



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 509 OF 2014

ERICK OTING'U MURILLA.....APPELLANT

-VERSUS-

JOSEPH MUTHEE NGURE MACHARIA.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable M. W. Murage (Mrs.) (Chief Magistrate) delivered on 30th October, 2014 in CMCC NO. 7661 OF 2008)

JUDGMENT

1. The respondent being the plaintiff in CMCC NO. 7661 OF 2008 filed a suit against the appellant herein on 3rd December, 2008 praying for general and special damages together with costs and interest thereon resulting from injuries sustained by the respondent on or about 31st January, 2008.

2. In brief, the respondent pleaded in his plaint that while lawfully cycling beside the road along Mombasa Road on the abovementioned date, he was knocked down by motor vehicle registration number KAU 868Z being negligently driven by either the said appellant or his driver/agent. According to the plaint, the appellant was sued as the registered owner of the subject motor vehicle.

3. The appellant in his statement of defence while admitting to the occurrence of the accident denied both ownership of the subject motor vehicle and the particulars of negligence set out in the plaint.

4. At the hearing, the issue of liability was settled by way of a consent recorded in the ratio of 70%:30% in favour of the respondent and hence the matter proceeded solely on quantum.

5. Both the respondent and Dr. G.K. Mwaura gave evidence in support of the plaintiff's case and in respect to the injuries sustained by the respondent before closing. The appellant did not call any witnesses.

6. Upon filing of submissions, the trial court rendered its decision in the following manner:

a) General damages-Kshs.650,000/=

b) Special damages-Kshs.3,000/=

Total-Kshs.653,000/= less 30% contribution equals Kshs.458,000/=

7. The aforesaid judgment is now the subject of this appeal. The memorandum of appeal dated 14th November, 2014 raises three (3) grounds, namely:

(i) THAT the learned trial magistrate erred in fact and in law by failing to have regard to the respective times in which the medical reports were made and note that the earliest medical report showed the highest degree of disability prior to the respondent's further recovery.

(ii) THAT the learned trial magistrate erred in the way she weighed the medical evidence and failed to note the minimal permanent disability mentioned in the last two (2) medical reports.

(iii) THAT the learned trial magistrate erred in fact and in law by making too high an award that amounted to a totally erroneous estimate.

8. The appeal was canvassed through written submissions, with the appellant submitting that the learned trial magistrate considered the first medical report by Dr. G.O. Afulo dated 17th October, 2008 which put the respondent's permanent disability at 60% notwithstanding the fact that he has since fully recovered. The appellant further submitted that two (2) medical reports were subsequently made hence the said magistrate ought not to have relied upon the first report abovementioned and should have instead considered the most recent medical report dated 7th April, 2010 prepared by Dr. P.M. Wambugu.

9. It is also the appellant's contention that the learned trial magistrate arrived at an erroneously high award on general damages and without considering the authority cited by the said appellant and his proposed award of Kshs.100,000/=.

10. On his part, the respondent argues that the appellant never called Dr. P.M. Wambugu as a witness and explain the contents of his medical report, hence there was no basis for reliance on his report. He further added that the learned trial magistrate took into account all the evidence tendered before her and having done so, arrived at a reasonable award on general damages. Ultimately, the respondent has urged this court to dismiss the appeal.

11. I have carefully considered the rival submissions together with the respective cited authorities. It is clear the appeal is on quantum and more specifically, the award made on general damages. As required of me, I have also re-evaluated the evidence adduced before the trial court in addition to perusing the impugned decision.

12. I shall move to address the first and second grounds contemporaneously. Incorporated into the record of appeal are three (3) different medical reports: the first by Dr. G.O Afulo dated 17th October, 2008; the second one dated 10th June, 2006 prepared by Dr. G.K. Mwaura; and the most recent report by Dr. P.M. Wambugu dated 7th April, 2010. I have looked at the said reports and established that the respective doctors arrived at relatively similar conclusions as to the nature of injuries sustained by the respondent. The second and third reports also indicated that the healing process has been fair save for occasional aches and pains.

13. Suffice it to say that the variance lies in the final prognosis. In the first medical report, permanent disability is calculated at 60% while the second medical report by Dr. Mwaura indicated no anticipated permanent disability. The most recent report assessed permanent incapacitation at 8%.

14. In her judgment, the learned trial magistrate took into account the prognoses given in the respective medical reports but noted that the medical report by Dr. Mwaura did not indicate the seriousness of the injuries sustained in contrast to the other reports as well as the P3 form dated 18th August, 2008. In view of this, she was persuaded that the injuries sustained were of a serious nature. The learned magistrate also noted the degrees of permanent disability indicated in the reports made by Doctors Afulo and Wambugu.

15. From the foregoing, the question is whether the learned trial magistrate failed to take the time factor between the respective reports into account in addition to the varying degrees of incapacity. Having studied the impugned judgment and medical reports, I would disagree with the trial magistrate's finding that Dr. Mwaura did not give the severity of the injuries for the reason that in his findings, the good doctor noted that the respondent had sustained severe injuries.

16. As concerns the percentage of permanent disability mentioned hereinabove, my view is that while there is nothing to indicate that the learned trial magistrate chose to rely on the permanent incapacity of 60% offered in the initial medical report by Dr. Afulo, she ought to have acknowledged the variance between the initial and third medical reports; there is nothing to indicate that she did so. In the premises, I find merit in the above-referenced grounds.

17. In answering the respondent's argument that the medical report by Dr. P.M. Wambugu could not have been relied on for the reason that he was not called as a witness by the appellant, I have looked at the proceedings attached to the record of appeal which show that in his oral testimony as PW2, the respondent produced the report by the aforesaid doctor as PEXH.5 without calling the doctor's attendance. It thus follows the said medical report was in fact part and parcel of the evidence presented to the trial court and the appellant was at liberty to make reference to it in the circumstances.

18. It now remains for me to address the third and final ground of appeal. I cannot do so without applying the relevant principles on interference with awards. These were comprehensively discussed in *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR* and buttressed in *Butt v Khan (1977) 1 KAR* thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

19. The appellant's third ground of appeal stands on the argument that the award made by the learned trial magistrate was erroneously high and ought to be interfered with for that reason.

20. Guided by the pleadings and medical reports, the respondent is indicated as having sustained the following injuries:

-Blunt head injury and extradural haematoma

-Fracture of the right/left fibula bone

- Swollen and tender left leg

21. Further to the above, I did note from the medical records that the respondent was admitted in hospital for a few weeks and as at the most recent medical report, he continues to suffer occasional aches and pains.

22. The respondent in his submissions before the trial court relied upon the cases of *Gabriel Ochieng v Nyali Beach Hotel – Hccc No.604 of 1992 –Mombasa* and *Stephen Mutisya Muumbi V Peter Mutuku Katuli [2008] eKLR* where the sums of Kshs.1,000,000/= and Kshs.600,000/= were awarded respectively. He therefore proposed the sum of Kshs.1,200,000/=. On his part, the appellant proposed Kshs.100,000/= as a reasonable award of general damages, citing *Peter Njangara Karanja v George Wainaina Njenga & Another HCCC No. 2348 of 1995* where a similar award was made. These were considered by the learned trial magistrate alongside the respective cited authorities. The said magistrate also took into account the injuries established in the respective medical reports.

23. I have looked at the authority of *Peter Njangara Karanja* (supra) cited by the appellant and offer the following view on the same. On the one hand, I find that the injuries sustained therein are comparable to those in the present case. On the other hand however, the case was decided ages ago.

24. I have also taken into consideration the additional authorities cited by the respondent before me. In *Lucy Ntibuka v Bernard Mutwiri & Others [2007] eKLR* where an award of Kshs.500,000/= was made, the injuries sustained were minor in comparison to those in the present instance.

25. Suffice it to say that I noted with keen interest the wide gap in variation on the degree of permanent incapacity between the first and third medical reports. The first report labelled the same at 60% whereas the most recent termed the same as 8%. On the flip side, the doctor who prepared the second medical report did not anticipate any permanent incapacity.

26. On the nature of injuries, it is evident from the medical reports that the respondent sustained a fracture, blunt head injury and a swollen leg. There is nothing from either of the medical reports to suggest that the said respondent stands a high chance of developing any serious health complications such as epilepsy resulting from the head injury. However, there appears to be a variance in the medical reports as concerns the nature of the fracture: the second report which was prepared by Dr. G.K. Mwaura indicates that the respondent suffered a comminuted fracture whereas the remaining two (2) reports termed the injury simply as a fracture.

27. From the foregoing, it is my view that the learned trial magistrate ought to have taken the above circumstances into consideration as a whole in making her award. Given the nature and extent of injuries suffered by the respondent, I am satisfied that the award of Kshs.650,000/= in general damages was excessive. That being the case, I am left with no option but to interfere with the same.

28. In *Stephen Mutisya Muumbi* (supra) and *Samuel Maina Kabago v John Apanja Ondiek & 3 others [2015] eKLR* where the respective courts awarded Kshs.600,000/= as general damages, I find the injuries sustained in both instances to be of a more serious nature in comparison to those in the present instance. To my mind, an award of Kshs.400,000/= would form a reasonable substitute in the circumstances.

29. Consequently, the appeal is hereby allowed and the award of Kshs.650,000/= as general damages is substituted with an award of Kshs.400,000/=. In that case, the total sum to which the appellant shall be entitled reads as follows:

a) General damages-Kshs.400,000/=

b) Special damages-Kshs.3,000/=

Total-Kshs.403,000/= less 30% contribution which equals Kshs.283,000/=.

There shall be no order on costs.

Dated, signed and delivered at NAIROBI this 27th day of June, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent