with the judgment of Hon. Momanyi SRM which was delivered on 30/05/2018.

The respondent, *James Gotini Mosigisi*, the plaintiff in the trial court, by a plaint dated 02/11/2016, sought general and special damages from the appellant for injuries he sustained on 31/05/2016 when the appellant's motor vehicle KBP 469E, in which the respondent was travelling as a lawful passenger along Siron – Rumuruti Road, was driven carelessly that it lost control, hit a gate at high speed and caused an accident that resulted in the respondent sustaining injuries.

The appellant was the registered owner of the vehicle and the vehicle was driven by the appellant's authorized driver. The particulars of negligence attributed to the appellant were pleaded at paragraph 5 of the plaint which were inter alia, that the vehicle was driven carelessly at an excessive speed, failed to stop or swerve to avoid the accident, failed to keep a proper lookout and failed to have regard for other road users.

The appellant filed a defence on 08/12/2016 denying being the owner of the subject vehicle or that the respondent was a lawful passenger in the said vehicle or that the vehicle was negligently driven. In the alternative, it was pleaded that if the accident occurred, it was wholly caused or substantially contributed to by the respondent by failing to buckle, failing to sit while the vehicle was in motion, attempting to walk when the vehicle was in motion and denied all the particulars of negligence attributed to it.

The respondent and appellant each called one witness in support of their cases. The trial court entered judgment for the respondent against the appellant on liability at 100% and general and special damages of Kshs.407,000/- which the appellant contends is inordinately high.

The appellant has raised four grounds of appeal as follows;

- 1) That the learned trial Magistrate erred in making a finding and arriving at an award of damages which is inordinately high as to represent an erroneous estimate of damages payable;**
- 2) That the learned trial Magistrate erred in law and fact in finding the appellants 100% liable against the overwhelming evidence on record against the respondent;**
- 3) That the learned trial Magistrate erred in applying wrong principles and failing to take into account relevant fact in arriving at an erroneous award of Kshs.400,000/- being general and special damages of Kshs.7,000/-;**
- 4) That the learned trial Magistrate erred in law and fact in disregarding the appellant's submissions.**

This being the first appeal it is required of this court to exhaustively examine all the evidence tendered in the trial court, analyze it and make its own determination. The court must however bear in mind that it did not see nor hear the witnesses testifying but the trial court did. This court is guided by the principles laid down in *Selle & Another vrs Associated Motor Boat Co. Ltd 1968 EA 123* where Sir Clement De Lestang stated "This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so, it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression

based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

At the hearing, the respondent **James Gotini Mosigisi** testified as PW1. He recalled that the accident occurred on 31/08/2016. He was a passenger in the company’s vehicle at 5.30am while going to work. On reaching Kianugu area, the vehicle was in high speed, failed to brake, hit the gate and they were thrown up as a result of which he was injured on the lower back and head. He was rushed to Nyahururu Hospital where he was treated. He was examined by Dr. Omuyoma who found that he sustained a blunt injury to the lower lumbar – sacral region of the back leading to several tissue injuries. On examination, he found tenderness of the lumbar – sacral region of the neck and assessed the degree of injury as harm.

Although the appellants challenged the trial court’s findings on liability, I agree with the respondent’s submissions that the issue of liability can not be challenged in this appeal because the parties had agreed on 22/11/2017 that CMCC 266/2016, would be the lead file and liability would be determined in that case. The court determined liability in CMCC 266/2016 at 100% as against the appellant. There is no appeal from CMCC 266/2016 and it can not be challenged here. Liability is settled, and this court will only consider the appeal on the issue of quantum. (**See my findings in HCCA 33/2018**).

On quantum, the principles of law to apply on when an appellate court can interfere in an award of damages are settled. The said principles have been applied in many cases – see **Ahmed Butt (Supra)**. **In Loice Wanjiku Kagunda vrs Julius Gachau Mwangi CA 142/200**, the court held “.....assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a whole erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see **Mariga vrs Musila (1984) KLR 257**).”

E.M. Juma, the appellant’s Counsel submitted that the court applied wrong principles and awarded inordinately high damages. Counsel relied on the decision of **Robert Musyoki Kitavi & Coastal Bottlers Ltd (1985) 1 KAR 89**.

Counsel submitted that the award of Kshs.400,000/- was not in tandem with the award of Kshs.400,000/- and that the court failed to consider the appellant’s submission on quantum; That apart from severe soft tissue injuries to the back, the respondent did not suffer any spinal curvature, defects or homological abnormalities; that at one time of his testimony he did not complain of any continuing pain or injury. The appellant’s Counsel submitted that an award of Kshs.60,000/- was adequate compensation for the respondent and relied on the decision of **Mega Spin Ltd vrs Gabriel Otieno (2007) eKLR** where J. Kimani reduced an award of Kshs.80,000/- to Kshs.30,000/- where the plaintiffs finger was chopped off in an industrial accident.

On his part, Mr. Achieng Owour, the respondent’s Counsel, relied on the decision of **Stephen Mburu Maina vrs H. Young & Co. (E.A) Ltd HCCC No.18/2013** where Aroni J. awarded Kshs.800,000/- for impacted fracture to L 1 vertebral bone, tenderness, bruises to the lumbosacral areas and injury to the lower back.

In my considered view, the case cited by the respondent was not comparable to the instant case as the plaintiff therein sustained much more serious injuries than what the respondent suffered. Having taken all the evidence into account, I find that the award by the trial court was inordinately high and constituted an erroneous assessment of damages payable to the respondent considering the fact that the respondent sustained minor soft tissue injuries. I hereby set aside the award of general damages of Kshs.400,000/- and substitute it with an award of Kshs.200,000/- for loss of amenities. There is no dispute as to the award of special damages of Kshs.7,000/- The appeal succeeds to the extent that the respondent will have judgment as follows;

1) General damages	120,000/-
2) Special damages	7,000/-
Total	127,000/-

Since the appeal partially succeeded, the appellant will have ¼ of the costs on appeal.

Dated, Signed and Delivered at NYAHURURU this 29th day of September, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Obura holding brief for Mr. Juma for appellant

Henry

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Court

assistant