



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 9 OF 2017

JOSEPH WAMBURA.....APPELLANT

- versus -

JOSEPH MWANGI OBAI.....RESPONDENT

(Being an appeal arising from part of the judgment and decree

by Hon. P. K. Rugut, Senior Resident Magistrate in Rongo

Senior Resident Magistrate's Civil Case No. 25 of 2015

delivered on 27/10/2016)

JUDGMENT

1. There is only one issue for determination in this appeal. It is whether the trial court made an inordinately high award in respect of general damages for pain, suffering and loss of amenities regarding the injuries sustained by the Respondent herein.
2. The Respondent, then a pillion passenger, was involved in a road traffic accident on 18/10/2014 when the motor cycle he was aboard was involved in an accident with motor vehicle registration number KBQ 053J along the Kisii-Migori Road thereby sustaining injuries. He was rushed to hospital and treated.
3. The Respondent then instituted **Rongo Senior Resident Magistrate's Civil Case No. 25 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.
4. Liability was apportioned by consent of the parties and in favour of the Respondent at 25% to 75% against the Appellant. Assessment of damages was undertaken, and the Respondent testified on the injuries he allegedly sustained in the accident. 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. 300,000/= and Special Damages at Kshs. 4,000/= subject to the agreed contribution together with costs and interests.
5. 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.

6. 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.

7. Counsel referred this Court to the decisions of **Odinga Jacktoe Ouma vs. Maureen Achieng Odera (2016) eKLR** where the court awarded Kshs. 180,000/= in 2016, that of **Kamenju Charles vs. Gideon Muia Mutisya (2014) eKLR** where an award of Kshs. 170,000/= was made in 2014, the decision in **Benson Charles Ochieng & Another vs. Patricia Atieno (2013) eKLR** where an award of Kshs. 120,000/= was rendered in 2013, that of **Chanan Agricultural Contractors Ltd vs. Fred Barasa Muayi (2013) eKLR** where the court awarded Kshs. 150,000/= in 2013 and the decision in **Michael Kariuki Muhu vs. Charles Wachira Kariuki & Another (2015) eKLR** where an award of Kshs. 120,000/= was made in 2015 in urging the Court to review the judgment and instead make an award in the region of Kshs. 150,000/= and Kshs. 250,000/= which will serve as adequate compensation instead of the inordinately high sum of Kshs. 300,000/= awarded by the trial court.

8. The Respondent opposed the appeal and submitted that the award of Kshs. 300,000/= 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 **Francis Ochieng & Another vs. Alice Kajimba (2015) eKLR**, **Catherine Wanjiru Kingori & 3 others vs. Gibson Theuri Gichuhi (2005) eKLR** and that of **Kenya Power & Lightig Company Limited vs. Mart Akinyi Kisii HCCA 72 of 2007** (unreported).

9. 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**.

10. 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.

11. 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.**)

12. 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.”

13. 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.**

14. That being the position in law the question which now begs an answer is whether the award of Kshs. 300,000/= 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. To enable me to answer that question I will first revisit the nature of the injuries sustained by the Respondent. The injuries are contained in the Medical Report by Dr. Ezekiel Ogando Zoga dated 05/11/2014 as well as the P3 Form dated 05/11/2014 and the treatment notes from Awendo Sub-District Hospital which were all produced as exhibits. The Respondent sustained a cut wound on the left orbit side, deep laceration on the left gluteal area, multiple laceration left elbow, deep laceration on the left hand, cut wound on the right-hand palm, multiple cut wounds on both knees with stitches in place, deep cut on the left leg, deep cut wound on the ankle left and cut on the right toe. At the examination, the injuries were in the process of healing with resultant ugly scars.

15. I have addressed my mind to the nature and extent of the injuries. Although they are soft tissue injuries, they are indeed multiple and resulted into ugly scars on the lower limbs, upper limb, orbit and the hands. At the time of examination by Dr. Ezekiel Ogando Zoga the injuries were around 3 weeks old and had not fully healed.

16. Turning to the decisions relied upon by the parties, I have to say that the decisions are on like injuries as those sustained by the Respondent. On the decisions relied upon by the Appellant, the court awarded Kshs. 180,000/= in 2016, Kshs. 170,000/= in 2014, Kshs. 120,000/= in 2013, Kshs. 150,000/= in 2013 and Kshs. 120,000/= in 2015 respectively whereas in the decisions relied upon by the Respondent the court awarded Kshs. 350,000/= in 2015, Kshs. 300,000/= in 2005 and Kshs. 350,000/= in 2013 respectively. Looking at the said awards one cannot miss it that there is a general upward trend on the awards with time.

17. I however remain alive to the fact that the above decisions are not binding on this Court but are good for comparative purposes. Having said so and given the passage of time and the comparable nature of the injuries in the decisions cited by the parties I do not find the award of Kshs. 300,000/= as outrageous or inordinately high as alleged by the Appellant. I therefore cannot fault the exercise of discretion on the part of the trial Magistrate and I affirm the finding of the trial court. The ground is hence unmerited.

18. Since there was only one issue for determination in this appeal which I have found in the negative 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