



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 136 OF 2016

ANN NAMULEMBO NYANDO.....APPELLANT

VERSUS

MUNGAI MWANGI.....1ST RESPONDENT

MALNE SIRENGO CHIPO alias

MILNE SIRENGO CHIPO.....2ND RESPONDENT

(Being An appeal from the Judgment and Decree of Hon. S. Telewa, Resident Magistrate, delivered on 23 September 2016 in Eldoret CMCC No. 50 of 2013)

JUDGMENT

[1] This is an appeal from the Judgment and Decree of the Resident Magistrate's Court (**Hon. S. Telewa**) in **Eldoret Chief Magistrates Case No. 50 of 2013: Rose Namulembo Nyando vs. Mungai Mwangi, Malne Sirengo Chipo and David Kamau**. That suit had been filed against the Respondents by the Appellant in respect of injuries sustained by her in a road traffic accident that occurred on **15 July 2011** on Uganda Road in Eldoret Town. The contention of the Appellant before the lower court was that, she was lawfully travelling in **Motor Vehicle Registration No. KAR 048N Nissan Matatu** when it collided with **Motor Vehicle Registration KBD 544W, Mitsubishi Lorry**, thereby occasioning her the injuries complained of.

[2] The Appellant averred that the accident was attributable to the negligence of the 1st Defendant in driving the Matatu, which at the material time, belonged to the 2nd and 3rd Respondents. Accordingly, particulars of negligence were supplied at paragraph 5 of the Appellant's Complaint filed on **25 January 2013**. Thus, the Appellant claimed General and Special Damages from the three Defendants before the lower court, jointly and severally, for her pain, loss and suffering. However, the Appellant thereafter filed a Notice of Withdrawal of Suit on **21 February 2013** in respect of the 3rd Defendant, **David Kamau**.

[3] On behalf of the two Respondents, a Defence was filed by **M/s Magare Musundi & Company Advocates**, denying the Appellant's claim. It was denied that the 2nd Respondent was the beneficial owner of the **Motor Vehicle Registration No. KAR 048N**; or that the said Motor Vehicle was driven in a negligent manner as alleged in Paragraph 5 of the Complaint; or that he caused it to collide with **Motor Vehicle Registration No. KBD 544W** as alleged or at all. In the alternative, it was averred in the Defence that, if an accident occurred then it was solely and substantially caused by the negligence of the driver of **Motor Vehicle Registration No. KBD 544W**. Particulars to that effect were supplied by the Respondents at Paragraph 7 of the Defence.

[4] It was further the averment of the Respondents, at Paragraph 9 of the Defence, that the Appellant was herself negligent and therefore substantially contributed to the accident by failing to fasten her seat belt; by jumping out of the motor vehicle; by inflicting the injuries on herself; by suffering phantom injuries and by being injured while on her own frolics. They accordingly prayed for the dismissal of the Appellant's suit with costs contending that it was untenable in law. The Respondents further gave indication of their intention to enjoin a Third Party, being the driver of the **Motor Vehicle Registration No. KBD 544W**. A Third Party Notice was accordingly issued on **3 February 2014** to **Interlink Limited** (1st Third Party) and **Leonard Isaiah Cheruiyot** (2nd Third Party) and pleadings were subsequently filed on their behalf; whereupon directions were given by the lower court on **23 May 2014** that the issue of liability between the Defendant and the Third Party be determined at the hearing of the suit between the Plaintiff and the Defendants.

[5] The Learned Trial Magistrate, having given consideration to the evidence presented before her as well as the written submissions made by Learned Counsel for the parties, came to the conclusion that the Defendants were fully liable for the Appellant's injuries. The Learned Trial Magistrate then proceeded to assess and award the Appellant **Kshs. 200,000** as **General Damages** and **Kshs. 12,250/=** as Special

Damages for the Appellant's pain, suffering and loss of amenities. In the result, Judgment was entered in the Appellant's favour against the Defendants jointly and severally for the aforesaid sum of **Kshs. 212,250/=** together with costs.

[6] Being dissatisfied with the outcome of the suit, the Appellant filed this appeal on **30 September 2016** against the said Judgment and Decree of the lower court on quantum on the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in the exercise of her judicial discretion on the assessment of damages as to amount to abuse and wrong application of principles on award/assessment of damages;

[b] The Learned Trial Magistrate erred in law and fact in awarding damages that were inordinately low as to amount to gross underestimation of the injuries sustained by the Appellant;

[c] The Learned Trial Magistrate erred in law and fact in failing to appreciate the medical evidence.

Thus, the Appellant prayed that the appeal be allowed with costs and that the damages due and payable to her be re-assessed by this Court.

[7] The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **17 July 2018**. Accordingly, the Appellant's Counsel, **F. Omondi, Esq.**, filed written submissions on **2 August 2018**, contending that a re-evaluation of the evidence on record with regard to the injuries sustained by the Appellant would lead to the inevitable conclusion that the Learned Trial Magistrate made an award that was too low as to amount to an erroneous estimate of the injuries sustained by the Appellant; and that the said award is also outside the range of awards made by various courts for comparable injuries.

[8] For the Appellant's injuries, namely, compound fractures of the right tibia and fibula, the Appellant's Counsel proposed an award of not less than **Kshs. 550,000/=**. He relied on the following authorities:

[a] **Voi High Court Civil Case No. 3 of 2016: Godfrey Wamalwa Wamba vs. Kyalo Wambua**, in which a sum of **Kshs. 700,000/=** was awarded in general damages for compound fracture of the right distal tibia/fibula together with minor soft tissue injuries;

[b] **Mombasa High Court Civil Case No. 597 of 2001: Veronica Mwangeli Kilonzo vs. Robert Karume**, in which the Plaintiff was awarded **Kshs. 500,000/=** in general damages for compound fracture of right tibia and fibula;

[c] **Nakuru High Court Civil Appeal No. 52 of 2008: Peter Ngigi Kamau vs. Philis Kamau Njuguna**, in which the Plaintiff was awarded **Kshs. 500,000/=** in general damages for comminuted fracture of the right tibia and fibula together with minor injuries.

[9] Counsel for the Respondents, on his part, defended the decision of the lower court contending that it was reasonable in the circumstances, taking into account the nature of the case and the evidence tendered before the lower court on the injuries sustained by the Appellant. Counsel relied on **West (H) and Sons Limited vs. Shepherd [1964] A.C. 326** and **Lim PohChoo vs. Cumden and Islington Area Health Authority [1979] 1 AllER 332** for the proposition that awards must be reasonable and fair. Counsel also relied on **Dickson Ndungu Kirembe & Another vs. Theresa Atieno & Others [2014] eKLR** in which an award of **Kshs. 400,000/=** for injuries that included a fracture of the distal intercarpal bone on the right hand, was reduced on appeal to **Kshs. 250,000/=**.

[10] The case of **Kemfro Africa Limited T/A Meru Express Service & Another vs. Aim Lubia & Another [1982-1988] 1 KAR 727** was also cited to support the Respondents' argument that an appellate court will not disturb the quantum of damages assessed by the trial court unless the appellant is able to demonstrate that the court took into account an irrelevant factor or failed to consider a relevant factor or that the award was so inordinately low or so inordinately high that it was a wholly erroneous estimate of the injury suffered. In his submission, the lower court exercised its discretion judiciously and therefore there is no basis for interference with the award made by it.

[11] I am mindful that this is a first appeal; as such, it is the duty of this Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[12] Accordingly, I have perused and considered the record of the lower court and re-evaluated the evidence that was presented therein. The Appellant testified before the lower court on **10 August 2015** as **PW1**. She stated that she was on her way to Eldoret Town on the **15 July 2011** at about 12.00 noon, travelling in **Motor Vehicle Registration No. KAR 048N**; and that on the way, the said motor vehicle was involved in an accident at Clinic Stage on Uganda Road. According to the Appellant, the motor vehicle had stopped at the stage, then some people pushed it backwards, thereby causing it to collide with a lorry that was also heading toward **Eldoret Town**. She sustained a fracture on her right leg and was taken to **Moi Teaching and Referral Hospital** where she was admitted from **15 July 2011 to 21 July 2011**. The Appellant further testified that, upon her discharge, she reported the incident at **Eldoret Police Station** where she recorded her statement and was issued with a P3 Form, which was filled at **Moi Teaching and Referral Hospital**. She then saw **Dr. Aluda** for examination and preparation of a Medical Report. She identified the documentary exhibits presented before the lower court, namely, the Discharge Summary, Invoice and Receipts issued to her at **Moi Teaching and Referral Hospital** as well as the P3 Form and Abstract.

