



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 105 OF 2013

ADERO ODINGA.....APPELLANT

VERSUS

ANGELICUS RICHARD NGAILO.....1ST RESPONDENT

ATHUMANI SALEHE MGANGA.....2ND RESPONDENT

(An appeal from the Judgment of Hon. A.O. Aminga SRM, in Kwale Principal Magistrate's Court Civil Case No. 27 of 2012 delivered on 24th July, 2013)

JUDGMENT

1. The appellant was the plaintiff in the lower court. He filed a suit on 15th February, 2012 following a road traffic accident. After the hearing of the case, he was awarded Kshs. 250,000/= as general damages, Kshs. 1,500/= as special damages together with costs and interest. The appellant being aggrieved by the said award filed a memorandum of appeal on 15th August, 2013 raising the following grounds of appeal:-

(i) That the Learned Trial Magistrate erred in Law and in fact by failing to consider the respective parties submissions in making the award for general damages;

(ii) That the Learned Trial Magistrate erred in law and fact in awarding a sum of Kshs. 250,000/= which was inordinately low to amount to an erroneous estimate of damages;

(iii) That the Learned Trial Magistrate erred in law and in fact in failing to consider the relevant authorities and thus failed to consider factors that he ought to have taken into consideration; and

(iv) That the Learned Trial Magistrate erred in-law and in fact in failing to make an award for cost of future medical care against the weight of evidence on record.

2. For the above reasons, the appellant prays for:-

(i) The appeal to be allowed;

(ii) The Honourable court to reassess general damages payable to the appellant; and

(iii) Costs to be awarded to him.

3. Mr. Nyabena, Learned Counsel for the appellant informed this court that the appeal is on the quantum award of Kshs. 250,000/=. He submitted that the appellant sustained a fracture of the radius, fracture of the femur with soft tissue injuries. He stated that the appellant underwent surgery to fix a metal plate. It was submitted that the award made for the above injuries was inordinately low and that the Hon. Magistrate failed to take into account pertinent facts. Counsel for the appellant relied on the case of **Mahmud Salim Omar vs. M.A Bayusuf** Mombasa Civil Appeal No. 48 of 2006, to shed light on the issues that this court needs to observe in considering if it ought to disturb the quantum of damages awarded.

4. It was argued that the Hon. Magistrate failed to consider that the appellant was hospitalized to fix metal plates and later to have them removed thereby subjecting him to pain. Further, the cost of Kshs. 100,000/= incurred by the appellant was not taken into consideration. Counsel invited the court to refer to the cases they had cited before the lower court but which were not taken into consideration, whereby

higher awards than in the present case were made in the years 2000, 1997, 2010, 2012 and 2007. He specifically referred to the case of **Devki Steel Mills vs. James Makau**, Machakos HCCC No. 191 of 2008, where the plaintiff was awarded Kshs. 250,000/= in the year 2008.

5. Mr. Nyabena further submitted that the Hon. Magistrate failed to make an award in the sum of Kshs. 100,000/= for future medical treatment because it was not pleaded but Counsel submitted that it was pleaded in paragraph 6 of the plaint. He stated that Dr. Ndegwa in his medical report indicated that the costs of future medical treatment for removal of implants would be Kshs. 100,000/=.

6. It was submitted that Dr. Mohamed who also examined the appellant found that the fractures that the appellant sustained had healed but noted that the right hand flexion finger deformity, was likely due to physiotherapy not being done adequately.

7. Ms. Munyari, Learned Counsel for the respondent opposed the appeal. She submitted that the general damages awarded were commensurate with the injuries sustained. She argued that the sum of Kshs. 250,000/= awarded in the year 2013 as general damages was reasonable. She submitted that the appellant was examined by Dr. Ndegwa on 5th December, 2011 and Dr. Mohamed on 17th October, 2012. The latter found that the injuries sustained by the appellant had healed with no permanent incapacity save for a right hand flexion finger deformity. She stated that the Hon. Magistrate relied on medical records, the evidence and authorities cited, in arriving at an award of Kshs. 250,000/= in general damages.

8. Ms. Munyari submitted that the amount of Kshs. 100,000/= for removal of metal implants was not pleaded as a special damage claim. She relied on Mombasa HCA No. 133 of 1998, **David Mwavughanga Kinganda vs Narcol Aluminum Rolling Mills Ltd** to show that the cost for future medical costs must be pleaded as special damages. She prayed for the appeal to be dismissed with costs.

