



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 84 OF 2016

DANFORD SIRO ONSARE

ONSARE SAMWEL ROSANA..... APPELLANTS

VERSUS

JERIA MORAA RABERA..... RESPONDENT

(An appeal from the judgment and decree of Hon. N. Wairimu (Principal Magistrate) dated and delivered on the 19th day of October 2016 in the Original Ogembo PMCC NO. 180 OF 2013.)

JUDGMENT

1. The respondent herein who was the plaintiff before the trial court sued the appellants through her plaint dated 18th November 2013 wherein she sought, *inter alia*, orders for general and special damages arising out of a road traffic accident that took place on 7th July 2013. The respondent's case was that on the material date, she was a lawful pedestrian walking along Kisii – Kilgoris Road when the appellant's motor vehicle Registration No. KBU 061J, which was being driven negligently and recklessly knocked her down thereby causing her serious bodily injuries.

2. In their statement of defence dated 4th March 2013, the appellants denied the occurrence of the accident but by a consent order recorded 3rd August 2016, parties entered judgment on liability at the ratio of 70% to 30% in favour of the respondent after which the trial court, upon hearing the respondent's evidence on the injuries sustained in the accident, made an award of Kshs. 2,400,000/= general damages for pain suffering and loss of amenities which judgment was subject to 30% contribution.

3. This appeal therefore purely challenges the award of damages made to the respondent and the appellants listed the following grounds of appeal in their memorandum of appeal:

1. That the award of General damages awarded to the respondent was manifestly and inordinately excessive in the circumstance.

2. That the Learned trial Magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.

3. The Learned trial Magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.

4. The Learned trial Magistrate erred in law and fact when the same relied on extraneous

issues as a basis of his determination on liability.

4. The appeal was canvassed by way of written submissions filed by both parties which I have perused and as the first appellate court, this court is under a duty to re-evaluate the evidence tendered before the trial court in order to arrive at its own independent findings while at the same time bearing in mind the fact that it neither heard nor saw the witnesses testify. **(See *Selle vs Associated Motor Boat Company Ltd [1968] E.A. 123.***

5. In the case of ***Peters vs Sunday Post Ltd [1958] EA 424***, the court stated:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses.... But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might have come to a different conclusion.”

6. In the instant case, the respondent tendered the evidence of 3 witnesses before the trial court whose evidence, I will consider, but only in regard to the injuries that the respondent suffered in the accident in view of the fact that liability had been agreed upon and that the appeal is therefore purely on the issue of the award of damages made to the respondent.

7. The respondent's (PW1) case was that she sustained the following injuries:

- a) Fractured neck of the right humerus.**
- b) Fracture dislocation of the right shoulder.**
- c) Fractured shaft of the right femur**
- d) Fracture of the pelvis**
- e) Head injury resulting in loss of consciousness.**

8. The respondent's injuries were captured in the treatment notes, the P3 form and the medical report which were produced (before the trial court as exhibits 1, 2 and 4 respectively).

9. PW2, Dr. Ogando Zoga, who examined the respondent and prepared her medical report, concluded that she sustained severe injuries which were expected to heal with time but that could lead to post traumatic arthritis and epilepsy. The doctor also stated that the respondent would be required to undergo a surgery at the cost of Kshs. 200,000/= to remove the plates and implants from the femur and humerus bones.

10. PW3 was the investigating officer who investigated the accident in question.

11. The appellants did not present any evidence before the trial court.

Analysis and determination

12. Upon considering the record of appeal and the written submissions filed by the parties herein, I note that the only issue for determination is whether the award general damages made to the respondent was manifestly excessive in the circumstances and by extension, whether this court should interfere with the trial court's said award.

13. It is now settled law that an assessment of damages is a matter of judicial discretion which an appellate court must not disturb unless the same was inordinately low or high as to be an erroneous estimate of damages. The foregoing cases set out the law and the guiding principles which we are bound to apply in the determination of this appeal.

14. In the case of **Loice Wanjiku Kagunda vs Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)** the Court held:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)

15. In **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727** at p. 730 Kneller J.A. said:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See KANGA V. MANYOKA [1961] E.A. 705, 709, 713; LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO [1970] E.A., 414, 418, 419. This Court follows the same principles.”

16. And in **Gicheru V Morton and Another (2005) 2 KLR 333** this Court stated:

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.”

17. See also **Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.**

18. In the instant case, I note that the trial court had the following to say when assessing damages payable to the respondent:

“Upon consideration of the submissions by the parties, the age of the plaintiff and the injuries sustained by the plaintiff in the authorities cited by both the plaintiff and the defendant, I am inclined to assess general damages at Kshs. 2,400,000/= as the injuries sustained by the plaintiff in the instant case were less severe than those sustained by the plaintiff in the authorities cited by the plaintiff and more severe than those in the authorities cited by the defendant.”

19. From the above extract of the trial court’s judgment it is clear that the trial court considered all the relevant factors in the case such as the injuries sustained by the respondent, her age and the authorities cited by both parties before arriving at her determination on the quantum of damages. I do not find that there was any relevant fact that the trial magistrate did not consider in her judgment. The trial court’s award was guided by the awards made by courts in similar cases. I find that the trial court’s award was in tandem with the established principles of assessment of damages and that the court exercised its discretion judicially.

20. In a nutshell, I find that the instant appeal lacks merit and the order that commends itself to me is to dismiss the said appeal with costs to the respondent.

Dated, signed and delivered in open court this 28th day of February, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

- N/A O.M. Otieno for the Appellant
- Miss Momanyi for the Respondent
- Omwoyo court clerk