REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL APPEAL CASE NUMBER 124 OF 2018

MWIFADHI HAMISI..1ST APPELLANT

ROY PARCELS SERVICES LIMITED................2ND APPELLANT

VERSUS

MARY WANJIKU MACHARIA.............................RESPONDENT

JUDGMENT

1. By a judgement dated 28/8/2018 the learned trial magistrate Hon W K Kitur RM gave the following orders as evidenced by the decree issued on 28/8/2019.

That the honourable court enters judgment in favour of the plaintiff as against the 1st and 2nd defendants as follows: -

General damages…………………………Kshs 700,000.00

Special damages…………………………Kshs 2,550.00

Total Kshs 702,550.00

Less 30% contribution by plaintiff… Kshs 210,765.00

Net award Kshs 491,785.00

2. The appellants were aggrieved and filed this appeal. The grounds set out in the memorandum of appeal were.

a. THAT the learned trial Magistrate erred in law and fact in making an award of General damages for minor soft tissue injuries which is manifestly excessive and totally unwarranted.

b. THAT the learned trial Magistrate erred in law and fact in misapprehending and or failing to properly deal with the medical evidence adduced in court, and misapprehending the nature of injuries sustained and law on the award of damages thereby making an award of general damages that is incongruent with the injuries sustained and proved, but also with authority and principle.

c. THAT the trial Magistrate erred in law in totally ignoring the submissions of the appellants on quantum and thereby making an award of general damages that is clearly not compensatory but enriching to the respondent.

d. ***THAT the judgement of the trial court is unreasonable and contrary to law, principle and facts of the case presented before that trial court.***

3. The parties agreed to proceed by way of written submissions.

4. The cause of action arose out of a Road Traffic Accident that happened on 1/9/2015 at about 6.30 am. According to the plaint filed on 25/5/2017, and the plaintiff’s testimony in court, she was walking along Nyahururu/Nakuru Road when the 1st defendant who was driving motor vehicle registration No KCC 9972 negligently drove the same, causing it to veer off the road and to hit her from behind. She blamed

the driver for the accident testifying that she sustained injuries, listed in the plaint as: -

a) Blunt injury to lumber spine leading to lumber spasm.

b) ***Soft tissue injuries to both knee joints***.

She also suffered special damages;

***Medical report**……………………………….2000*

KRA search………………………………………. <u>550</u>

<u>2550/=</u>

She sought both of General Damages and Special Damages, plus costs of the suit.

5. The defendant filed defence on 27/6/2017 denying the plaintiff's claims and that if any Road Traffic Accused happened, she was to blame for among such things walking on the road carelessly. The 1st defendant in his testimony conceded that indeed a Road Traffic Accident did happen but that he was driving carefully on a stretch of road with pot holes when a woman talking on her mobile phone suddenly crossed the road. He tried to avoid her but the body of the canter hit her. He was charged with a traffic offence for which he paid a fine of Kshs 10,000/=

6. An eye witness PW 2 said that she saw the lorry come, driven in a zig zag manner, hit the plaintiff who fell and lost consciousness.

7. Though the doctor did not testify, I found the documentary records and especially the report by doctor Omuyoma dated 3/4/2017. He confirmed from the patient referral form dated 1/9/2015 from Bahati District Hospital, and the P3 of the same date that she sustained the injuries as described in the plaint.

8. She was treated and at the time of examination complained of lower back pain especially while bending. The degree of injury was assessed as harm.

9. A CT Scan of the lumber spine revealed loss of normal lumber lordosis also described as lumber spams, tenderness on palpation, healed bruises on both knees.

10. It is on this evidence and citing the case of **<u>Joseph Musee Mua vs Julius Mbogo Mugt & 3 others [2013] eKLR</u>** stating that;

> ***"Damages must be within set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees."***

And **<u>Ben Menger Versus Lande Kakamega HCCC No 140 of 2010</u>** the learned trail magistrate made the following statement;

> ***"the court upheld on award of Kshs 900,000 by the trial court for the Respondent who had <u>suffered blunt injury to the head, injury on the shoulders and blunt injuries to the back, x-rays showed no fractures and now has low back pain that is chronic and relies on pain killers</u>. Though injuries in this authority are multiple<u>, I find it as being more relevant in this suit."</u>***

10 . The issue for determination are

-whether the general damages were manifesting excessive.