[13] In support of her case, the Appellant called as her witnesses **Dr. Paul Kipkorir (PW2)** of **Moi Teaching and Referral Hospital** and **Dr. Aluda (PW3)**, a private medical practitioner based in Eldoret Town. **PW2** confirmed that the Appellant was admitted at their facility from **15 July 2011** to **21 July 2011** following a road traffic accident; and that she sustained a fracture of the right tibia and fibula. He identified and produced the Appellant's Discharge Summary, Inpatient Invoice and several radiology documents. He also produced the Appellant's P3 Form that was filled by **Dr. Imbengi**, who had since retired. **PW3** on his part told the lower court that he examined the Appellant on **7 January 2013** and was of the finding that she had suffered compound fractures of the tibia and fibula which had healed at the time of examination. He produced his report and the receipt for his fees as exhibits before the lower court.

[14] On behalf of the Defence, **Peter Odoki (DW1)** testified on **1 October 2015** and stated that he was working as the conductor for **Motor Vehicle Registration No. KAR 048N**; and that on **15 July 2011**, they were plying the Maili Saba-Eldoret Town Route. He confirmed the motor vehicle stalled at Clinic Stage in Eldoret Town when the driver stopped to drop a passenger; and that as the driver tried to restart it, a lorry **Registration No. KBD 504W** came and hit their vehicle from behind. He denied that they were trying to push the motor vehicle when the accident occurred.

[15] The Third Parties called two witnesses in support of their case. Their first witness was **Ronald Isaiah Chiroch (DW2)**. He testified that he was driving lorry **Registration No. KBD 544W** along Uganda Road on **15 July 2011** when, on reaching Clinic Junction near National Petro Station, **Motor Vehicle Registration No. KAR 048N** was suddenly reversed onto the road on his path, thereby causing the two motor vehicles to collide. Thereafter the Police were involved; but that he was never charged with any offence as the fault was that of the driver of the other motor vehicle.

[16] The second witness for the Third Parties was **PC Derrick Kiptoo (DW3)** of Traffic Records, Eldoret Police Station. He confirmed that an accident occurred on the **15 July 2011** involving **Motor Vehicles Registration Numbers KBD 544W, Lorry and KAR 048N, Nissan Matatu**; and that the lorry was being driven towards Eldoret Town when on reaching Clinic Stage, the Matatu reversed onto the main road and was hit by the lorry. He also confirmed that as a result of the collision, several passengers in the Matatu were injured; and that after investigations were conducted, the driver of the Matatu was found blameworthy. That he was accordingly charged with the offence of careless driving and was fined **Kshs. 5,000/=** after he pleaded guilty to the Charge. **DW3** further confirmed that the Appellant, **Ann Nyando**, was one of the victims.

[17] Having given due consideration to the evidence adduced before the lower court, there is no disputing that the accident in question did occur in the manner alleged by the Appellant. There was therefore sound basis for holding the Respondents 100% liable to the Appellant for her injuries; and for absolving the Third Parties from blame. Similarly, there was no basis for holding the Appellant liable in contribution as none of the particulars alleged against her by the Respondents at Paragraph 9 of their Defence was proved. Accordingly, the only issue for the Court to determine is whether or not the assessment of damages by the lower court is defensible.

[18] It is trite that assessment of damages is a matter of discretion; and that an appellate court will not disturb an award unless sufficient cause be shown. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court 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 a wholly erroneous estimate of the damages."

[19] The Appellant gave credible evidence before the lower court as to her injuries; namely, that she sustained a fracture of her right leg for which she was confined at **Moi Teaching and Referral Hospital** from **15 July 2011** to **21 July 2011**, while undergoing treatment. Her evidence was corroborated by the evidence of **PW2** as well as the medical documents produced before the lower court. Those documents included the Discharge Summary Form (**Plaintiff's Exhibit No. 2**) and the P3 Form (**Plaintiff's Exhibit No. 5**). Indeed, **Dr. Aluda's** Medical Report dated **7 January 2013** confirms that the Appellant had sustained compound fractures of the right tibia and fibula; and that the right leg was swollen and tender with a cut wound which had largely healed as at the time of examination, save for occasional pains. In the opinion and prognosis of **Dr. Aluda**, the Appellant's injuries were very severe and the ensuing scar would remain a permanent feature on her body.

[20] In the light of the foregoing, the Learned Trial Magistrate expressed herself as follows in assessing the damages due to the Appellant:

"Under general damages the defendant relying on Nakuru HCCA No. 99 of 2003 Sokoro Saw Mills vs. Grace Nduta urged the court to accord Kshs. 50,000/-. The plaintiff on the other hand relied on Mombasa HCC No. 579 of 2001, Veronica Mwangodi vs. Robert Karume and Nakuru HCCA No. 52 of 2008 Peter Ngigi Kamau vs. Philip Kamau Njuguna urged the court to accord Ksh 550,000/-."

I have put this into consideration looking at the nature of the injuries sustained as well as the resulting effect. I find an accord [award] of Kshs 200,000/- as fair and reasonable..."

[21] It is manifest therefore that the Learned Trial Magistrate did not proceed to explain why she was not persuaded by either the Appellant's or the Respondent's proposal. More importantly, she did not give any justification for the award of **Kshs. 200,000/=** as opposed to the **Kshs. 50,000/=** and **Kshs. 550,000/=** proposed by either side, respectively. Nevertheless, having considered the case of **Sokoro Saw Mills Limited vs. Grace Nduta Ndungu** (supra), I would agree that the Trial Magistrate was correct in disregarding the same. The case involved soft tissue injuries and is therefore incomparable to the facts of the instant case.

[22] The cases of **Veronica Mwangeli Kilonzo vs. Robert Karume** (supra), on the other hand, involved compound fracture of right tibia and fibula which was immobilized with an external fixator; and fracture/dislocation of the left ankle. The Court awarded her **Kshs. 500,000/=** as General Damages on **17 June 2003**. Similarly, in **Peter Ngigi Kamau vs. Philip Kamau Njuguna** (supra), in which the Plaintiff sustained a comminuted fracture of the right tibia and fibula along with soft tissue injuries on the left forearm hand and left thigh, an award of **Kshs.500,000/=** was made on **15 February 2011**.

[23] It is manifest therefore that the authorities cited by the Appellant's Counsel were in respect of comparable injuries as the injuries suffered by the Appellant; and therefore the trial court was duty bound to explain why it found the authorities distinguishable. This was not done; and therefore, I am satisfied that the Appellant has demonstrated that the Learned Trial Magistrate misapprehended a material aspect of the case before her and consequently arrived at a figure which was inordinately low in the circumstances.

[24] In support of the appeal and the proposal for an award of not less than **Kshs. 550,000/=**, Counsel for the Appellant relied on the following authorities:

[a] **Voi High Court Civil Case No. 3 of 2016: Godfrey Wamalwa Wamba vs. KyaloWambua**, in which a sum of Kshs. 700,000/= was awarded in general damages for compound fracture of the right distal tibia/fibula together with minor soft tissue injuries;

[b] **Mombasa High Court Civil Case No. 597 of 2001: Veronica MwangeliKilonzo vs. Robert Karume**, in which the Plaintiff was awarded **Kshs. 500,000/=** in general damages for compound fracture of right tibia and fibula;

[c] **Nakuru High Court Civil Appeal No. 52 of 2008: Peter NgigiKamau vs. PhilisKamau Njuguna**, in which the Plaintiff was awarded **Kshs. 500,000/=** in general damages for comminuted fracture of the right tibia and fibula together with minor injuries.

[25] It is noteworthy that Counsel for the Respondents, in their written submissions cited an authority in which an award of Kshs. 250,000/= was made for less severe injuries. The case is **Dickson Ndungu Kirembe & Another vs. Theresa Atieno & Others (supra)**, in which the Plaintiff suffered tenderness in the chest, tender swelling on the right hand in respect of which x-ray showed fracture of distal intercarpal, swelling of the left knee and bruises in the face.

[26] Thus, going by the comparable authorities cited before the lower court, I would consider an award of **Kshs. 500,000/=** to be reasonable and fair award as General Damages for the Appellant's pain, suffering and loss of amenities. Accordingly, I would allow the appeal with costs, set aside the Judgment of the lower court in so far as it related to assessment of General Damages only and replace its award of **Kshs. 200,000/=** with an award of **Kshs. 500,000/=**. The result is that Judgment is hereby entered for the Appellant in the total sum of **Kshs.512,250/=** together with interest and costs. Interest to accrue from the date of the lower court Judgment until payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 20TH DAY OF FEBRUARY 2019

OLGA SEWE

JUDGE