



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.58 OF 2018

WEST KENYA SUGAR CO. LTD.....APPELLANT

VERSUS

ENW (Minor suing through next

friend, guardian and father SWS.....RESPONDENT

[An appeal from the judgment and decree in original Bungoma CMCC 432/2013 delivered on 14.8.2015 by Hon C.L Yalwala Principal Magistrate]

JUDGEMENT.

By plaint dated 19/09/2013, the respondent in this appeal ENW (Minor suing through next friend, guardian and father SWS) sued the Appellant **WEST KENYA SUGAR COMPANY LIMITED** seeking general damages for pain and suffering from injuries sustained in a road traffic accident involving motor vehicle registration number **KBM 239S 620D** and **KBF 409N NEW HOLLAND TRACTOR** owned by the appellant and driven by appellant's driver along Kakamega-Webuye Road. The plaintiff claim was that on or about 28th day of May 2013 the appellant's driver driving motor vehicle registration number **KBM 239 S** recklessly drove the same that it knocked motor vehicle registration number **KBF 409N NEW HOLLAND TRACTOR** that it lost control and hit the Respondent herein and in the consequence thereof the Respondent sustained severe injuries. The particulars of negligence on the part of the appellant were pleaded and nature of injuries sustained tabulated in paragraph 6 of the plaint.

The Appellant in its defence denied any negligence or liability in respect of the accident and averred that the accident was caused solely or substantially contributed to by the respondent. Particulars of the negligence on the part of the Respondent were stated. The appellant in his statement of defence averred that the Respondent caused or substantially contributed to the accident due to the Respondent negligence in failing to have proper lookout for other road users and failing to keep correct side of the road. Appellants also denied particulars of injuries and special damages.

After the close of the respective parties' cases their advocates filed written submissions both on liability and on quantum. The trial magistrate by judgement dated 14.8.2015 found the appellant liable and **Kshs.227,152/=** awarded as damages. The appellant then filed this appeal on the following grounds: -

- i. That the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to wrong conclusion on the same;***
- ii. That the learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and relevant authorities on quantum cited in the written submissions presented and filed by the appellant.***
- iii. That the learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the soft tissues injuries allegedly sustained by the Respondent.***
- iv. The Learned trial magistrate erred in failing to evaluate the evidence tendered judiciously.***

By consent of the parties, this appeal was canvassed by way of written submissions. Counsel Mulama for the appellant submitted that the Respondent sustained the stated injuries and supported by Medical reports prepared by Dr. Mumoki that indicated the Respondent's incapacity was 13%. Dr. Oketch stated in his medical report that she was healed with no incapacity thereof submitted the earlier report was excessive in nature and damages could not be assessed based on it and urged the court to set aside award of **Kshs.280,000/=** and substitute with **Kshs.50,000/=**.

M/s Mumalasi Counsel for Respondent on the other hand filed submissions and submitted that the respondent sustained several serious injuries and the trial court took into consideration the same in arriving at the decision and they also cited supporting authorities which I have

duly considered with regard to the appeal.

This being a first appeal, this court is obliged to reevaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. This is the principle of law that was well settled in the case of **Selle Vs. Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Sarif Vs Ali Mohammed Solan [1955] 22 EACA 270).

Evaluating the evidence on record, I have duly perused the court record and considered written statements and all supporting documents filed in court. The parties agreed on liability and recorded the same at 80% for the appellant and 20% for the Respondent.

With regard to general damage respondent’s witness Washira Shilaro testified that the Respondent sustained injuries on the head, face and left leg and relied on treatment notes from Webuye District Hospital that indicated: -

- i. Swelling on left side of the face***
- ii. Bruises on the nose and bleeding***
- iii. Her left eye had been infected with oedema***
- iv. Traumatic conjunctivitis with reduced vision***

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellants and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is:

- i. Whether the quantum of damages awarded was inordinately excessive in the circumstances of this case.***
- ii. What order should this court make?***

On quantum of damages the appellant complains that the learned trial magistrate erred in law in awarding the plaintiff/Respondent award that was inordinately excessive given the injuries suffered. The respondent on the other hand states trial court awarded the damages basing on severity of the injuries sustained.

It is trite law that a court of law sitting on Appeal can only interfere with an award for damages if the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. The respondent suffered injuries as a result of a road accident. Particulars of the injuries were:

- i. Swelling on left side of the face***
- ii. Bruises on the nose and bleeding***
- iii. Her left eye had been infected with oedema***
- iv. Traumatic conjunctivitis with reduced vision***

The P3 form filled indicated the degree of injuries.

The trial court on 7.7.2011 awarded a sum of Kshs.280,000/= less 20% contributory liability by Respondent on general damages and Kshs.3,940/= on special damages.

In determination of issue on damages awards it is important to note that the assessment of quantum of damages is at discretion of the trial court and this court can only interfere if the damages were excessive or too low in nature during the award, as the trial court took into account extraneous matters or did not consider relevant matters.

It is also important to note that general damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta Vs. Mercy Mutitu Njeru [2014] eKLR** thus:

- 1. “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of***

injuries and comparable awards made in the past”.

I have re-evaluated the injuries sustained and that being the case, I find that the award of Kshs.280,000/= as general damages plus Kshs.3,940/= as special damages and less 20% making a total award of Kshs.224,000/= for such injuries was in the circumstances of this case sufficient to compensate the respondent for the injuries sustained. I have reviewed the entire record at trial and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts interference with the discretion as exercised. I find no merit in the grounds of appeal impugning assessment of general damages and I dismiss the same. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate. The upshot of the foregoing is that I find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and Delivered at Bungoma this 28th day of May 2019.

S.N.RIECHI

JUDGE