



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 50 OF 2017

JOHNSTONE KOECH.....APPELLANT

VERSUS

ALIWO DALACHA EBREN.....RESPONDENT

(Being an appeal from the whole of the judgement and decree delivered on 19th September 2017 by Hon T. Gesora, SPM, in the Chief Magistrate's Court at Narok in Narok CC No. 76 of 2015, Aliwo Dalacha Ebren v Johnstone Koech)

JUDGEMENT

1. The appellant has appealed the award of Kshs 400,000/= damages in favour of the respondent on the basis that the award was inordinately high and excessive.

2. In this court the appellant has raised three grounds in his memorandum of appeal.

3. In ground 1 the appellant has faulted the trial court in law for awarding Kshs. 400,000/= general damages, which award was inordinately high and excessive for soft tissue injuries. In this regard, it is important to point out that liability was settled by consent with the appellant bearing 80 per cent and the respondent 20 per cent. Furthermore, special damages were agreed at Kshs 15, 980/=.

4. This is a first appeal. As a first appeal court, I am required to independently re-assess the documentary evidence presented by the parties and arrive at my own independent conclusions. I am required to defer to findings of fact based on credibility, unless those findings are inconsistent with the evidence generally see *Peters v. Sunday Post Ltd (1958) EA 424*. The principles governing the re-assessment of damages by a first appeal court are well settled. An appeal court should be slow to reverse the damages awarded by a trial court unless it is shown that the court took into account an irrelevant factor or it failed to take into account a relevant factor. It may also interfere where it is shown that the award is manifestly excessive or is inordinately so low as to represent an erroneous estimate of the damages. They have been approved in many cases among them the following. *Kemfro Africa t/a Meru Express & Another v A. M. Lubia & Another (1982-88)1 KAR 777*, *Selle Another v Associated Motor Boat Co. & others (1968) EA 123*, *Peters v. Sunday Post Ltd (1958) EA 424*, *Butt v Khan (1981) KLR 349 and Watt v Thomas (1947) AC 484*.

5. In the instant appeal, the issues of credibility does not arise as no witnesses testified during the trial. The issue of liability was agreed by consent and the assessment of quantum of damages was by consent done on the basis of the medical reports.

6. According to the report of Dr. Ezekiel Ogando Zoga, the respondent suffered the following injuries.

- Contusion on the scalp left side
- Contusion on the left ear
- Cut on left temporal area
- Blunt trauma on the back
- Contusion on the chest has difficulty in breathing.

7. As at time of re-examination on 31st January 2015, the respondent complained of pain on the chest and back and hearing loss on the left ear. The doctor concluded that following the road accident, the respondent sustained soft multiple injuries, which had not yet healed. The doctor also found that he had developed pneumonia due to poor chest mobility and therefore needed pain killers on and off. He also found that loss of hearing needed to be followed up because it was likely to be permanent.

8. The respondent had been examined much earlier on 10th January 2015 by Hami Healthcare and Laboratory Services, who found the same injuries. This examination found that the respondent did not lose conscious as a result of the accident.

9. Counsel for the appellant submitted that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. Counsel the cited among other authorities, **George Mugo & Another v A K M (a minor suing through the next friend and mother of A K M [2018] eKLR** in which the High Court awarded Kshs 90,000/= as damages for soft tissue injuries. He also cited **Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR** in which the High Court reduced an award of Shs 300,000/= to shs 100,000/= for soft tissue injuries, after finding that the award by the lower court was manifestly excessive. Counsel therefore submitted that the award of shs 400,000/= be reduced to between shs 90,000/= and shs 120,000/=

10. Counsel for the respondent submitted that the award of shs 400,000/= is proper. He cited amongst other, authorities the case of **Francis Ochieng & Another v Alice Kajimba [2015] eKLR** in which the trial court awarded shs. 500,000/=for soft tissue injuries with no permanent disability anticipated and the High Court reduced the award to shs 350,000/=. The injuries sustained by the plaintiff therein were less severe compared to those sustained by the respondent herein. Counsel also cited **Catherine Wanjiru Kingori & 3 Others V Gibson Theuri Gichubi [2005] eKLR** in which the court awarded shs 300,000/= and shs 350,000/= respectively to the plaintiffs, who had sustained soft multiple tissue injuries but with no permanent disability anticipated. Counsel therefore urged the court to dismiss the appeal with costs.

11. I have independently re-assessed the medical evidence, and the submissions of both counsel and the authorities they cited. This is a first appeal. As a first appeal court, I am required to independently re-assess the evidence tendered at trial and make my own independent findings. I am also required to take into account the inflationary trends. I have done so.

12. With the foregoing principles in mind, I now turn to the grounds of appeal. I will consider all the grounds together since they relate to faulting the trial court for awarding a manifestly high and excessive award in respect of soft tissue injuries, and for ignoring the appellant's submission on the quantum of damages and finally for making findings that are not supported by evidence. I find that the lower court relied on the case of **Francis Ochieng v Gabriel Ongele Ogolla supra**, in which the plaintiff suffered the following injuries.

- a cerebral contusion with loss of conscious for two hours.
- massive haematoma on the right parietal head.
- subconjunctual haematoma of the right eye.
- peri-orbital ecchymosis.
- nuckial stiffness.
- cut wound on the right hand and the right knee.

Additionally, the respondent therein was hospitalized for six days and then discharged.

13. I find that the lower court failed to take into account that the respondent in the instant appeal did not lose his consciousness for two hours following the road accident as did the respondent in that case. He also did suffer any other permanent disability; other than what the examining doctor found to be a likely loss of hearing that needed to be followed up. This loss, the doctor found was likely to be permanent. I find on the evidence that this is not a permanent disability. Again this was not considered by the trial court. It therefore follows that I am entitled to interfere with the award of the magisterial court for failing to take into account the injuries sustained by the respondent in that which case were more serious than those sustained by the respondent herein. The submission of counsel for the respondent that the injuries sustained by the plaintiff in **Francis Ochieng v. Gabriel Ongele Ogolla, supra**, were less serious is not correct.

14. The appeal is therefor allowed with the result that the magisterial court judgment in respect of general damages is substituted with an award of shs 140,000/= subject to the agreed contribution making a sum of shs 112,000/=.

15. The appellant shall have the costs of the appeal.

Judgement signed, dated and delivered in open court at Narok this 24th day of October, 2019 in the absence of both parties and in the presence of Mr. Kasaso, Court Assistant.

J. M. Bwonwong'a

Judge

24/10/2019