



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 1 OF 2018

PAUL MAGEKA NYACHOTI.....APPELLANT

VERSUS

TOMBE TEA FACTORY CO. LIMITED.....RESPONDENT

{Being An Appeal Against the Judgement of Hon. E. K. Nyutu – PM Nyamira dated and delivered on the 15<sup>th</sup> Day of December 2017 in the original Nyamira Chief Magistrate’s Court Civil Case No. 185 of 2012}

JUDGEMENT

This is an appeal on the quantum of damages awarded to the appellant pursuant to a claim for compensation for personal injuries as well as material damage following a collision involving motor vehicles kak 910w which was being driven by the appellant and motor vehicle KBH 703c which belongs to the respondent. The Trial Magistrate’s apportionment on liability is not disputed.

The gist of the appeal is that the trial magistrate erred in not awarding the appellant damages for the personal injuries whereas the claim had been proved. This court is also urged to find that the appellant was entitled to special damages of kshs. 7,000/= for the medical report as well as kshs. 22,000/= for towing charges. The court is urged to revisit the judgement of the lower court and to consider the nature of injuries and award damages for pain, suffering and loss of amenities in the sum of kshs. 500,000/=.

In opposing the appeal, counsel for the respondent has submitted that this appeal is incompetent for being filed out of time without leave of the court the judgement of the trial court having been delivered on 15<sup>th</sup> december 2017 and a decree thereto issued on 15<sup>th</sup> january 2018. The court is urged to dismiss the appeal with costs to the respondent.

I Have Considered The Rival Submissions In The Appeal And Also Perused The Record Of The Lower Court. I note from the record of the proceedings that the judgement in issue in this appeal was delivered by Hon. M. O. Wambani on 15<sup>th</sup> december 2017 (**see page 48 (in red) line 10 of the record of appeal**). It is also clear from the record that the appeal herein was filed on 9<sup>th</sup> january 2018 as evidenced by the memorandum of appeal and receipt thereof being No. 0681838, hence less than the thirty days reserved for filing of appeals by **section 79g of The Civil Procedure Rules**. What was filed on 5<sup>th</sup> december 2018 is the record of appeal and that is excusable given that the appeal itself was admitted on 15<sup>th</sup> november 2018. the submission that the appeal is incompetent is therefore erroneous.

On the merits, i agree with counsel for the appellant that the trial magistrate misdirected herself when she failed to make an award for pain, suffering and loss of amenities on the ground that no evidence was adduced under that Head. The record shows that when parties appeared before the trial magistrate j. njoroge on 12<sup>th</sup> march 2014 a medical report was produced by consent and marked Exhibit 6 (**see page 32 of the record of appeal**). The appellant had himself testified before the same magistrate on 15<sup>th</sup> may 2013 (**page 27 of the record of appeal**) and stated that he lost consciousness after the accident and was rushed to hema hospital. He also stated that he sustained injuries on the chest, head, left leg and left hand. On the day he gave evidence he told the court that he continued to experience pains in the right leg when walking and was on pain killers. He testified that he had been examined by one dr. raute and was candid enough to say he did not have evidence that he was still being treated. it was therefore erroneous for the trial magistrate who wrote the judgement to hold that no evidence was adduced in that respect and she ought to have assessed and awarded damages under that head. that ground of appeal must therefore succeed and given that the magistrate is no longer within the jurisdiction of this court, the duty falls upon this court to consider the appellant’s evidence under that head and award damages.

In Dr. Raute’s medical report dated 1<sup>st</sup> february 2012 it is stated that the appellant suffered the following injuries: -

**“Head And Neck: Suffered Head Injury With Loss Of Consciousness For About 6 Hours. Had Soft Tissue Injuries On The Occiput With Swelling. Occiput Scalp Still Tender.**

**Chest And Abdomen: Sustained Soft Tissue Injuries On The Anterior Chest Wall. He Has Mild Tenderness On The Right Chest Wall Anteriority.**

**Upper Limbs: Suffered Soft Tissue Injuries On Both Shoulder Joints. Has Limited Range Of Movement On The Right Shoulder Joint.**

**Lower Limbs: Suffered Soft Tissue Injuries On The Left Hip Joint. Has Difficulty Bearing Weight On The Left Leg Due To Pain On The Left Hip Joint.”**

The above are soft tissue injuries which in the p3 form also produced by the appellant are classified as harm which is the lowest degree of classification for injuries. counsel for the appellant has proposed an award of kshs. 500,000/= but in my view an award of kshs. 130,000/= (one hundred and thirty thousand only) would have been adequate under the head of pain, suffering and loss of amenities.

The Appellant has also asked for kshs. 7000/= for the medical report. that sum was specifically pleaded in the plaint and strictly proved at the hearing by production of a receipt as Exhibit P7 and shall therefore be awarded. the appellant had also pleaded a sum of kshs. 22,000/= towing charges which he also proved by way of a receipt at the hearing but it was not awarded. The said sum is hereby awarded.

In The Upshot this appeal succeeds and the judgement of the Lower Court is reviewed as follows: -

1. **Liability At 80:20% in favour of the appellant against the respondent.**

2. **Material Damage** – **Kshs. 174,580/=**

3. **General Damages for pain, suffering**

**and loss of amenities** – **Kshs. 130,000/=**

4. **Special Damages**

a. **Medical Report – Kshs. 7,000/=**

b. **Towing Charges – Kshs. 22,000/=**

**Sub-Total** – **Kshs. 29,000/=**

**Total** – **Kshs. 333,580/=**

**Less 20%** – **Kshs. 66,716/=**

**Grand Total** – **Kshs. 266,864/=**

5. **Costs of the suit in the lower court and in this appeal.**

6. **Interest at court rates to be calculated in the usual manner.**

It Is So Ordered.

**Signed, Dated And Delivered In Nyamira This 19<sup>th</sup> Day Of December 2019.**

**E. N. MAINA**

**JUDGE**