-whether the learned trial magistrate misapprehended the medical evidence hence awarding general damages incongruous with the injuries, authority and principle.

-whether the trial magistrate ignored submissions of appellant on quantum.

11. It is noted that the Road Traffic Accident is not denied as a fact.

12. It is also evident that the assignment of liability at 70%;30% in favour of the respondent was not challenged

13. The only issue is the award of damages. Before the trial court the plaintiff submitted for Kshs 1,000,000/= general damages relying on Kakamega HCA 140 of 2010 **<u>Ben Menger Vs Edith Mukungu Lande [2013] eKLR.</u>** In that case the plaintiff sustained the following injuries:

- Blunt injury to the head, both shoulders
- Blunt injury to the back

- Numbness of the lower limbs
- Tender lumbar sacral spine
- Post traumatic osteoarthritis of the lumber spine
- Injury to both legs
- Injury to the chest

The plaintiff was also hospitalized for 3 days, assessed to have suffered 5% permanent incapacity. The trial court awarded general damages of Kshs 900,000/= which was upheld on appeal.

14. For the defendant it was submitted that Kshs 40,000/= general damages would suffice. Several cases were cited;

"**CIVIL CASE NO. 86 OF 2008 JOSEPH MUSEE MUA –VS- JULIUS MBOGO MUGI & 3 OTHERS [2013] eKLR** where the judge opined that,

> ***"Damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive."***

OSSUMAN MOHAMED & ANOTHER –VS- SALURO BUNDIT MOHUMED CIVIL APEAL NO 30 OF 1997 (unreported) where the court of appeal quoting the case of **KIGARAGARI –VS- AYA (1982-1988) 1 KAR 768** held;

> ***"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form if increased costs of Insurance or increased fees."***

It was submitted that no two cases are the same and decided cases are merely a guide. The court was urged to find guidance in the authorities cited considering the injuries were already healed as noted by Dr. Obed Omuyoma in his medical report. The following cases on quantum were cited for my guidance;

CIVIL APPEAL NO 60 OF 2010 AT NAKURU IN CROWN FOODS LTD –VS EMILY WANGUI [2011] eKLR;

> **"plaintiff sustained soft tissue injuries to the left leg and a cut wound and the court made an award of Ksh 40,000/=".**

CIVIL APPEAL NO 22 OF 2003 AFRICAN HIGHLANDS PRODUCE CO LTD –VS- FRANCIS B MOSOSI [2005] eKLR;

> **Where the respondent sustained a deep cut wound on his right ankle and also sustained bruises on his right leg. … mostly soft tissue injuries which healed well, leaving him only with a scar and no permanent disability. The High Court set aside an award of Kshs 100,000/= general damages by the lower court and substituted the same with an award of Kshs 40,000/=**

CIVIL APPEAL NO 175 OF 2008 SHALIMAR FLOWERS LTD –VS NOAH MUNIANGO MATIANYI [2011] eKLR;

> ***Where the respondent suffered a deep cut on the left wrist joint which healed leaving a scar, soft tissue to the same joint and blunt injury to the anterior chest wall. The doctor accessed the degree of injury as harm. The High Court set aside an award of Ksh. 120,000/= as general damages and substituted the same with an award Ksh 50,000/=***

CIVIL APPEAL 99 OF 2000 AT NAKURU SOKORO SAW MILLS LIMITED –V- GRACE NDUTA NDUNGU HIGH COURT [2004] eKLR;

Where the plaintiff suffered soft tissue injuries to the right hip joint and in the back. The court to reduce the general damages for soft tissue injuries to Kshs 30,000."

