



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 56 OF 2017

KIBATHI GITAU.....APPELLANT

VERSUS

JOSEPH KIPLAGAT MAINA.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree in Eldoret CMCC No.

412 of 2011 delivered by Honorable N. TELEWA on 31st March 2017).

1. *KIBATHI GITAU* hereinafter referred to as the Appellant is aggrieved by the judgment of the Resident Magistrate Eldoret in which the magistrate gave judgment in favor of the Respondent herein as follows:-

(a) Defendant found 100% liable

(b) (i) Special damages at Kshs.33,501/-

(ii) General damages Kshs.500,000/-

Total 533,501/-

Costs and interest to the plaintiff

2. The appellant having been dissatisfied with the said judgment preferred an appeal before this court on grounds that:-

- i. The learned trial magistrate erred in law and in fact in finding that the appellant was 100% liable for the accident which was the subject matter of the suit.
- ii. The trial magistrate erred in law and in fact in failing to consider the defendants submissions on the issue of liability.
- iii. The trial magistrate erred in law and in fact in failing to consider the evidence that was tendered by the defence on liability during the hearing of the suit and the submissions filed.
- iv. The trial magistrate erred in law and in fact in finding that the plaintiff was entitled to general damages which were too high in view of the injuries suffered by the plaintiff.
- v. The trial magistrate erred in law and in fact in failing to consider the defendant's submissions on quantum.
- vi. The trial magistrate erred in law and in fact by failing to take into account conventional awards for general damages in cases of similar injuries.
- vii. The trial magistrate erred in law and in fact in calculation of the general damages which were inordinately too high and in failing to consider conventional awards for general damages in cases of similar injuries and circumstances.

3. The appeal was canvassed by way of written submissions. The appellants submitted that the trial magistrate failed to give reasoning behind the awarding of Kshs. 500,000 as general damages and Kshs. 33,501 as special damages.

4. The said general damages awarded are erroneous and exorbitantly high and do not reflect the injuries suffered by the respondent.
5. Further, that the respondent suffered a mere cut wound on the lower limb and a fracture of the proximal part of the left tibia and fibula which injuries were categorized as grievous harm and had healed without any deformation.
6. Lastly, that in most cases, such injuries suffered usually attracts awards between Kshs. 50,000 to 150,000.
7. The Respondent submitted that the evidence by the plaintiff together with the police officer clearly indicated that the defendant was liable for the accident.
8. As a result of the accident, the plaintiff sustained a fracture of the proximal part of the tibia and fibula, cut wound on the lower limbs, swollen left limb and a scar on the interior part of the limb.
9. The amount awarded by the trial court is reasonable and commensurate to the injuries, loss and damages suffered by the Respondent.
10. The appellate Court does not ordinarily interfere with findings of facts by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278* and *Kiruga v Kiruga & Another (1988) KLR 348*.

Issues for determination

11. The main issues for determination are:-

- a) whether the appellant was 100% liable for the accident.
- b) Whether the learned magistrate awarded excessive damages in view of the injuries sustained.
- c) Whether the special damages were proved.

12. The evidence by the Respondent shows that the appellant was joining the main road from a feeder road and did not stop to give way to the road users on the highway and hence caused the accident. This evidence was not effectively controverted by the appellant and the trial court correctly believed in it. Given the position I find that the court well weighed the evidence and rightly found the appellant 100% liable for the accident.

13. Medical reports by Dr. Kubasu and Dr. Kiprono shows that the respondent suffered a cut wound on the left lower limb, fracture of proximal tibia and fibula.

In an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see *Butt vs Khan [1982-88] 1 KAR 1* and *Mariga vs Musila [1982-88] 1 KAR 57*).

15. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries.

16. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*).

17. The respondent in this case suffered:-

- (i) Fracture of the proximal part of the left tibia
- (ii) Fracture of the proximal part of the left fibula
- (iv) Tenderness of the left limb
- (v) Scar on the anterior part of the limb.

Considering the awards in relied on authorities by the respondent, of *HCCA No. 99 and 98 of 2015, Elizabeth Bosibori* and *Sammy Nyambeki -vs- Damaris Nyamache*, where damages for almost similar injuries was 724,653/- and HCCA No. 36 of 2015 where the award was 634,008/-, it's of no doubt that the trial magistrate award in this case was fair and reasonable.

18. Special damages pleaded was 43,801/-. However, what was proved is 33,501 and the court awarded the same.

19. In the premises there is no ground established by the appellant warranting disturbance of the finding on liability and the award of damages by the lower court. The appeal therefore lacks merit and is dismissed with costs to the respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of September, 2020.

In the presence of:-

Ms Sawe holding brief for Mr. Chepkwony for the appellant

Ms Cherono for respondent absent

Ms Gladys - Court assistant