



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 226 OF 2016

CHARLES KIMUNYA.....1ST APPELLANT

DANIEL NDUNGU GITAU.....2ND APPELLANT

-VERSUS-

ROSE MUENI MAINA.....RESPONDENT

(Being an appeal from the judgement delivered by Hon. Lilian Arika (Mrs) (SPM), delivered on the 5/4/2016.)

JUDGEMENT

1. The Plaintiff was the Respondent in the lower court. She sued Appellants who were Defendants in the trial court following a road traffic accident that occurred on 15/2/2010 that led to her sustaining injuries as she was at Muthurwa Bus terminus awaiting to board a motor vehicle.
2. The 1st Appellant was sued as registered owner of motor vehicle KAR 945S while the 2nd Appellant was sued as beneficial owner of asset/servant of the 1st Defendant/Appellant. The Defendant/Appellant denied the claim.
3. The parties did on liability recorded consent on basis of 75% to 25% in Respondent favour.
4. The matter was heard fully on quantum and the trial court made a judgement to the effect that;
 - i. General damages Kshs.900,000/=
 - ii. Damages for diminished earning capacity Kshs.650,000/=
 - iii. Costs and interest.
5. The Appellant were not happy with the aforesaid verdict thus filed instant appeal and set out 3 grounds;
 - 1. The learned trial magistrate's Judgement was unjust, against the weight of evidence and was relied on the wrong principals of law and thereby occasioning a miscarriage of justice upon the Appellants.**
 - 2. The learned magistrate erred in law and in fact in awarding general damages of Kshs.900,000/= and diminished earnings of Kshs.650,000/= that was excessive and unjust in the circumstances considering the nature of injuries and the conventional awards in relation to such injuries.**
 - 3. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice in awarding damages for diminished earnings when in fact the Respondent failed to specifically plead and prove the same.**
6. The parties were given directions to file submissions to canvass appeal.

ISSUES:

7. After going through evidence on record and parties' submissions, I find the issues are;

i. Whether the award in general damages was excessive and inordinately high to warrant interference by the court?

ii. Whether award on diminished earning was justified in the instant case?

ANALYSIS AND DETERMINATION:

8. This is a first appeal and the court has to evaluate the entire evidence afresh and make its own conclusion. The parameters upon which this court can interfere with the finding of the trial court are well established. In the case of *Butt vs Khan (1981) KLR 349* the court held as follows:-

“The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at misconceived estimates.”

9. Similarly, in the case of *Shabani vs City Council of Nairobi (1985) KLR, 516*. The Court of Appeal equally held as follows:-

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence.”

10. On general damages for pain and suffering the appellants' complain firstly, that the trial court accepted the respondent's evidence that she sustained back injury against the evidence of the appellants' doctor, and secondly that the award was high in any event.

11. On the issue of whether or not there was a back injury, they have alleged that there was no mention of trauma to the back on the discharge summary and P3 form; that, the injury to the back must have been a pre-existing condition.

12. However, the discharge summary talks of tender pelvic region; and P3 form records that there was narrowing of disc spaces of T11 and T12.

13. Questioned on the trauma at the back on his report visa viz the discharge summary Dr. Wokabi clarified that whereas the word “trauma” was not used by Kenyatta National Hospital, the discharge summary indeed indicates a back injury. He further asserted that the discs at that level could not just occur without an injury to the back.

14. What about the allegation by Dr. Theuri that, it was a pre-existing condition suggestive of degenerating disc diseases? Dr. Wokabi made the distinction between the two conditions by stating that the degenerating disc disease affects the spine generally, and not confined to two discs as in the present case.

15. Dr. Theuri gave no basis for claiming that the disease was pre-existing. As asserted by Dr. Wokabi, there must be a basis for arriving at a finding that the pre-lapsed disc was a pre-existing condition.

16. Neither Dr. Theuri in his report nor DW1 as his representative provided a basis for such a finding. Dr. Wokabi confirmed that he looked at the x-ray film. Dr. Maina admitted that she did not know whether Dr. Theuri looked at any report and indeed Dr. Theuri's report is silent on whether he viewed the x-rays or not.

