



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 42 OF 2018

REBECCA WATARE MUGURE.....APPELLANT

-VERSUS-

JULIUS NDIRANGU WANJERU.....RESPONDENT

(Being an Appeal from the Judgment of Hon. H.Adika (SRM) in the Chief Magistrate's Court at Nyeri, Civil Case No.459 of 2016, delivered on 23rd July 2018)

JUDGMENT

1. The Appellant filed a case in the lower court seeking general damages for personal injuries sustained from a road accident on 30/07/2016 along the Nyeri-Nyahururu road at Kiawara. She also prayed for special damages, costs of the suit and interest.

2. The Respondent filed a statement of defence, denied all the adverse averments in the plaint and called for strict proof of the claim. The matter later proceeded for hearing and judgment was eventually delivered. The learned trial magistrate found the Respondent 100% liable and awarded damages as follows;

General damages.....Kshs.100,000/=

Special damages.....Kshs 3,500/=

Total.....Kshs 103,500/=

3. Aggrieved by the decision, the Appellant filed this appeal and listed 3 grounds as follows;

a) **That**, the learned trial Magistrate erred in law and fact by ignoring and/or not taking into account the submissions and the legal authorities of the Appellant.

b) **That**, the learned trial Magistrate erred in law and fact in making an award which was inordinately low in the circumstances and not commensurate with the nature of injuries occasioned to the Appellant.

c) **That**, the learned trial magistrate erred in law and fact and misdirected himself on points of law.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellant through Mr. Kariuki advocate submits that the trial Magistrate erred by finding that he had no fracture yet the P3 form states otherwise.

6. He faults the trial magistrate for stating (*in the judgment*) that he lacked the benefit of the Appellant's submissions yet the said submissions were duly filed and received.

7. In his submissions before the trial court, he relied on **Nairobi HCCC No. 24 of 2000: Jairus Mwanza Kyove –vs- James Karanja Nguthi** in which the plaintiff was awarded Kshs.300,000/= as general damages. He submitted that the Appellant's injuries were comparable to the ones in that authority.

8. The Respondent through M/s Lucy Mwai advocate on ground (a), submits that the Appellant's submissions were filed out of time and without leave hence probable that they were not in the court file at the time of writing judgment.

9. On grounds (b) and (c), she submits that the trial Magistrate concluded properly that the Appellant's injuries were not as serious as she wanted the court to believe. He contends that the trial Magistrate properly directed himself and rendered a reasoned judgment based on correct points of law.

10. It is also her submission that failure to file and serve a supplementary record of appeal as directed by the court is a fatal defect and the appeal should be struck out. She relies on the case of **Floris Pierro & Anor –vs- Giancarlo Falasioni (2014) eKLR** where the Court held that;

“An appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out as the order or decree appealed from is a primary document.”

Analysis and determination

11. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Another –vs- Associated Motor Boat Co. Ltd & Others 1968 E.A. 123**.

12. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

- a) Whether the appeal should be struck out for failure to include the supplementary record of appeal.
- b) If question (a) is answered in the negative, whether the quantum of damages should be disturbed.

13. On 06/12/2019, the Appellant was granted leave to file a supplementary record of appeal but she did not comply. The relevant provisions with regard to appeals from subordinate courts to the High court are sections 79, 79A, 79B of the Civil Procedure Act and Order 42 of the Civil Procedure Rules (CPR). Strictly speaking, there is nothing in those provisions requiring the filing of a record of appeal but practice and convenience have normalized the filing of such records.

14. I am aware of the different positions in the Court of Appeal and Supreme Court for the reason that the rules of those courts specifically provide that a litigant should file a record of appeal. Accordingly, I am of the view that the strict enforcement of the requirement by those courts is not applicable in the High Court.

15. Further, this appeal has already been admitted to hearing and I do not think the overriding objective of the CPA will be achieved by striking it out at this stage. In any case, the lower Court record has been availed hence no prejudice will be suffered by the Respondent. Accordingly, the appeal should be determined on its merits.

Issue (b) Whether the quantum of damages should be disturbed.

16. The injuries sustained were pleaded as follows;

- a) Swollen/tender right shoulder with fracture dislocation.

17. In awarding Kshs.100,000/= as general damages, the trial magistrate expressed himself as follows;

“On quantum, looking at the P3 form, I note that the plaintiff only has a dislocation and not a fracture in fact how it was managed was that she was put in a sling..”

18. The said P3 form indicates as follows with regard to upper limbs;

“Swollen/tender right shoulder with fracture dislocation”

19. This court has no expertise in medical matters but I do not see the basis of the trial court's conclusion because the P3 is so clear that there was a fracture dislocation. In my view, if the medical expert intended it to be just a dislocation, nothing would have been easier than to omit the word 'fracture'. Further, the same P3 categorizes the degree of injury as 'grievous harm' hence my conviction that indeed the Appellant sustained a fracture. In the circumstances, the award of Kshs.100,000/= was inordinately low as it is usually awarded in cases of soft tissue injuries.

20. As for the Appellant's submissions, it is true that they were filed out of time and it is indeed probable that they were not in the Court by the time the trial magistrate retired to write his judgment. However, they are now on record and this court has an opportunity to look at them. The Appellant's proposal was Kshs.400,000/=.

21. I have considered several other cases and in **M N W –vs- Boniface Musyoka Munyao [2016] eKLR**, the doctor described the Appellant's injury as a simple fracture of the right femur which had healed well. The appellate court opined that a figure of Kshs.200,000/= as general damages would have been reasonable.

22. Similarly, considering the evidence adduced I am confident that the Appellant's fracture can be categorized as a simple fracture. It is therefore my view that an award of Kshs.230,000/= is adequate compensation.

23. The upshot is that the appeal has merit. I set aside the award of Kshs.100,000/= for general damages and substitute it with one of Kshs.230,000/=. I enter judgment for the Appellant in the sum of Kshs.233,500/= plus interest and costs.

- The Appellant will also get costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge