



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 55 OF 2019

LUCY KAGWERA MWENDA.....1ST APPELLANT

CMC MOTORS GROUP LTD.....2ND APPELLANT

VERSUS

ZACHARIA NJUE NJIRU.....RESPONDENT

(Being an Appeal from the judgment of the learned Principal Magistrate

Hon. H. Nyakweba in Embu CMCC No. 242 of 2018 delivered on 30th August 2019).

JUDGMENT

1. The respondent herein was the plaintiff in CMCC No. 242 of 2018 in which she sued the appellants vide a plaint dated the 22nd day of 2018, in which, she claimed general damages, costs of the suit and interest.
2. His cause of action is based on a Road Traffic Accident that occurred on the 25th day of August, 2018 along Embu – Meru Road at Runyenjes junction near Total Petrol Station. It is pleaded that on the said date, the respondent was riding motorcycle registration No. KMDN 124Z along the said road, when the first appellant’s authorized driver and /or agent drove motor vehicle registration No. KCJ 457N recklessly and/or negligently that, it lost control and hit the respondent thereby occasioning him serious injuries.
3. The particulars of negligence, those of injuries and special damages are set out in paragraph 5 of the plaint. He prayed for orders as set out in the plaint.
4. The appellants filed the defence dated the 2nd of February, 2019 in which, they denied the respondent’s claim. In the alternative, they pleaded contributory negligence on the part of the respondent and averred that if the accident did occur, the same was solely caused and/or substantially contributed to by negligence on the part of the respondent. In addition, they pleaded the doctrine of *Res-Ipsa Loquitur*. The particulars of negligence and those of injuries were also denied and so were those of injuries and special damages.
5. The respondent did file a reply to defence, on the 8th day of February, 2019 in which, he joined issues with the appellants on their defence. He denied any negligence on his part and the particulars of negligence attributed to him in the defence. He urged the court to strike out the defence and enter judgment in his favour as prayed in the plaint.
6. On the 23rd day of July, 2019, parties entered a consent on liability in the ratio of 20:80% in favour of the respondent and agreed to put in written submissions on quantum adopting documents filed together with the pleadings which the parties duly filed. In his judgment delivered on the 17th day of October, 2019 the learned magistrate entered judgment on quantum against the 2nd appellant in the sum of Kshs. 350,000/= and Kshs. 7,250/= as general and special damages respectively less the contributory negligence at 20%, leaving a total of Kshs. 287,250/=. The respondent was also awarded the costs of the suit.
7. The appellants being dissatisfied with the award on damages have appealed to this court vide the memorandum of Appeal filed on the 27th September, 2019 in which, they have set out six (6) grounds of Appeal. Looking at the grounds of appeal, the appellants main contention is on award of general damages at Kshs. 350,000/=.
8. The Appeal was canvassed by way of written submissions which this court has duly considered. The injuries that the Respondent sustained are set out in the medical report dated the 10th November 2018 by Doctor G. K. Mwaura as follows: -

- i. Bruises – head left side

- ii. Fracture – left hand 2nd and 3rd fingers
- iii. Bruises – left hand
- iv. Deep cut wound – left leg
- v. Bruises – left ankle and right knee

9. At the time of examination, he still had pain and tenderness at the sites of injury and he was unable to use his left hand. According to the said doctor, he suffered grievous harm and soft tissue injuries prognosis was fair.

10. A second medical report dated the 4th March, 2019 was also produced which confirmed the injuries sustained by the respondent as set out in the medical report by Dr. G. K. Mwaura. According to the doctor who prepared the 2nd medical report, which was the later in time, the injuries have healed well with a deformity at proximal inter phalangeal joint on left middle finger. He assessed the degree of injury as “maim”.

11. The appeal herein is on quantum of damages and the only issue for determination is whether the learned magistrate used the correct principles in assessing the quantum of damages that he awarded to the Respondent.

12. In their submissions, the appellants submitted that the 2nd medical report by Dr. Ashwin Madhiwala is more instructive of the nature and permanence of the injuries sustained by the Respondent since it was done after the respondent’s injuries and had time to heal. That according to the 2nd report, the doctor only confirmed fracture of the middle finger – proximal phalanx, bruises of the left leg below the left knee and bruises of the right leg. It was their submission that Dr. Madhiwala had only noted a fracture of one finger and not two as alleged by the Respondent. On that basis, they urged the court to award Kshs. 150,000/= as general damages for pain, suffering and loss of amenities.

13. In support of their submission, they made reliance on the cases of **Zipporah W. Wambaira & Others Vs Gachuru Kiogora & Others, Omari Motors Garage Limited Vs John Ochieng Otiende** and that of **Simba Posho Mills Limited Vs Fred Michira Onguti** where sums of Kshs. 50,000/= and Kshs. 150,000/= respectively were awarded as general damages.

14. On the part of the respondent, and in supporting the award made by the trial court, it was submitted that the trial court, considered the evidence tendered by the parties, written submissions and the authorities relied on by the parties. They relied on the cases of **Kennedy Mutinda Nzoka Vs Basco Products (Kenya) Limited [2013] eKLR**, that of **Spin Knit Limited Vs Johnstone Ottara [2016] eKLR**, that of **Joseph Wahome Muturi Vs Municipal Council of Nyeri [2008] eKLR** where sums of Kshs. 210,000/=, 300,000/= and Kshs. 180,000/= respectively were awarded as general damages for pain and suffering.

15. The court has considered those submissions. I have also perused the two medical reports that were tendered in evidence. As submitted by the respondent, awarding general damages is at the discretion of the court. In the case of **Savana Saw Mills Vs George Mwale Mudomo [2005] eKLR**, the court stated as follows: -

I must state from the outset that the award of general damages is a discretion of a trial court and an appellate court will be slow to interfere with such discretion unless the discretion is exercised on wrong principles of law.

16. Similarly, in the case of **Catholic Diocese of Kisumu Vs Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001**, the Court of Appeal reiterated its earlier holding in the case of **Kemro Vs Lubia [1982 – 88]** that;

It is trite that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out some relevant one) or misapprehended the evidence and so arrived at a figure so inordinacy high or low as to represent an entirely erroneous estimate”.

17. The court has perused the two medical reports produced before the trial court. As rightly submitted by counsel for the appellants, the 2nd medical report only captures fracture of one finger, being the middle finger and not two fingers as stated in Dr. Mwaura’s medical report. Dr. Mwaura’s report also capture an additional injury to the left hand which is not shown in the 2nd medical report. This, therefore, means that Dr. Mwaura’s report reflects severer injuries than that of Dr. Madhiwala. Though the medical report by Dr. Madhiwala was done after that of Dr. Mwaura, if there was a fracture of two fingers, the doctor would have been able to capture the same in his report. The 2nd medical report was served upon the counsel for the respondent who did not find it necessary to send his client for yet another opinion in view of the conflicting injuries.

18. In the circumstances, I am persuaded by the appellant’s submissions that the award of general damages in the sum of Kshs. 300,000/= was a bit high considering the injuries sustained by the respondent. In my view, Kshs. 200,000/= would have been a reasonable award. I find the case of **Simba Posho Mills Limited Vs Fred Michira Onguti (HCCA 65 of 2002)** relevant but the court has also taken into account the rate of inflation.

19. In the end, the Appeal succeeds as aforesaid and due to the nature and the circumstances of the case, each party shall bear its own costs of the Appeal.

20. It is so ordered.

DELIVERED, DATED and SIGNED at EMBU this 25th day of November, 2020.

L. NJUGUNA

JUDGE

.....**for the Appellant**

.....**for the Respondent**