



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO.25 OF 2017

(Being an appeal from the Judgement of Hon.R.Ombata Resident Magistrate in CIVIL SUIT NO.355 OF 2012 in the CHIEF MAGISTRATE'S COURT at KITUI delivered on 12th September, 2017)

KARIUKI KIMULI.....APPELLANT/APPLICANT

VERSUS

DAVID MUNYOKI.....RESPONDENT

J U D G E M E N T

1. **Kariuki Kimuli** the **Appellant** herein has lodged this appeal against the Judgment of Hon.R.Ombata Resident Magistrate delivered on 12th September, 2017 in **Kitui Senior Principal Magistrate's Court Civil Suit No.355 of 2012**. In that suit, the **Appellant** had sued the **Respondent** for tort of negligence as a result of a road traffic accident that occurred on 28th July, 2012 that involved the **Appellant's** Motor Cycle Registration No.**KMCT 413A** and Respondent's Motor Vehicle Registration No.**KBP 367 R**. The question of liability was negotiated and agreed at the ratio 10%: 90% in favour of the **Appellant**.

2. The only question that was left for determination by the trial Court was the issue of quantum. The trial court in that respect found that the **Appellant** failed to specifically plead and prove the injuries suffered. It only found that the special damages of kshs.**2,190/=** had been specifically pleaded and proved.

3. The **Appellant** felt aggrieved and preferred this appeal raising the following namely:-

(i) That the learned Magistrate erred in law and in fact by holding that the particulars of injuries in the medical report were markedly different from the particulars of injuries in the pleadings.

(ii) That the learned Magistrate erred in law and in fact by directing herself on wrong principles and not addressing the correct issues from the pleadings filed.

(iii) That the learned Magistrate erred in law and in fact by failing to make a determination on the award on quantum.

(iv) That the learned Magistrate erred in law and fact by failing to consider contemporaneously the Appellant's pleadings, the oral evidence and documentary evidence tendered.

4. In his written submissions, through his learned counsel **M/s Mulu & Company Advocates**, the **Appellant** contends that he expressly pleaded in his Plain the nature and extent of injuries he sustained and has listed the same as follows:-

(a) Injuries to the head.

(b) Injuries to hand.

(c) Injuries to the right leg.

5. He insists that at the trial he tendered medical evidence (Treatment Card from Kitui General Hospital P Exh. 1a & 1b) P3 form (P Ex.2) and the medical report (P Ex.9) which in his view proved the injuries he had pleaded.

6. The **Appellant** urges this court to interfere with the decision made by the lower court and award him **ksh.900,000/=**. He cites the decision in **Ben Mengesa –VS- Edith Malangu Lande [2013] eklr** to support his prayer stating that the claimant in that decision suffered similar injuries to him and has listed the injuries as follows:

- (a) Blunt injury to the head and both shoulders.
- (b) Blunt injury to the back.
- (c) Injury to both legs with numbness.
- (d) Injury to the chest.
- (e) Post traumatic osteoarthritis of lumber spine.

7. The **Respondent** has opposed this appeal through written submissions of his counsel **M/s. O.N. Makau** and **Mulei** Advocates. The **Respondent** has supported the finding by the trial court contending that the **Appellant** was not entitled to an award in damages because in his view, the Appellant's pleaded injuries which were markedly different from the injuries exhibited through medical reports tendered in evidence. According to the **Respondent** the **Appellant** did not prove the specific nature and extent of the injuries pleaded. He has relied on the decision of **Treadsetters Tyres Ltd –VS- Wekesa Wepukhulu [2010] eklr** to buttress his contention. In that decision, the court held that in tortious claims based on negligence injuries and special damages must be specifically pleaded and proved to be sustained in law.

8. The **Respondent** has further relied on the Provisions of **Order 2 Rule 4** which underpins the decision made Justice Ibrahim in Treadsetters Tyres Case (supra).

9. This Court has considered this appeal and the response made. This appeal relates to **Civil Appeal No.24 of 2017** where this court has given detailed legal requirements given under **Order 2 Rule 4** regarding tortious claims based on negligence. The law requires in such claims injuries and special damages must be specifically pleaded and proved. The decision in Treadsetters has enunciated the principles clearly and for the interest of judicial time I will not go into details because the same has been elaborated in a related **Civil Appeal No.24 of 2017**.

10. I will therefore go straight to the only issue for determination in this appeal which is the question of quantum given that the question of liability was, as observed, settled by consent.

11. The pleadings filed by the **Appellant** in the trial court and the Plaintiff in particular listed the following injuries

- (a) Concussion of the brain.
- (b) Swelling of the left side of the head.
- (c) Haematoma formation in the head.
- (d) Dislocation of the right wrist.
- (e) Crush injury to the right knee.
- (f) Crush injury to the right ankle joint medially.

12. The **Appellant** also pleaded that he suffered special damages of kshs.5,780/= and gave specific particulars as follows:-

- (a) Medical and related expenses – 2,000/=
- (b) Medical report - 2,000/=
- (c) Police Abstract - 2,000/=
- (d) Search Certificate - 1,500/=

Total 5,700/=

13. The medical evidence relied on by the **Appellant** comprised, Treatment chits, doctors evidence, and P3 form. The proceedings from the trial court shows that Dr. Judith Kimiyu testified as Pw2 and told the trial court she examined the **Appellant** and noted the following injuries:-

- (i) **Blunt injury to the head**

(ii) Blunt injuries to right hand and leg.

(iii) Bruises on the knee and ankle joint.

14. She tendered medical report (P Ex.9) which indicates that the **Appellant** had suffered the following injuries:

(i) Blunt injury to the head (swellings)

(ii) Blunt injury to the right hand.

(iii) Blunt injury to the right leg.

(iv) Bruises and swelling to the knee and ankle.

15. The **Appellant** also tendered P3 form (P.Ex.2) which revealed the nature of the following injuries.

(i) Swelling on the left side of the head suggesting haematoma.

(ii) Wrist dislocation of the right hand.

(iii) Swelling of the right knee and ankle joint medially.

16. I have compared the nature of injuries described in the **Plaint** and those highlighted in the **P3** and looking at the two set of injuries apart from brain concussion all the other injuries are similar **Dr.Kimiyu (Pw2)** also clearly described the same injuries in her evidence in court and going through the medical report (**P.Exh.9**) she tendered, I am persuaded that oral evidence in court was in tandem with what the **Appellant** had pleaded. Had the trial court properly directed its mind to the said evidence, perhaps then its conclusion would have been different. I agree with the **Appellant** that given that the evidence adduced by the **Appellant** was not challenged or controverted in regard to what had been pleaded, it was erroneous for the trial to hold that because of one disparity which is in regard to brain concussion the entire claim could not be sustained.

17. This Court takes the view that if a party alleges say 5 types of injuries but at the trial he/she proves only 3 to the satisfaction of the court, then he or she is entitled to be awarded damages on the basis of proven injuries. In that sense since the **Appellant** proved all other injuries specifically pleaded save for brain concussion. He was therefore entitled to damages on the basis of the injuries specifically pleaded and proved.

18. This Court having re-evaluated the evidence adduced by the **Appellant** *visa viz* what he had pleaded, I am satisfied that the **Appellant** was entitled to be awarded general damages for the following injuries:-

(i) Swelling of the left side of the head possible caused by haematoma.

(ii) Dislocation of the right wrist.

(iii) Blunt injury (swelling) to the right knee and ankle joint medially.

19. The **Appellant** has submitted that an award of kshs.900,000/= is fair but looking at the nature of injuries suffered here, the injuries are soft tissue and the doctor (**Pw2**) testified that the injuries had satisfactorily recovered. In my view the authority cited by the **Appellant** in **Ben Mengesa –VS- Edith Makungu Lande** (*supra*) is not relevant to his claim because the injuries suffered in the cited case are far more serious. In my considered view a fair and just award to the **Appellant** in view of the injuries suffered is kshs.200,000/=.

In the premises and for the reasons advanced this appeal is allowed. The decision by the lower court which failed to give any award is set aside and in its place the **Appellant** is hereby award kshs.200,000/= less 10% liability agreed which translates to kshs.180,000/=. He will also have the awarded special damages of kshs.2,190/= costs and interest in the lower court from date of judgment in the lower court and also costs of this appeal.

Dated, Signed and Delivered at Kitui this 19th day of October, 2020.

R. K. LIMO

JUDGE