



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 68 OF 2017

OGEMBO TEA FACTORY.....APPELLANT

VERSUS

GEORGE BIRINGI OINO.....RESPONDENT

(Being an appeal from the judgment of the Honourable Principal Magistrate Hon. Naomi Wairimu in Ogembo PMCC No. 72 of 2014 dated 2nd August 2017)

JUDGMENT

1. The respondent, originally the plaintiff in PMCC No. 72 of 2014, sued the appellant following a road traffic accident. His case was that on 8th January 2014, while travelling aboard the respondent's motor vehicle registration KBH 357Q along Eberege-Kenyeny road, the vehicle overturned and he sustained injuries to wit;

- a. **Blunt trauma to the chest;**
- b. **Contusion on the left knee; and**
- c. **Contusion on the left hip.**

2. The parties consented to apportionment of liability at 70:30 in favour of the respondent. This appeal is against the quantum of damages, which the trial court assessed at Kshs. 300,000/= for general damages and Kshs. 6,500/= for special damages.

3. When this matter came up for hearing, Mr. Wesonga, counsel for the respondent referred to the case of *Stanley Maore vs Geoffrey Mwenda Civil Appeal No. 147 of 2002 [2004]eKLR* in support of his submission that there must be uniformity of awards in cases of similar injury. He submitted that when compared to past decisions, the award by the trial court was inordinately high. He urged the court to consider the authorities relied on by the respondent before the trial court and urged the court to reduce the award of general damages to Kshs. 60,000/=.

4. Ms. Sagwe, counsel for the Respondent, countered in support of the award made by the trial court. She submitted that in the medical report dated 28th February 2014, the doctor had indicated that post traumatic arthritis was likely due to joint involvement. She pointed out that no rival medical report had been filed to challenge the said medical report. She submitted that at the trial court, the respondent had relied on the case of *Kenya Power & Lighting Co. Ltd v Mary Akinyi Civil Appeal No. 72 of 2007* where the court upheld an award of Kshs. 350,000/=. Counsel urged the court to uphold the trial court's award and dismiss the appeal.

5. It is not in dispute that after the accident, the respondent sought medical assistance at Kenyeny District Hospital where he was issued with a discharge abstract. He reported the matter to Ogembo police station and was issued with a P3 form and police abstract. He later saw Dr. Ogando Zoga who prepared a medical report which the respondent produced as evidence together with a receipt for Kshs. 6,500/= for the preparation of the report.

6. The said report indicates that Dr. Ogando examined the respondent on 28th February, 2014 and concluded that following the accident the respondent sustained blunt trauma to the chest and contusions on the left knee and left hip. He concluded that the injuries were healing well although post traumatic arthritis was a likely complication due to joint involvement. At the time of his examination by the doctor the appellant complained of pain on the chest and left hip. During trial, he told the trial court that he was still experiencing pain on his chest but he had not gone for further treatment.

7. In determining this matter, I am aware of the general principle that an appellate court will not ordinarily disturb an award of damages unless it is shown that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect as to reach a figure so inordinately high or low. (See *Butt v Khan [1981]KLR 349*)

8. Nambuye J. (as she then was) in **Boniface Waiti & another v Michael Kariuki Kamau Civil Appeal 705 of 2003 [2007] Eklr** outlined the guiding principles in assessing quantum thus;

i. *An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.*

ii. *The award should be commensurate to the injuries suffered.*

iii. *Awards in decided cases are mere guides and each case should be treated on its own facts and merit.*

iv. *Where awards in decided cases are to be taken into consideration then the issue of own element of inflation has to be taken into consideration.*

v. *Awards should not be inordinately too high or too low.*

9. In their submissions before the trial court, the appellant cited the case of **Kipkebe Limited v Thomas Amoro Ngarisa Civil Appeal No. 250 of 2011[2015] eKLR** where the court upheld an award of Kshs. 70,000/= for a deep cut wound and continuing pain on the right leg. The appellant also cited the case of **Socfinaf Company Limited -vs- Joshua Ngugi Mwaura Civil Appeal No.732 of 2003**, where Justice Visram made an award of Kshs.20,000/= for soft tissue injuries. On his part, the respondent relied on the case of **Kenya Power & Lighting Co. Ltd v Mary Akinyi Civil Appeal No. 72 of 2007** where the court upheld an award of Kshs. 350,000/= for a deep cut wound on the calf muscles of the left leg, laceration on the right knee, right shoulder and contusion on the chest.

10. In my view, the injuries suffered in **Kipkebe Limited v Thomas Amoro (supra)**, were mild as compared to those suffered by the respondent in this case, which were of a multiple nature. The case **Socfinaf Company Limited -vs- Joshua Ngugi Mwaura (supra)** was more than a decade old and may not be reflective of the general trend of awards. The trial court appears to have been swayed by the authority cited by the respondent. However, in **Kenya Power & Lighting Co. Ltd v Mary Akinyi (supra)** the plaintiff had suffered a 20% permanent disability.

11. The injuries suffered by the appellant in this case were soft tissue injuries without fracture or residual disability. Dr. Ogando Zoga observed that the injuries were healing well but could not rule out the possibility that the appellant would develop post traumatic arthritis. The doctor examined the respondent in February 2014, about one month after the accident. When the matter was heard, in May 2017, the only complaint by the respondent was pain in his chest. Applying the above principles to this case, I find the award of Kshs. 300,000/= to be on the higher side. I find an award of Kshs. 200,000/= for general damages sufficient.

12. The appellant also contested the award of special damages though the parties did not submit on this issue. The respondent claimed Kshs. 4,000/= for the medical report and produced a receipt for Kshs. 6,500/=. The trial court awarded Kshs. 6,500/= as special damages. I uphold the trial court's decision on special damages as the amount varied slightly with what was pleaded.

13. In light of the foregoing, I set aside the award of Kshs. 300,000/= for general damages and substitute it with an award of Kshs. 200,000/=. The award of Kshs. 6,500/= for special damages is upheld. The respondent shall be paid Kshs. 206,500/= less 30% contribution. That sum shall accrue interest from the date of judgment before the trial court until payment in full. The respondent shall pay costs of this appeal assessed at Kshs. 15,000/=

Dated, signed and delivered at Kisii this 28th day of February 2019.

R.E.OUGO

JUDGE

In the presence of;

Mr. Wesonga For the Appellant

Mr. Nyangacha h/b M/s Kusa For the Respondent

Rael Court clerk