



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 39 OF 2016

FAIRMILE SCHOOL LIMITED 1ST APPELLANT

CHARLES MUSALIMA 2ND APPELLANT

VERSUS

LUCY W. NJORGE.....RESPONDENT

JUDGMENT

1. This appeal emanates from the judgment of *Hon. D.W. Mburu (PM)* dated 15th January 2016 in which the respondent who was the plaintiff in Milimani CMCC No. 4343 of 2013 was awarded general damages in the sum of KShs.400,000; costs for future medical expenses in the sum of KShs.60,000 and special damages in the sum of KShs.7,150. She was also awarded costs of the suit and interest.

2. The award arose from a claim in which the respondent had sued the appellants for general damages for pain, suffering and loss of amenities as well as special damages in the sum of KShs.7,150 following injuries she sustained in a road traffic accident on or about 11th February 2013.

In her amended plaint dated 3rd December 2013, she averred that she had been travelling as a passenger in motor vehicle registration number KBK 517Q which was owned by the 1st appellant *Fairmile School Limited* and was being driven by the 2nd appellant *Charles Musalima* who was the 1st appellant's driver, servant and or agent. It was the respondent's case that the accident was caused by the sole negligence of the 2nd appellant in the manner in which he drove or controlled the aforesaid vehicle.

3. In their joint statement of defence dated 3rd February 2014, both appellants denied liability. On the date that the trial was supposed to commence, the parties recorded a consent on liability which was adopted as an order of the trial court. Following the consent, judgment on liability was entered in favour of the respondent against the appellants in the ratio of 70:30. The respondent was also awarded special damages in the sum of KShs.7,150. Parties also agreed to have the medical reports authored by *Dr. G.K. Mwaura* and *Dr. P.M. Wambugu* admitted in evidence without calling their makers and to file written submissions to guide the court in the assessment of damages. The medical reports were supposed to be filed together with the parties' written submissions.

4. The record shows that both parties duly filed their written submissions after which the trial court delivered its judgment in which the respondent was awarded the damages aforesaid which are now the subject of this appeal.

5. In their memorandum of appeal dated 3rd February 2016, the appellants advanced six grounds of appeal in which they complained that the learned trial magistrate erred in law and in fact by awarding the respondent general damages which were manifestly excessive and inordinately high; that the trial magistrate awarded the said damages without considering the nature of injuries sustained by the plaintiff, the medical evidence, the respondent's submissions and comparable awards in similar injuries; that the award of damages was so high as to be entirely erroneous. The appellants also averred that the learned trial magistrate erred in law by awarding special damages which had not been specifically pleaded.

6. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellants were filed on 5th March 2019 while those of the respondent were filed on 14th March 2019.

7. This is a first appeal to the High Court. I am conscious of my duty as a first appellate court which is to revisit, reconsider and re-evaluate the evidence tendered before the trial court to arrive at my own independent conclusion on the validity or otherwise of the trial court's decision- See: **Selle & Another V Associated Motor Boat Company Limited, [1968] EA 123** and **Kenya Ports Authority V Kuston (Kenya) Limited [2009] 3EA 212.**

8. The court record shows that no oral evidence was tendered in this case since as noted earlier, parties recorded a consent on liability and agreed that quantum of damages be assessed on the basis of medical reports produced by consent and the written submissions filed by the parties.

9. I have carefully considered the grounds of appeal and the rival submissions filed by the parties. I have also read the material that was placed before the trial court and the judgment of the learned trial magistrate. This being an appeal on quantum only, I wish to start by pointing out that as a general rule, the award of damages is always at the discretion of the trial court. That discretion must however be exercised judiciously taking into account the injuries sustained and comparable awards previously made for similar or comparable injuries.

10. It is now settled that though an appellate court has jurisdiction or power to interfere with a trial court's award on quantum, that jurisdiction should be exercised cautiously. The principles that guide the court in deciding whether or not to interfere with an award of damages by a trial court have been restated in many authorities. For purposes of this appeal, it will be sufficient to name just two of them.

11. In Mariga V Musila, (1984) KLR 251, the Court of Appeal held that:

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles.”

In Kemfo Africa limited t/a Meru Express Services (1976) & Another V Lubia & Another, (1987) KLR 30, the same court expressed itself as follows:

“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 to be that; it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage...”

12. A reading of the trial court's judgment reveals that in arriving at its decision, the trial court considered the injuries the respondent had sustained and the proposals on quantum made by both parties in their written submissions. The respondent proposed a sum of KShs.500,000 relying on Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko, [2006] eKLR where the plaintiff was awarded KShs.300,000 in the year 2006 for what the trial magistrate referred to as similar injuries though the same were not disclosed. The appellants' claim that the learned trial magistrate did not consider the respondent's written submissions and the nature of the injuries sustained by the respondent in making her decision cannot thus be sustained.

