



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 24 OF 2013

KARA ROADWAYS LIMITEDAPPELLANT

VERSUS

PETER KIVUVA NYAMAIRESPONDENT

(Being an Appeal from the Judgement by Hon. Mwangi K. Mwangi (Senior Principal Magistrate in CMCC No. 418 of 2012 - Peter Kivuva Nyamai =Vs= Kara Roadways Limited at Machakos Chief Magistrate's Court delivered on 31/01/2013)

JUDGEMENT

1. The appeal herein arises from the judgement of Hon. Mwangi K. Mwangi delivered on the 31/01/2013 in **Machakos CMCC No. 418 of 2012** wherein the Respondent was awarded general damages of Kshs.175,000/= for pain and suffering as well as special damages of Kshs.2,600/= plus costs of the suit.

2. The Appellant was dissatisfied by the said judgment and raised three (3) grounds of Appeal as follows:-

(i) The learned trial magistrate erred in law and in fact in making an award of Kshs, 175,000/= in respect of injuries suffered by the Respondent namely:-

(a) Blunt injury to the chest

(b) Blunt injury to left shoulder

(c) Blunt injury opt the right shoulder

(d) Blunt injury to the right leg

(ii) That the learned magistrate erred in fact and law in failing to appreciate the Plaintiff's medical report, the general nature of injuries suffered and the Appellant's written submissions which would have led to a lesser award.

(iii) That the award given by the learned magistrate was excessive considering the nature of the injury suffered by the Respondent.

3. Learned Counsels for the parties herein agreed to canvass the Appeal by way of written submissions.

Before embarking on the submissions, I need to point out at the outset that the parties herein had entered into a consent before the lower court on the issue of liability in the ratio of 10% to 90% whereby the

Respondent was to shoulder 10% contribution while the Appellant shouldered the remainder of liability at 90%. The submissions herein therefore relate only to the quantum of damages awarded by the trial Court and is the subject of this Appeal.

It was submitted for the Appellant that the award arrived at by the trial court was inordinately high that it must be a wholly erroneous estimate of the damages. It was the opinion of the Counsel for the Appellant that the injuries sustained by the Respondent ordinarily range between Kshs.50,000/= to Kshs.200,000 depending on the extent and severity of the injuries. The learned counsel urged this court to set aside the trial court's assessment on quantum and do assess the damages payable. It was submitted for the Respondent that the trial magistrate had followed proper principles of the law in arriving at the award of Kshs.175,000/= and had taken into account the authorities and submissions presented and therefore the said award should be upheld. The case of **MUNZA INVESTMENT CO. LIMITED =VS= BENJAMIN NTHAA – MACHAKOS HCCA NO. 128 OF 2009** was cited.

4. As this is the first Appellate Court, its duty is to re-evaluate the evidence tendered before the trial court afresh and reach its own independent conclusion bearing in mind that it had no opportunity of seeing or hearing the witnesses but to make an allowance for that (see **SELLE & ANOTHER =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123, OLUOCH ERICK GOGO =VS= UNIVERSAL CORPORATION LTD [2015] eKLR**).

5. The Respondent **Peter Kivuwa Nyamai** testified before the trial court that on the material date he was travelling from Nairobi to Machakos when an accident took place and he suffered injuries on the left leg, both shoulders and chest. At the time of the hearing he had completely healed save for massional pain on the leg. The Respondent called Doctor John Mutunga, who confirmed the blunt injuries on shoulder, chest and left leg. The said doctor assessed the injuries as of soft tissue in nature which would heal completely.

6. The Appellant did not offer evidence before the trial court. Leaned Counsel indeed presented written submissions before the trial court. It can be seen that the Respondent's Counsel had proposed the sum of Kshs.250,000/= and relied on the case of **JOHN MUHINDI KINGORI =VS= CHARLES MAINA & ANOTHER – NBI HCCC NO. 3698 OF 1990** where a Plaintiff who sustained cut wound on the scalp and soft tissue to the right shoulder and right ankle was awarded Kshs.150,000/= as general damages on 23/07/1992. On the part of the Appellant it is noted that the sum of Kshs.90,000/= was proposed and two cases relied upon namely **LOCHAB BROCHERS CO LTD =VS= SAMUEL KIBUNGEI KIRISWO – ELDORET HCCA NO, 60 OF 2006** where a plaintiff who sustained soft tissue injuries on right shoulder and head was awarded Kshs.80,000/= as general damages on 24/03/2009. Again the case of **NAKURU INDUSTRIES =VS= BENARD LIDORO - NAKU HCCA 35 OF 2002** as sum of Kshs. 70,000/= was awarded to a Plaintiff who sustained soft injuries on left index finger.

7. It is now well established that the Appellate court will not normally interfere with award of damages by trial courts unless it is shown that the trial court proceeded on wrong principles or that the amount is ordinally high or low as to make it an entirely erroneous estimate of damages. The reason behind this is that the award of damages entails exercise of discretion by the trial court.

8. Learned Counsel for the Appellant has attacked the decision of the trial magistrate on the ground that he did not follow any known legal principle and cited the relevant portion of the judgement on page 37 of the record of Appeal that stated :-

“Considering the said injuries, authorities cited and the effect of inflation, I award the Plaintiff a sum of Kshs.175,000/= as general damages.”

9. Looking at the observation by the trial magistrate, I find he did take into account the nature of the injuries and he also considered the authorities cited before him. He did factor the effect of inflation and arrived at the award of Kshs.175,000/=. Indeed the Appellant's Counsel agreed that such injuries ordinarily attract general damages ranging from Kshs.50,000/= to Kshs.200,000/=. Hence I find the award of damages arrived at by the trial court was within that range. Even though the trial Magistrate did not

recite the cases, he did indicate that he had indeed considered the same and thus arrived at Kshs.175,000/=. I do not think that the complaints by the Appellant are merited since there appears to be no misdirection by the learned trial Magistrate in the way he approached the assessment of damages. There was no error of principle in the assessment and that I find the award was not inordinately high as it was within the acceptable limits and range.

10. In the result I find that there are no grounds warranting the interference by this court of the trial court's award of damages. Accordingly, the Appeal herein lacks merit and is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Machakos this **18th** day of **January 2018**.

D. K. KEMEI

JUDGE

In the presence of:-

.No appearance for Miller & co. Adv for the Appellant

Sila for the Respondent

Kituva - Court Assistant