9. Mr. Nyabena in response to the above stated that in the case he had referred to in his written submissions of **Wamunyu Children's Development Fund vs Michael Mutuku**, Machakos HCA 125B of 2007, the plaintiff therein sustained less severe injuries and an amount of Kshs. 420,000/= was on appeal, upheld by the High Court in the year 2007.

10. Counsel submitted that the Kshs. 100,000/= they had prayed for future medical need is something that looks into the future and does not fall under the category of a special damage claim. He prayed for the appeal to be allowed with costs.

ANALYSIS AND DETERMINATION

The issue for determination is if quantum of damages should be varied.

11. This court is alive to the duty of the first appellate court as espoused in the case of **Selle vs Associated Motor Boat Co. Ltd** (1968) EA, that :-

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

12. It is not contested that an accident took place in which the appellant was hit by a motor vehicle. He was treated at Msambweni District Hospital and issued with a P3 form which the appellant produced as plf. exh. 3. He also produced a medical report by Dr. Ndegwa as plf. exh. 4 and a receipt thereof as plf. exh. 5. The appellant who testified as PW1 before the lower court stated that he sustained an injury on the left leg, which had a metal implant in the thigh region. He was also injured in the right hand and stated that he was unable to flex his fingers. He indicated that he was still experiencing pain as at the time he was giving evidence in court. The 2nd medical report by Dr. I. Mohamed dated 17th October, 2012 was produced by consent of the parties, as def. exh. 1.

13. In the case of **Kemfro Africa Ltd. T/A Meru Express Service and Gathogo Kanini versus Lubia and Olive Lubia** (1982-88) KAR 728, the Court of Appeal held as follows on quantum of damages:-

“The principle 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 Eastern Africa to be that it must be satisfied that either the Judge in assessing damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amounts is so inordinately high that it must be a wholly erroneous estimate of the damages.”

14. The Hon. Magistrate in his judgment stated that he considered the nature and the extent of the injuries sustained, written submissions and authorities and he was of the considered view that the amount of Kshs. 250,000/= would be fair recompense in general damages. He stated that future treatment costs were not pleaded thus would not be awarded.

15. The medical report by Dr. S.K. Ndegwa dated 5th December, 2011 shows that the appellant herein suffered a fracture of the proximal right radius, fracture of the left femur, cut wound at the base of the right thumb, large 6cm long cut wound on the lateral aspect of the right ankle joint and multiple cut wounds on the scalp. The Doctor noted a surgical scar on the lateral left thigh and implants which were still *in situ*. Other scars were seen on the right thumb, on the scalp and on the right lateral ankle joint. Stiffness of the right elbow and joints of the right thumb was noted. The Doctor classified the injuries as severe multiple bone and soft tissue injuries. He indicated that future medical costs including removal of the implants would be Kshs. 100,000/=. He recommended another assessment after 6 months of physiotherapy.

16. On 15th October, 2012, the appellant was examined by Dr. Ibrahim A. Mohammed. On examination, he noted that the appellant had a healed fracture of the right elbow with no deformity joint movement was normal. There was a healed scar at the base of the hand, healed wound scars on the scalp and a healed fracture of the left femur.

17. The doctor was of the opinion that the appellant suffered multiple soft injuries and fractures which had healed with no permanent incapacity. He stated that the right hand flexion finger deformity was most likely due to physiotherapy not being done adequately.

18. The appellant's Counsel relied on the cases he had cited in the lower court of **Hannington Agoi Lusiola vs Sogea (K) Ltd and Another**, HCCC No. 2904 of 1997 where an award of Kshs. 450,000/= was made in the year 1997, **Mahinder Sembi vs. Attorney General**, Nairobi HCCC No. 817 of 1993 where an award of Kshs. 500,000/= was made in the year 2000, **Orion Hauliers vs Michael Semoer**, Mombasa HCCA No. 55 of 2010 where an award for Kshs. 800,000/= was made in the year 2007, **Kenya Breweries Ltd vs. Barkar Ali and Another** HCCCA No. 214 of 2009 where an award of Kshs. 800,000/= was made in the year 2012, **Wamunyu Children's Development Fund vs Michael Mutuku**, Machakos HCCA No. 125B of 2001 where an award of Ksh. 420,000/= was upheld by the High Court in the year 2007 and **Devki Steel Mills Ltd. vs James Makau Kisuli**, Machakos HCC 191 of 2008 where an award of Kshs. 250,000/= was made for soft tissue injuries.

19. Counsel for the appellant in his written submissions sought orders for the award of Kshs. 250,000/= to be set aside and substituted with an award of Kshs. 750,000/= general damages. He also prayed for future medical expenses in the sum of Kshs. 100,000/=.

20. The respondent's Counsel cited the cases she had relied on in the lower court, these were **Kasanga Musumba vs Aris Luhunyo**, Mombasa HCCC No. 259 of 1991 where an award of Kshs. 120,000/= was made in the year 1991, **Swabah Mafudh (a minor) vs. Mini Bakeries (Nairobi) Ltd.**, HCCC 46 of 1990, where an award of Kshs. 90,000/= was made in the year 1991, **Peter Kingori vs Fabian Kagwiri and Another**, Nairobi HCCC No. 2916 of 1993 where award of Kshs. 80,000/= was made on 2000.

21. A perusal of the authorities cited by Counsel for the appellant shows that the plaintiffs in the said cases suffered more severe injuries save in the case of **Wamunyu Children's Development Fund vs Michael Mutuku** (supra) where the plaintiff suffered a compound fracture of the left femur shaft, lacerations on the right knee laterally, several bruises around the right ankle and cut wound (lacerations) on the forehead. An award of Kshs. 420,000/= in general damages was made on 11th October, 2001. The plaintiff therein resorted to the use of a walking stick after the accident and it could not be ascertained if he could walk without one. The award of general damages was on appeal upheld by the High Court in the year 2007.

22. The authorities cited by Counsel for the respondent were decided over 10 years before the accident, the subject of this appeal happened. They were therefore out of tune with the monetary value of the Kenya shilling as at the time of the filing of the case in the lower court.

23. The case in the court below that gives rise to the present appeal was determined on 24th July, 2013, which was 11 years after the decision in the case of **Wamunyu Children's Development Fund** (supra). In relying on the said case as a guide, I am persuaded that I should interfere with the award of Kshs. 250,000/= that was made by the Hon. Magistrate. The appellant herein suffered severe multiple bone and soft tissue injuries and had to be operated on to insert a metal plate in his left thigh. It is my finding that the award of Kshs. 250,000/= was manifestly low in the circumstances of this case. I hereby set aside the said award and substitute it with an award of Kshs. 550,000/= which takes into account the nature of the injuries the appellant suffered, the pain and suffering he underwent, the element of inflation and depreciation of the Kenya Shilling between the time when the **Wamunyu Children's Development Fund** case (supra) was determined and the date of the Judgment in this case, before the lower court.

24. The issue of future medical costs was dealt with by the Court of Appeal in the case of **Simon Taveta vs. Mercy Mutitu Njeru** [2014] eKLR where the court cited the case of **Kenya Bus Services Ltd. vs. Gituma** [2004] EA 91. The court stated thus:-

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded.”

25. The appellant pleaded Kshs. 100,000/= for future medical treatment but did not adduce any evidence that he would need to undergo an operation to remove the metal implant. All that we have on the said issue is the medical report of Dr. S.K. Ndegwa, but again he was not called to lead evidence to shed light on the said item.

26. In the case of **Kombo Juma Mzee vs Karisa Nzai Munyika & Another**, Mombasa High Court Civil Suit No. 488 of 1996 an award for future treatment was awarded in the said case as the Doctor testified that further operations would be necessary to remove metal plates and screws and to correct mal-union of the plaintiff's leg and the Doctor confirmed that there was need for their removal and an attendant cost. The said plaintiff had testified about the insertion of knutsher nails on the leg and arm. Calling of such evidence is necessary as it gives the opposing party an opportunity to cross-examine the Doctor and the witness to test the veracity of their evidence with regard to the need for future medical treatment for a victim of a road traffic accident. In the circumstances of this case, I decline to make an award for future medical treatment.

27. The upshot of the foregoing is that the appeal is allowed. Liability had been apportioned at 75:25 with the plaintiff bearing 25% liability. The outcome of the award in general damages therefore is:-

Kshs. 550,000/=

Less Kshs. 137,500/=

Net award Kshs. 412,500/=

28. The appellant is awarded general damages in the sum of Kshs. 412,500/= in net, special damages in the sum of Kshs. 1,500/=, plus the costs of this appeal and of the case in the lower court. He is also awarded interest.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

V. Otieno holding brief for Mr. Nyabena for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant