



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CIVIL APPEAL NO 9 OF 2017

P.N. MASHRU LIMITED.....APPELLANT

VERSUS

OMAR MWAKORO MAKENGE ALIAS OMAR MASOUD.....RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate E. G. Nderitu SPM in Voi CMCC No 124 of 2016 delivered on 8th May 2017)

IN

CHIEF MAGISTRATE'S COURT CIVIL CASE NO 124 OF 2016

OMAR MWAKORO MAKENGE ALIAS OMAR MASOUD.....PLAINTIFF

VERSUS

P.N. MASHRU LIMITED.....DEFENDANT

JUDGMENT

1. In his Plaint that was dated 20th April 2016 and filed on 8th June 2016, the Respondent sought the following reliefs:-

a. General damages

b. Special damages Kshs 56,500/=

c. Costs and incidental to this suit and interests

d. The Appellant's Statement of Defence undated was filed on 27th July 2016. On 30th January 2017, both the Appellant and the Respondent recorded consent on liability at 80%- 20% against the Appellant herein. The matter then proceeded for the assessment of general and special damages.

e. In her judgment delivered on 8th May 2017, Hon E. G. Nderitu, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 1,003,900/= made up as follows:-

General damages Kshs 1,200,000/=

Special damages Kshs 43,900/=

Kshs 1,243,900/=

Less 20% contribution as per the consent on liability plus costs and interest thereon from the date of judgment.

4. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed their Memorandum of Appeal dated 29th May 2017 on the same day. It relied on four (4) Grounds of Appeal.

5. The Appellants filed their Record of Appeal dated 13th September 2017 on the 15th September 2017. They filed their Written Submissions dated 3rd November 2017 on 6th November 2017. On 18th September 2017, the Respondent also filed a Record of Appeal. It was not a Cross-Appeal as he had enclosed the Appellant's Memorandum of Appeal therein.

6. It was the considered view of this court that his filing of the said Record of Appeal was superfluous and unnecessary as he was not the Appellant herein. Although the Appellant did not object to the same, this court did not consider it while determining the Appeal herein as the same only caused confusion herein. He filed his Written Submissions dated 13th October 2017 on 1st November 2017.

LEGAL ANALYSIS

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

8. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“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...”

9. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties respective Written Submissions, it was clear to the court that the only issue for consideration and determination was whether or not the quantum that was awarded by the Learned Trial Magistrate was so manifestly excessive and/ or inordinately high in the circumstances requiring interference by this court.

10. The Appellant referred this court to the case of **Cecilia W. Mwangi & Another vs Ruth Mwangi [1977] e KLR** where the court cited with approval the case of **Tayab vs Kinanu (1982-88) 1 KAR 90** and **Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR** where the court cited with approval the case of **Kigaragari vs Aya (1982-88) 1 KAR 768**.

“I state this so as to remove the misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.

11. It also relied on the case of **Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR** where the court cited with approval the case of **Kigaragari vs Aya (1982-88) 1 KAR 768** and rendered itself as follows:-

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee”

12. It was its contention that the award of Kshs 1,200,000/= as general damages was excessive and without basis as the Learned Trial Magistrate did not provide a basis for her decision to award the said sum. It submitted that a sum of Kshs 500,000/= was sufficient to compensate the Respondent herein for the injuries that he sustained. In arriving at the said figure, it relied on several cases which have been set out herein below.

13. In the case of **Johnstone Ochieng vs CC Limited & Another HCCC 309 of 1998 Nakuru** (unreported), the court awarded the plaintiff therein a sum of Kshs 400,000/= general damages for pain, suffering and loss of amenities for having suffered fracture of the base of the skull, cut wound on the left cheek, left hand, soft tissue injury to the lower jaw, loss of hearing on left ear, frequent headaches, loss of memory.

14. It also relied on the case of **Musya Musili vs MJ Glesson International Ltd HCCC 429 of 1987 Nakuru** (unreported) where the court awarded the plaintiff therein a sum of Kshs 350,000/= for pain, suffering and loss of amenities for having sustained a fracture of the skull and a deep cut wound on the left forearm, he complained of severe headache, pain on left arm, he healed with a resultant 6x5 cm scar on the right temporal parental area of the scalp and scars on the left hand and right shoulder. The doctor who examined him had noted that there was a small chance he would develop epilepsy.

15. The other case it relied upon was that of **Edward G Nyaga vs Mombasa Liners HCCC No 197 of 1999 Mombasa** (unreported) where the court therein awarded the plaintiff who was unconscious for several days, hospitalised for one month and who suffered a fracture of the skull, jaws and left leg and as a result of the head injury he suffered headaches, double vision due to brain hematoma and a likelihood of suffering epilepsy a sum of Kshs 400,000/= for pain, suffering and loss of amenities.

16. On his part, the Respondent submitted that the sum of Kshs 1,200,000/= that was awarded by the Learned Trial Magistrate was not manifestly excessive because he had suffered serious injuries necessitating admission in hospital for seventeen (17) days which injuries left him with a limp, five (5%) per cent loss of function of the hip joint, painful limbs due to piercing of the leg by the metallic plate and inability to stand for long periods.