13. According to paragraph 6 of the plaint, the respondent sustained the following injuries:

- i. Frictional burns – right temple and neck right side.
- ii. Laceration – right hand – dorsal surface 4 inches long.
- iii. Frictional burns – right hand dorsal surface.
- iv. Deep cut – right middle finger – middle 1/3 dorsal surface.
- v. Pain, swelling and blood loss.

14. Though the parties had indicated that they would annex the medical reports of their respective doctors to their written submissions, it is apparent from the trial court's record that the appellants did not file the medical report prepared by their doctor *Dr. P.M. Wambugu*. Only the report authored by the respondent's doctor *Dr. G.K. Mwaura* was availed to the court.

15. In his report, *Dr. Mwaura* confirmed the respondent's injuries as pleaded in the plaint. The report shows that the doctor examined the respondent on 13th May 2013 and noted that she had scars on the right temple and right hand; experienced pain on the right hand on exertion; she had a contracture deformity on the right middle finger at the middle inter phalangeal joint (finger bent). He opined that the respondent would require surgery to release the contracture at a cost of KShs.60,000 and that the injuries had left her with a permanent degree of functional incapacity on the right middle finger assessed at 30%.

16. I have perused the appellants' submissions in the lower court. To support their proposal of KShs.80,000 for general damages, they relied on two authorities, namely, Lucy Wanjiru Waitaha V Soikoro Plywood Limited, [2004] eKLR where the plaintiff was awarded KShs.80,000 in March 2010 for burns on her left leg. The other authority was Eastern Produce (K) Limited V Edwin Abdalla Wasike, [2012] eKLR where the plaintiff had suffered 3rd and 4th degree burns on the legs, toes and hands. The trial court awarded him KShs.160,000 in general damages which was overturned on appeal and was substituted with a sum of KShs.100,000.

17. Having considered the cases relied on by the parties in their submissions on quantum, I find that the injuries sustained by the respondent were multiple and more severe than those sustained by the plaintiffs in the authorities relied on by the appellants. There is no indication in those authorities including the one relied on by the respondent that the injuries suffered by any of the plaintiffs resulted in any degree of permanent incapacity.

18. In my considered view, given the injuries sustained by the respondent as evidenced by the medical report of *Dr. Mwaura*, the award of KShs.400,000 general damages was reasonable and adequate compensation for the respondent's pain and suffering and loss of amenities. There is no indication from the trial court's judgment that in arriving at his decision, he considered any irrelevant factor or failed to consider a relevant one or that he applied the wrong legal principles. I cannot also say that the amount was either too low or inordinately high to justify an inference that it was based on an erroneous estimate of the damage suffered.

19. For the foregoing reasons, I find no basis to interfere with the trial court's award on general damages and it is hereby upheld. The award of special damages in the sum of KShs.7,150 was agreed upon by the parties in their consent recorded on 24th March 2014 and the same is also upheld.

20. Turning to the award of KShs.60,000 damages for future medical expenses, I note that the appellants did not address the same in their submissions though it was raised in *Dr. Mwaura's* report and the respondent's written submissions.

21. A claim for future medical expenses though it usually features in the claim for general damages is a special damage claim that requires to be specifically pleaded and proved. This position was expounded by the Court of Appeal in *Tracom Limited & another V Hassan Mohamed Adan, [2009] eKLR* where the court held as follows:

“We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it. In the case of *Kenya Bus Services Ltd v Gituma (2004) 1 EA 91*, this Court, stated:

“And as regards future medication (physiotherapy), the law is also well established that although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damage and is a fact that must be pleaded if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal right should be pleaded.”

22. In this case, the claim for future medical expenses was not pleaded in the amended plaint at all though evidence was adduced in support thereof in the form of *Dr. Mwaura's* medical report. Being a special damage claim, it ought to have been specifically pleaded and proved. Since the claim was not pleaded in the plaint, the trial court erred in law in awarding the respondent the sum of KShs.60,000 for future medical expenses. The award was erroneous and is consequently set aside.

23. In the end, the appeal partially succeeds to the extent that the award of general damages and special damages in the sum of KShs.7,150 is upheld. The judgment of the learned trial magistrate is set aside and is substituted with a judgment of this court in favour of the respondent against the appellants jointly and severally in the total sum of KShs.407,150 less the respondent's 30% contribution which amounts to KShs.285,005.

The award of general damages will attract interest from the date of the trial court's judgment while the award on special damages will earn interest from the date of filing of the suit till payment in full.

24. The Respondent is awarded costs of the suit in the lower court. Since the appeal has partially succeeded, each party will meet its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of October, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Anyona holding brief for Mrs. Muchemi for the appellants

No appearance for the respondent

Mr. Salach: Court Assistant