



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.13 OF 2014

(Being an appeal from the Judgment in Kericho CM CC No.408 of 2007 by Hon. S. Soita dated 3rd June 2014)

JENNIFER JEPKEMOI CHERUIYOT.....APPELLANT

VERSUS

JOSPHAT ONDERI.....RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Chief Magistrate's Court in Kericho Civil Suit No.408 of 2007 in which the trial court entered judgment in favour of the respondent against the appellant on 100% liability basis for Kshs.600,000/- as general damages and Kshs.35,000/- as special damages with costs.

2. The appellant being dissatisfied with the decision of the trial court has come to this court on appeal on the following grounds-

a) The learned trial magistrate erred in law and in fact in finding that the appellant do pay the respondent a gross sum of Kshs.635,200/- in damages which award is arbitrary an unwarranted in the circumstances, the plaintiff having failed to establish that he suffered injuries to the head.

b) That the trial magistrate erred in law and infact in not taking into account entirely the submissions of the appellant as well as the testimonies of the plaintiff, PW1 and of Dr. Raymond Churyai, PW2 with regard to alleged injury to the head.

c) That the learned trial magistrate erred in law and fact in not addressing himself to the plaintiff's treatment records and the two medical reports as relied upon by the respondent and appellant respectively.

d) That the award of Kshs.635,000/- is so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent.

3. By consent of counsel of the parties, the appeal proceeded by way of filing written submissions. The appellant's counsel M/s Moronge & Company Advocates filed written submissions on 30th July 2019 and the respondent's counsel Sila Munyao & Company filed their submissions on same date. M/s Cheron for the appellant and Mr. Rugut for the respondent who appeared in court for the parties opted not to highlight the written submissions filed.

4. In their submissions, counsel for the appellant complained that the damages awarded by the trial court were for above current levels, and that the trial court did not give any reasons for the award. Counsel relied on the case of **Jameson Sika –vs- Andrew Maranga Ongeri [2016] eKLR** wherein the court reiterated that failing to set out the points for determination by a court was tantamount to abdicating judicial responsibility. Counsel relied also on the case of **Jitan Nagra -vs- Abednego Nyandusi Oigo [2018] eKLR** in which an award of Kshs.1,000,000/- was reduced by the High Court to Kshs.450,000/-.

5. Counsel for the respondent, on the other hand, submitted that the court was correct in finding 100% liability against the appellant on the basis of the doctrine of *Res-Ipsa-Lonquito* and relied on the case of **Embu Public Road Services Ltd -vs- Riimi [1968] EA**. Counsel was of the view that the general damages award of Kshs.600,000/- was reasonable in view of the established injuries suffered by the respondent herein.

6. This is a first appellate court. As a first appellate court, I am required to reconsider the evidence on record, evaluate it and come to my own conclusions, though I should bear in mind that I neither saw nor heard the witnesses testify to determine their demeanor and make due allowance in that respect – see **Selle & Another -vs- Associated Motor Boat Company Ltd and Others [1968] EA 123**. In doing so, I have to bear in mind what the defunct Court of Appeal for Eastern Africa, stated in **Peters -vs- Sunday Post Ltd [1958] 424** that-

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had gone wrong, the appropriate court will not hesitate so to decide....”

7. I have re-examined the evidence on record. The plaintiff called two witnesses. He testified as PW1. PW2 was Dr. Raymond Tuiyot of Kericho District Hospital who produced a medical report of the respondent prepared by Dr. Ochieng in which it was recorded that the respondent suffered fracture of the tibia and fibula and classified as grievous harm. The appellant who was defendant did not testify but a second medical report by Dr. Lodhia was produced on his behalf by consent in which it was recorded that the respondent suffered injury to tibia and fibula, but the injury was not classified.

8. I note that, parties counsel filed written submissions in the trial court, from which the trial court found the appellant liable to awarded general damages of Kshs.600,000/- and special damages of Kshs.35,200/-, costs and interest. Therefrom arose this appeal.

9. It is the complaint of the appellant that the magistrate did not evaluate the evidence and submissions before him to determine the issues, but instead just awarded excessive damages. Counsel for the appellant has not stated the issues that the trial court should have considered.

10. Indeed, the judgment of the trial court is short. However, in my view the trial magistrate took into account the evidence placed before him which was itself brief. The magistrate rightly found that the accident did occur as alleged, as the respondent gave sworn evidence on the same and the police abstract was produced in court by consent. Thus in my view, 100% liability was justified as respondent was a passenger when the accident and injury occurred.

11. With regard to damages, I will start by stating that appellate courts are slow to interfere with the quantum of general damages assessed by trial courts, as such awards are an exercise of discretion of the trial court – see **Butt -vs- Khan [1981] KLR 349**, and **Kemfro and Another -vs- R. M. Lubia [1982-1888] 1 KAR 727** wherein the principles to be applied by appellate courts for interfering with awards of general damages were set out.

12. At the trial, the respondent’s counsel did not refer to any figure of general damages in his written submissions though he relied on old time decided cases. The appellant’s counsel on the other hand asked for general damages of Kshs.120,000/-. He also relied on decided cases that had been decided a considerable time earlier.

13. In determining the general damages the trial court stated briefly as follows-

“In view of the injuries sustained by the plaintiff and having considered the submissions by both sides, I am minded to assess general damages at Kshs.600,000/-.”

14. In my view, had the trial court considered that the only injury established on the balance of probabilities was that of the tibia and fibular fracture, he would not have arrived at that figure. The head injury and fracture was only mentioned as an allegation which was not backed by the medical evidence or by an x-ray examination. The figure of general damages awarded is thus inordinately high. I thus find that on that account, I will have to interfere with the award and instead award general damages of Kshs.400,000/-.

15. Consequently, I allow the appeal in part. I set aside the award of general damages of Kshs.600,000/- and replace it with general damages of Kshs.400,000/-. The other findings and awards of the trial court are upheld. The parties will bear this respective costs of the appeal.

Dated and delivered at Kericho this 17th day of December 2019.

George Dulu

JUDGE