17. He referred to a 2013 decision which dealt with comparable injuries like those he sustained where the plaintiff therein was awarded Kshs 2,000,000/= general damages for pain, suffering and loss of amenities but did not cite the case. This court was therefore unable to consider the same. He did not also rely on any authorities to persuade this court to find that the said sum of Kshs 1,200,000/= general damages was adequate compensation.

18. Dr Eunice Wahome (hereinafter referred to as “PW 1”) was a medical doctor at River Jordan Medical Centre. She testified that she examined the Respondent on 8th April 2016 for injuries he had sustained on 17th April 2015. She told the court that he had with him medical records from Moi Hospital Voi, CT scan report, X-ray films and P3 form.

19. She stated that he suffered loss of consciousness at the time of the accident, fracture of the femur distal third, fracture of the temporal bone with heamatoma, head injury to the right frontal parietal bone with brain oedema, left subdural heamatoma. She confirmed that the X-ray revealed the fractures.

20. She explained that he complained of pain and stiffness of the left hip particularly during the cold weather, pain at the fracture site of the leg and loss of memory. He could not recall the details of the accident well and there was general sluggishness on all the prompt questions that she asked him. She therefore recommended further head scan and examination by a neurologist. She contended that the injuries he sustained were severe and amounted to grievous harm leaving him with memory loss and five (5%) per cent incapacity on the limbs.

21. On his part, the Respondent reiterated PW 1’s evidence. He testified that the metal plate that was inserted in his leg was still in place and that when it was cold, he suffered discomfort and feeling of being pierced when going up and down a hill. He averred that he suffered from memory loss and that he walked with a limp.

22. Notably, the Appellant did not call any expert witness who could have controverted PW 1’s evidence on the degree of his incapacitation, loss of memory and need for further examination by a neurosurgeon. Her evidence therefore remained unrebutted and uncontroverted.

23. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law.

24. The principles for an appellate court interfering with an award of a trial court were set out in the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No 2) (1982-88) L KAR 727** at page 703 that:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

25. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

26. In the case of **Cecilia W Mwangi & Another vs Ruth Mwangi [1977] e KLR** where the court cited with approval the case of **Tayab vs Kinanu (1982-88) 1 KAR 90** where the court therein stated that:-

“I state this so as to remove the misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill.

27. Further in the case of **Daniel Kosgei Ngelechi vs Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR**, the court therein cited with approval the case of **Kigaragari vs Aya (1982-88) 1 KAR 768** where it had been stated as follows:-

“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Kenya awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs of insurance cover or increased fee”

28. In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff’s compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents.

29. This court therefore had due regard to several cases with a view to establishing whether or not the Learned Trial Magistrate applied the correct principles in awarding the Respondent general damages for pain, suffering and loss of amenities.

30. In the case of **Edward Mzamili Katana vs CMC Motors Ltd [2006] eKLR**, the court therein awarded the plaintiff therein a sum of Kshs 2,000,000/= general damages for pain, suffering and loss of amenities for having sustained a head injury leading to concussion, cut wound and bruise on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injuries with multiple fractures of left 5th, 6th and 7th ribs and fracture of the left femur.

31. In the case of **Mary Pamela Oyioma vs Yess Holdings Limited [2011] eKLR** the court therein awarded the plaintiff therein a sum of

Kshs 900,000/- general damages for pain, suffering and loss of amenities for having sustained a comminuted fracture of the right femur, compound fracture of the left tibia, soft tissue injuries of the right shoulder and multiple cut wounds all over the body.

32. In the case of **Boniface Njiru v Tohel Agencies and Another [2011]eKLR**, the plaintiff therein sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries. The court therein awarded him a sum of Kshs 1,000,000/= general damages for pain, suffering and loss of amenities.

33. In the last case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR**, on appeal, the court allowed a sum of Kshs 700,000/= general damages for pain, suffering and loss of amenities where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

34. Courts have a responsibility to keep themselves apprised of recent authorities. This is not to say that reliance on old authorities is acting on the wrong principle. However, courts are also required to take into consideration inflation which has taken a toll on the value of the Kenya Shilling.

35. Notably, the Appellants relied on very old authorities which did not assist this court in establishing what the recent awards of courts in awarding general damages for pain and suffering and loss of amenities were as they did not take into account the inflationary trends over the years. Bearing in mind the nature of injuries that were sustained by the Respondent herein, the sum of Kshs 500,000/= general damages for pain and suffering and loss of amenities was clearly manifestly low.

36. Accordingly, having considered the evidence that was adduced in the Trial Court, the written submissions and the case law that was relied upon by the Appellant herein, this court came to the firm conclusion that the Learned Trial Magistrate applied the correct principles in assessing the general damages and future medical expenses. The same were assessed with moderation and were not inordinately high or too low in the circumstances for this court to interfere with the same. Indeed, the Respondent's speech was sluggish which required further interrogation by a neurologist. This could not be taken lightly.

37. It was therefore the considered view of this court that the award of Kshs 1,200,000/= general damages for pain and suffering and loss of amenities that the Learned Trial Magistrate awarded the Respondent herein was fair and reasonable in the circumstances of the case.

DISPOSITION

38. For the reasons foregoing, the upshot of this court's judgment was that the Appellant's Appeal that was dated 13th September 2017 and filed on 15th September 2017 was not merited and the same is hereby dismissed with costs to the Respondent herein.

39. It is so ordered.

DATED and DELIVERED at VOI this 20th day of February 2018

J. KAMAU

JUDGE