REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 95 OF 2007

REUBEN MULI.....1ST APPELLANT

DUNCAN KIBOI NGATIA.....2ND APPELLANT

-VS-

BEATRICE KANINI WAITA.....RESPONDENT

[An appeal from the Judgment of Hon. Munguti (Resident Magistrate) delivered on 8.5.2007 in Civil Case No. 311 of 1999 before the Chief Magistrate's Court at Machakos]

JUDGEMENT

1. According to the pleadings in the trial court, the respondent brought this action in the Chief Magistrates Court at Machakos against the appellants for general damages for pain, suffering and loss of amenities and special damages due to negligence.

2. It was pleaded that on 6.2.1998, the respondent was a passenger aboard Motor Vehicle Registration Number KAH 468D along Nairobi-Mombasa Road that the 2nd Appellant drove and or controlled vehicle KVT 328/ZA 6285 Mercedes Benz so negligently that he permitted it to move onto and remain on the lane of Motor Vehicle KAH 468D and collide with it and as a result of the accident the respondent suffered injuries.

3. The parties recorded a consent on liability at 85%:15% and the parties agreed that the P3 form, the Medical Report by Dr Wambugu and Dr Kaburu as well as the police abstract be tendered without calling their makers. The documents were accepted and thereafter parties filed and exchanged submissions. After the trial court considered the consent, the tendered documents and the submissions of the parties, it awarded a sum of Kshs 170,000/- for general damages and no award as special damages was made. The appellant was aggrieved with the quantum as being too high and appealed to this court. There were 3 grounds of appeal as follows:

> ***a) The learned magistrate erred in law and fact by not conducting a trial in assessment of general damages.***
>
> ***b) The learned resident magistrate erred in law and fact in making an award that was manifestly excessive given the injuries sustained by the respondent and the relevant case law.***
>
> ***c) The learned magistrate erred in law and in fact by deciding the case against the weight of evidence.***

The appellant prayed that the appeal be allowed and the court sets aside the award of the lower court and award what it deems fit to grant.

4. In essence, this appeal is only against the quantum. Both parties to this appeal filed written statements of their arguments in support of their respective cases. The appellant's counsel submitted that the award of damages was excessive considering the injuries suffered by the respondent. Counsel viewed that the injuries suffered would attract damages of Kshs 37,000/- and not the Kshs 170,000/- that was awarded by the court. Reliance was placed on the case of **Caroline Kabae v Nancy Muthoni (2010) eKLR** where Kshs 70,000/- was awarded for blunt injury to the leg, interior chest and forehead.

5. The learned counsel for the respondent submitted in respect of the 1st ground of appeal that a consent was recorded to admit the P3 form, medical records and police abstract without calling the makers and in that regard counsel submitted that ground 1 must fail. On the 2nd ground, counsel submitted that the award was not inordinately high and urged the court to dismiss the appeal.

6. Having considered the pleadings, the evidence and the submissions on record, the issue for determination is whether the court should reduce the award of the trial court being cognizant that the general principle upon which this Court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

> ***An appellate court will not disturb an award of damages unless it is so inordinately must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low*** ….

7. The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered. The heads or elements of damages recognized as such by law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, like expenses such as medical expenses. The latter comprises all losses which do not represent inroad upon a person's financial or material assets such as physical pain or injury to feelings. The former, being a money loss is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable, it is a consolation offered by the court to the victim to condole him or his family for the loss, the court being the voice of the people.

8. The general rule regarding measure of damages applicable both to contract and tort has its origin in what Lord Blackburn said in: ***Livingstone v Rawyard's Coal Co. (1880) 5 App cas 259.*** He defined measure of damages as:

> ***"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."***

9. On the basis of the law as applied in the authorities I have referred to, one of the material factors on which award of general damages was based was the medical reports that were admitted by consent of the parties. In **Hirani v Kassam (1952) EA 131** it was observed that a consent judgment can be varied if it was given without sufficient material facts or misapprehension or ignorance of material facts or in general for a reason which would enable a court to set aside an agreement.

10. In **Verchures Creameries, Limited Vs Hull & Netherlands Steamship Company, Limited (1921) 2 KB** at Pg. 612, Scrutton LJ stated that;

> "***A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage***".

11. In my view the consent to admit the medical reports and the abstract is legally binding to the parties who had it adopted in court. This matter was addressed and heard in court and both parties agreed and the court relied on the issue of proof of injuries in writing its judgement. It is clear that the appellant has not proved any grounds to warrant setting aside the consent to admit the said documents without calling the makers and this means that the 1st ground of appeal collapses.

12. In light of the consent to admit documents, there is no doubt that the respondent was a victim of the road accident and according to the P3 form dated 7.3.98 suffered scars and bruises as well as blunt injury to both hip joints. According to the report by Dr Wambugu dated 21.3.2003, it was noted that the respondent suffered scars however removal of the scars would cost Kshs 30,000/- but no permanent disability was noted. Dr Kaburu in his examination conducted on 1.7.2004 noted that the respondent suffered bruises and cuts and is expected to recover. No permanent disability was noted.

13. In his judgment, the learned trial magistrate considered the authorities and awarded Kshs 170,000/-.The learned trial magistrate had not erred in so doing as there is a wealth of authorities that have given awards for injuries similar to the ones sustained by the respondent. In that regard I find that the trial court had not erred in making such an award.

14. The law is now well settled that an appellate Court will not interfere with an award of damages by a trial Court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In ***Phillips vs The London South Western Point Way Company (1879 -80) 5. Q.B.D. 78***, James L. J. said on page 85:-

> ***"The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and f necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury."***

15. In ***Owen vs Sykes (1936) I.KB.192*** the Court of Appeal of England felt that although if they had tried the case in the first instance they would have probably awarded a smaller sum as damages yet they would not review the finding of the trial Judge as to amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of law, or that amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. The Court of Appeal followed the case of- ***Flint vs Lovell (1935) I.KB.354***.

16. In **Board of Trustees Anglican Church of Kenya Diocese of Marsabit v THW (suing through her father and guardian ad litem HWG) [2019] eKLR**, Justice Chitembwe observed that "It is true that accident victims should not view court awards as mathematical computation to their losses up-to the last penny. Awards of general damages should not be seen as punishment to those being called upon to settle the same. There should be a balance between the injuries suffered and the need to make reasonable compensation to accident victims. However, compensation for accident victims should not be so low as to be meaningless to the victim. The court should not close its eyes on the suffering experienced by the accident victim".

17. In the case of **Maimuna Kilungya v Motrex Transporters Ltd [2019] eKLR** an award of Kshs. 125,000 was made for blunt neck injury, blunt injury left shoulder and bruises on the left ear. I find that the award of the trial court is sufficient in the instant case because the injuries are comparable to the one suffered by the plaintiff in the cited case.

18. The finding on the award of special damages is undisturbed and I agree with the finding of the trial court.

19. In the result it is my finding that the appeal herein lacks merit. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at **Machakos** this **19th** day of **December, 2019.**

D.K.Kemei

Judge