17. On the two varying opinions, the respondent submit that, as rightly observed by the honourable magistrate, Dr. Wokabi's qualification and experience are superior compared to Dr. Theuri or Wainaina making Dr. Wokabi opinion more persuasive.

18. Dr. Wokabi told the court that he was a consultant surgeon with a Master's Degree in Medicine while Theuri and Wainaina are General Practitioners with First Degree in Medicine. Dr. Wokabi told the court that he had 40 years' experience while DW1 told the court her and Dr. Theuri qualified in the year 1999.

19. The respondent told court that she had no problem with her back prior to the accident. The respondent testified that she was hit from the back by one vehicle and thrown onto another vehicle which was in front of her, evidence which was neither contested nor rebutted.

20. The respondent's injuries, as correctly observed by honourable magistrate again were very consistent with the manner in which the accident occurred as narrated by the respondent. The first vehicle caused the back injury; the impact on the 2nd vehicle tore up her abdomen, a rather inevitable albeit unfortunate outcome.

21. It is significant to note that the manner in which the accident occurred was not contested at cross examination. It is the respondent's submission therefore that the honourable magistrate did not error at all in finding Dr. Wokabi's evidence more persuasive regarding the question of whether the back injury was a pre-existing condition or not as his evidence was corroborated by the respondent's testimony, the discharge summary, the P3 form and the circumstances of the accident itself.

22. On whether the award was too high in any event to warrant a downward revision by the appellate court, in support for a claim for damages under this head, the respondent, apart from her oral testimony produced a discharge summary from Kenyatta National Hospital and P3 form. She also called Dr. Wokabi as a witness, who testified and produced the medical report.

23. A summation of these testimonies show that the respondent suffered intra-abdominal injuries causing a tear of the mesentery and collapse of disc T11 and T12.

24. According to Dr. Wokabi in both his report and oral testimony in court the respondent sustained intraabdominal injuries which caused a tear in the mesentery. Major back injury which caused narrowing of disc spaces at T11 and T12 signifying collapse of the discs.

25. At the time of examination, the doctor observed that the back muscles were spastic; she could not bend her back full range, because of the back muscle spasms. In the opinion part of the report, Dr. Wokabi opined as stated below. The injuries were major. A tear of the mesentery can cause life threatening blood loss if not treated by surgery in good time.

26. In this case the respondent was lucky as she received emergency surgical intervention. Indeed according to the discharge summary from Kenyatta National Hospital and which fact was picked by Dr. Wokabi in his report the respondent was indeed pale and sick looking on admission at the hospital.

27. He opined that the respondent could not do any work involving the straining of abdominal muscles for the next 4-5 years with the risk of developing hernia if she did such work. She is predisposed to life threatening intestinal obstruction.

28. The back injury caused the collapse of T11 and T12. Recovery of back injury will never be fully achieved. Assessed permanent disability at 20%. The doctor who filled the P3 form described the injuries as “*grievous harm*”.

29. The respondent drew the attention of the court to where the respondent stated, **“if I stand like today, I have to use hot heater (water?) to treat the back.” Just before that within the same paragraph, she had just told the court, “I am not healed, I cannot bend, I eat little food, I can’t do work due to back pain; when I sleep I have to lie on hot water bottle...”**

30. Therefore, the magistrate’s observation that, “*she was still standing as she testified*” or that “*she has recovered*” cannot be taken to be conclusive of the condition of the respondent at the time of the hearing and also in the light of the Dr. Wokabi’s prognosis.

31. She invited the court to review and make its own finding in this regard in the light of: what the respondent was feeling as given in her oral testimony and which testimony was not challenged at cross examination; and The doctor’s own prognosis such as, **“she is predisposed to life-threatening intestinal obstruction.... recovery from collapse disc is never achieved....and assessment of permanent disability of 20%”.**

32. The respondent cited the following past decisions in support of her submissions:

In the case of ***Kenya Power & Lighting Co. Ltd [2016] vs Kenneth Lugalia Imbugua eKLR*** – The intra-abdominal injuries in the above case were to the liver and gall-bladder. The then doctor noted that one could live normally without a gall-bladder while the liver a portion of which had been cut off will regenerate.

33. The risks were similar as in the present case namely; the risk of intestinal obstruction and development of hernia; permanent disability was 15% compared to 20% in this case. The High Court upheld the lower court award of Kshs. 700,000/=.

34. The injuries in the present case are more serious as there are the additional injuries of prelapse of the two discs and permanent disability is higher at 20%. The award was made three years ago, and bearing in mind consideration of inflation Kshs.900,000/= cannot be said to be too high.

35. In the case of ***Abdi Haji Gulleid vs Auto Selection Ltd & Another [2015] eKLR*** – The respondent sustained a compressed fracture of L1, being the only injury, with permanent disability of 25%. The High Court awarded Kshs. 750,000/=.

36. Although the injury to the back was a fracture, it is to be noted that it was the only injury unlike in this case where there is the additional abdominal injury as aforesaid. The decision was also made 4 years ago.

37. Turning to the appellants’ cited authorities, they invited the court to consider the following awards:

In ***Mwavita Jonathan vs Silvia Onunga [2017] eKLR*** the High Court – **Justice Manjanja** awarded Kshs. 400,000/= where the claimant sustained left hip comminuted intertrochanteric fracture, blunt chest injury dislocation right knee joint, sprain of the cervical spine of the neck and the lumbar sacral spine of the back and they urge the court to review the award in the instant appeal.

38. Also ***Gabriel Kariuki Kigathi & Another vs Monica Wangui Wangeci [2016] eKLR*** where the respondent suffered fracture of the neck, bilateral rib fractures, bilateral lung confusion, injuries to both hands, injuries to both legs, fracture C2, fracture cervical spine and fracture of right ankle was awarded Kshs. 800,000/= by the lower court and on appeal reduced to Kshs. 400,000/=.

39. In the case of ***John Kamore & Another vs Simon Irungu Ngugi*** where a respondent who suffered a blunt injury to the posterior part of neck which resulted to a fracture of the cervical spine and consequently weakness the partial paralysis was awarded Kshs. 500,000/=.

40. The respondent submits that, they have no bearing to the injuries suffered by the respondent. This court agrees wholly. The respondent submitted that in the light of the seriousness of the injuries sustained the award was reasonable damages it was not inordinately high to warrant any review by this court. This court also agrees with respondent submission above.

41. On damages for diminished earning capacity, contrary to the appellants' assertion that this claim was not proved, the following would show that the claim was indeed proved.

42. She testified that she used to work as store-keeper. She produced a letter for her then employment and the letter states in part, **"Rose had an accident on 15th February 2010 at Muthurwa Bus Park, where she was seriously injured and thus she could not continue with employment with consumer choice."** The letter records that she was earning a salary of Kshs. 20,800/=.

43. She testified that, **"I cannot do work due to the back pain.....my work was to carry goods from the store to motor vehicle, I would also do offloading....., I can no longer do that work, I feel pain when I stand for long....., I have not gone back to place of work, I cannot do any household work.....If I stand for long like today, I have to use hot water to treat the back....)."**

44. Dr. Wokabi in his opinion in his report stated, **"she has not fully rehabilitated, she was advised not to do work that would strain abdominal muscles for 4 to 5 years."**

45. Contrary to the appellants' counsel submissions therefore, loss of earning capacity was adequately proved. She was incapacitated and the incapacitation was projected for up to 5 years. The respondent had pleaded for loss of earning capacity for 5 years which is the projected period by the doctor as she would be out of work.

46. The courts also have the liberty to apply the global or mathematical approach where calculating loss of earning. The honourable magistrate in this case took the former approach, while relying in the case of *Mumias Sugar Company Ltd vs Francis Wahalo*, which the respondent relied on in the lower court.

47. She relied on the same authority for purposes of these submissions. The court had made a global award of Kshs. 500,000/= in the year 2007, and therefore the award of Kshs. 650,000/= twelve years later was apparently low in the circumstances. The court also agrees on respondent submissions on this item.

48. Thus the court holds that **the appeal has no merit and makes the following orders;**

i. The appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE