



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 8 OF 2017

JOSEPH WAMBURA APPELLANT

-versus-

JULIUS MONYENYE OCHOMBA RESPONDENT

(Being an appeal arising from part of the judgment and decree by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo Chief Magistrate's Civil Case No. 27 of 2015 delivered on 27/10/2016)

JUDGMENT

1. The Respondent, then a motor cycle rider, was involved in a road traffic accident on 18/10/2014 when the motor cycle he rode collided with motor vehicle registration number KBQ 053J along the Kisii-Migori Road thereby sustaining injuries. He was rushed to hospital, admitted and treated.

2. The Respondent then instituted **Rongo Senior Resident Magistrate's Civil Case No. 27 of 2015** (hereinafter referred to as '**the suit**') claiming General Damages for pain, suffering and loss of amenities, Special Damages, costs and interests. The Appellant herein was sued as the owner of the motor vehicle number KBQ 053J.

3. Liability was apportioned by consent of the parties and in favour of the Respondent at 25% to 75% against the Appellant. The parties also agreed on the admission of the Medical Report by Dr. Ezekiel Ogando dated 05/11/2014 and the receipt thereto as exhibits. Parties then filed written submissions on quantum of damages and judgment was rendered on 27/10/2016 where the court awarded General Damages at Kshs. 1,000,000/= and Special Damages at Kshs. 4,000/= subject to the agreed contribution together with costs and interests.

4. The Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment. He filed a Memorandum of Appeal on 30/01/2017 with the leave of this Court and preferred the following four grounds: -

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. THAT 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. THAT the learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability."

5. Directions were taken, and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. Counsel for the Appellant consolidated the grounds of appeal and argued them as one in contending that the Respondent sustained far less serious injuries, but the court made an inordinately high award on the limb of General Damages for pain, suffering and loss of amenities and was not guided by appropriate precedents.

6. Counsel referred this Court to the decisions of **Rachel Mihaki vs. Karim Simon Mwhaki & Another (2015) eKLR** where the court awarded Kshs. 450,000/= in 2015, that of **David Kiplang'at Sang vs. Richard Kipkoach Langat & Another (2006) eKLR** where an award of Kshs. 550,000/= was made in 2006, the decision in **Edwin Otieno Japaso vs. Easy Coach Bus Company Limited (2016) eKLR** where an award of Kshs. 550,000/= was rendered in 2016 and the decision in **Mwaura Muiruri vs. Suera Flowers Limited & Another (2014) eKLR** where an award of Kshs. 1,450,000/= was made in 2014 in urging the Court to review the judgment and instead make an award of Kshs. 500,000/= which will serve as adequate compensation instead.

7. The Respondent opposed the appeal and submitted that the award of Kshs. 1,000,000/= on General Damages for pain, suffering and loss of amenities was fair and reasonable and urged the Court to dismiss the appeal. The Respondent referred to the cases of **Leah Wambui Githuthu vs. Attorney General & Another (2005) eKLR**, and that of **Kenya Power & Lightig Company Limited vs. Benard Mutuku Kilonzo (2015) eKLR**.

8. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**).

9. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

10. As the appeal is on the assessment of damages, I must reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler (1982) KLR 277.**)

11. The Court of Appeal in the case of **Kemfro Africa Limited t/a Meru Express Services** (supra) discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

“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 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.”

12. This position was restated by the Court of Appeal in the case of **Arrow Car Limited -vs- Bimomo& 2 others (2004) 2 KLR 101** and so recently in the case of **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR**.

13. This Court is now called to determine whether the award of Kshs. 1,000,000/=under General Damages for pain, suffering and loss of amenities is inordinately high in the circumstances of this case to call for the intervention of this Court. As expected, to enable me to answer that question I will first revisit the nature of the injuries sustained by the Respondent which are contained in the Medical Report by Dr. Ezekiel Ogando Zoga dated 05/11/2014. The Respondent sustained a contusion on the right eye leading to nerve damage accompanied with loss of vision assessed at 30%, multiple cuts on the right orbit left side with adhesion, contusion on the occipital area occasioned with loss of consciousness, blunt trauma to the chest right side, blunt trauma to back, deep frictional extreme burns on the right shoulder, extensive multiple cut on both knees, deep cut on the right foot, multiple lacerations on both fingers and a deep cut wound on the right shoulder with stitches. The injuries were to heal with permanent scarring.

14. I have addressed my mind to the nature and extent of the injuries. There is no doubt the injuries are extensive and multiple with a resultant disability. The Respondent was also admitted at Nyagena Hospital for a week and at the time of examination by Dr. Ezekiel Ogando Zoga he still complained of pain on the back and the chest.

15. I have as well considered the decisions relied upon by the parties in this appeal. On the decisions by the Appellant, I have noted that the injuries sustained by the victim in the case of **Rachel Mihaki** (supra) are few compared with those sustained by the Respondent herein although there was as well a resultant disability of 30%. That aside, the court awarded Kshs. 450,000/= in 2015. That applies to the decision in the case of **David Kiplang'at** (supra) as well as the other two decisions. Infact, none of the decisions relied upon by the Appellant are of comparable injuries to those sustained by the Respondent herein. They mostly dealt with fractures unlike the present case.

16. The most comparable decision is that of **Kenya Power & Lighting Company Limited vs. Benard Mutuku Kilonzo (2015) eKLR** although the victim therein only sustained severe burns on the scalp and forehead with a total loss of sight in one eye. He was also admitted. The High Court awarded Kshs. 1,500,000/= on general damages in 2015. I note that in the present case although the disability was at 30% the Respondent sustained many other multiple injuries. That was the very decision used by the trial court as a guide towards settling at the impugned amount.

17. Having cautiously considered this aspect, I must find, which I hereby do, that the sum awarded by the trial court is not outrageous or inordinately high as alleged by the Appellant. The trial magistrate exercised her discretion so judicially and considered the nature and gravity of the multiple injuries sustained further to being guided by a relevant binding decision. I therefore affirm the finding of the trial court.

18. The upshot is that the appeal is unsuccessful and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. O. M. Otieno instructed by the firm of O.M. Otieno & Co. Advocates for the Appellant.

Mr. J. S. Odongo Counsel instructed by the firm of Khan & Associates for the Respondent.

Miss Nyauke – Court Assistant