15. On appeal the appellant filed 2 sets of submissions- the 1st one dated 16/6/2020 submitted that the respondent if entitled to any damages at all, the sum of Kshs 100,00/= would suffice. Relied on **George Kinyanjui t/a climax coaches and Another Vs Hussein Mahad Kuyale [2016] eKLR** where for similar injuries the court awarded general damages at Kshs 109,890. That the learned trial court had no justification for finding that "*the life of the plaintiff had been adversely affected by the injuries suffered in the Road Traffic Accident*" to support the award of Kshs 700,000/=. The 2nd were the Supplementary submissions dated 27/7/2020 expounding on the previous submissions and confirming that the appeal was on quantum only.

16. For the respondent it was argued that the sum of Kshs 700,000/= was sufficient in the circumstances of the case. More cases were cited;

Rosemary Wanjiru Kungu Vs Elijah Macharia Githinji & another [2014] eKLR, **William Wagura Maigua Vs Elbur Flora Ltd [2012] eKLR**

17. I have carefully considered the evidence, submissions and authorities cited.

18. On the principles to guide an appellate court regarding quantum of damages, I found guidance in the cases cited by respondent;

In the case of **DAVID KIMATHI KABURU VS DIONISIUS MBURUGU ITIRAI [2017] eKLR** the learned judge opined as follows: -

> **"… As a matter of law, assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages.**

See the decision of the court of Appeal in the case of; KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VERSUS A.M. LUBIA AND OLIVE LUBIA, where it was held inter alia that: -

> ***"…the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 high that it must be wholly erroneous estimate of the damages".***

Also the case of **BHUTT –VS- KHAN (1982-88) 1KAR 1** where it was stated that: -

> "***a court of appeal will normally not interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle***". – **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA –VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KAR, 278**"

19. It must be established that the learned trial magistrate;

- Took into account irrelevant factors, or

- Left out of account relevant factors, or

- The amount awarded is so inordinately high or low to amount to an erroneous estimate of the damages, or

- Based the award on no evidence, or

- Misapprehended the evidence, or

- Acted on wrong principle.

20. I am alive to the fact that as an appellate court, I ought not to interfere with the discretion of the trial court simply because I may have arrived at a different assessment.

21. The authorities cited by the respondent were for far more serious injuries.

22. The appellant added more relevant authorities; **NDUNGU DENNIS Vs ANN WANGARI NDIRANGU & ANOTHER [2018 eKLR** where for similar injuries the judge found the award of Kshs 300,000/= to be manifestly excessive and substituted with Kshs 100,000/=.

Similarly, in **PHILIP MUSYOKA MUTUA VS MERCY NGINA SYOVO [2018] eKLR** where for blunt injuries to head, both shoulders, ribs, bank, deep cut wounds to both ankle joints, cut wounds on right knee. Trial court awarded 180,000/= which on appeal was substituted with 108,200/= plus costs and interest.

23. Is this a case up for interference?

The learned trial magistrate relied on a case where the plaintiff has sustained serious injuries, leading to hospitalization and with 5% permanent incapacity. This is incomparable with the injuries sustained by the respondent where there was no evidence of hospitalization/permanent incapacity. She sustained harm basically soft tissue injury. There was no evidence to support the learned trial magistrate finding that the respondent's life had drastically been affected by the injuries she sustained. In her own words, she was on pain killers and the pain was manageable.

The learned trial magistrate clearly misapprehended the medical evidence and the degree of injury. He relied on an authority that led him to what was a manifestly excessive assessment of general damages as compared to the injuries sustained.

What award then?

From the persuasive authorities cited by the appellant, the sum of 700, 000 was manifestly excessive for the injuries sustained. I find that a sum of Ksh 150, 000 would suffice as General damages for the injuries sustained. Add Special damages of Ksh **2550** Total Ksh **107,550** less 30%, contribution it comes to Ksh **106,785.**

The award of Ksh 491, 785 is substituted with the Ksh 106, 785/=

The respondent will have costs and interest at court rates from date of judgement below.

The appellant will have costs of the appeal.

Dated and Signed at Nakuru this 19th October 2020.

Delivered via Email

Mumbua T. Matheka,

Judge.

In the presence of: Edna CA