



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 57 OF 2014

AKAMBA PUBLIC ROAD SERVICES LIMITED.....APPELLANT

-VERSUS-

ROSEMARY AMOIT.....RESPONDENT

(Being An appeal from the Judgment and Decree of the Senior Principal Magistrate's Court (Hon. S. Mokua), delivered on 22 April 2014 in Eldoret CMCC No. 715 of 2010)

JUDGMENT

[1] This appeal was filed herein on **14 May 2014** by the Appellant, **Akamba Public Road Services Limited**, in respect of the Judgment of the Learned Senior Principal Magistrate, **Hon. S. Mokua** delivered in **Eldoret Chief Magistrates Court Civil Case No. 715 of 2010** on **22 April 2014**. The Appellant was the Defendant in that suit that had been brought by the Respondent herein, **Rosemary Amoit**. The brief facts of the case, as pleaded before the lower court were that, on or about the **10 August 2009**, the Respondent was lawfully travelling as a fare paying passenger in the Appellant's **Motor Vehicle Registration No. KAW 715V** along Eldoret-Webuye Road when, at Musembe Area, an accident occurred in which the Respondent suffered a fracture of her right arm.

[2] It was the contention of the Respondent before the lower court that the accident was attributable solely to the negligence of the Appellant and/or its agents, servants and employees in driving the said motor vehicle. Accordingly, the Respondent made a claim for General and Special Damages in respect of the injury she suffered, together with interest and costs. The particulars of negligence were provided as per paragraph 4 of the Plaintiff; and although the Appellant filed a Defence denying the Respondent's allegations, the issue of liability was subsequently settled by consent on **13 February 2014**, whereupon judgment on liability was entered in favour of the Respondent against the Appellant in the ratio of 5:95 per cent. The lower court then proceeded to determine the issue of quantum, and in a Judgment dated and delivered on **22 April 2014**, the court awarded a sum of **Kshs. 400,000/=** as General Damages, less 5% contribution, and **Kshs. 2,200/=** as the proven Special Damages, together with interest and costs.

[3] Being aggrieved by that decision, the Appellant lodged this appeal contending that:

[a] The Learned Magistrate erred in law and in fact in awarding **Kshs. 400,000/=** as general damages which sum was not consistent with the injuries sustained, the submissions of Counsel and the legal precedents relied on.

[b] That the Learned Magistrate erred in law and in fact in arriving at an amount as general damages which amount was not supported by the evidence on record.

[c] That the Learned Magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages.

[d] That the Learned Magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.

[e] That the Learned Magistrate erred in law and in fact in awarding quantum of damages without having regard to the fact that the plaintiff had healed completely and had no permanent disability.

[f] That the Learned Magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant.

[g] That the Learned Magistrate erred in law and in fact in failing to consider the submissions tendered by the Appellant.

[h] That the Learned Magistrate erred in law and in fact in applying wrong principles of law in arriving at the said general damages.

[4] It was therefore the prayer of the Appellant that the Judgment and Decree of the lower court in **Eldoret CMCC No. 715 of 2010** on General Damages be set aside; and that in the alternative, this Court do make its own independent assessment on quantum of damages. The Appellant also prayed for the costs of the appeal.

[5] Pursuant to the directions of the Court given on **25 April 2017**, the appeal was canvassed by way of written submissions. Thus, the Appellant's written submissions were filed herein on **16 May 2017** by **M/s Kimaru Kiplagat & Company Advocates**, while the Respondent's written submissions were filed on **23 June 2017**. On the basis thereof, it was the contention of the Appellant that since the Learned Trial Magistrate found as a fact that the Respondent's injury had fully healed, he fell into error in assessing General Damages at **Kshs. 400,000/=** as that award was manifestly excessive. Counsel relied on the cases of **Jackson Maringu Kimani vs. Richard Githenya Gichuru Nairobi High Court Civil Case No. 4511 of 1990** wherein **Nambuue, J.** (as she then was) stated thus:

"The Plaintiff is only always entitled to what is fair, just and reasonable. We are all aware of the fact that money cannot renew a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the Plaintiff. It is not also supposed to punish the Defendant."

[6] Accordingly, Counsel for the Appellant proposed an award of **Kshs.180,000/=** and urged the Court to consider the award made in **George Kinyanjui t/a Climax Coaches and Another vs. Hassan Musa Agoi Eldoret HCCC No. 29 of 2012** in which the Plaintiff was awarded **Kshs. 452,000/=** for the injuries he suffered, which included two loose teeth, a fracture of the left clavicle as well as fractures of the 4th and 5th left ribs; which are more severe than the Respondent's injury. Granted that the major injury sustained by the Respondent was the fracture of the right arm, Counsel for the Appellant submitted that sufficient cause had been shown for the setting aside of the Learned Magistrate's award. He also relied on the following authorities:

[a] **Nakuru High Court Civil Appeal No. 232 of 2001:Imco Engineering & Building Contractors Limited vs. Joseph Macharia;**

[b] **Eldoret High Court High Court Civil Appeal No. 92 of 2012:Haron Cheror vs. Eastern Produce Ltd, and**

[c] **Nairobi High Court Civil Appeal No. 870 of 2002: Samwel Mungai Njau vs. Wananchi Sanitary Hardware Ltd.**

[7] Counsel for the Respondent, on the other hand, urged the Court to uphold the Judgment of the lower court, contending that assessment of damages is a matter of judicial discretion with which an appellate court ought not to interfere unless it is shown that the award is based on wrong principles, is manifestly excessive or grossly inadequate; or that the award is extravagant or oppressive and does not take into account previous awards for similar injuries. Counsel relied on the following authorities:

[a] **Court of Appeal (Nairobi) Civil Appeal No. 152 of 2001:Bildad Mwangi Gichuki vs. TM-AM Construction Group (Africa) [2002] eKLR;**

[b] **Eldoret High Court Civil Appeal No. 76 of 2012:Eastern Produce (K) Limited (Savani Estate) vs. Gilbert Muhunzi Makotsi [2013] eKLR; and**

[c] **Kisumu High Court Civil Appeal No. 94 of 2014:Akamba Public Road Services Limited vs. Maureen Akinyi Abok [2016] eKLR;**

[8] This being a first appeal, I am mindful that it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was expressed thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial 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 this respect..."

[9] What then was the evidence adduced before the lower court with regard to quantum? First and foremost was the evidence of the Respondent who testified as **PW1** before the lower court. She stated that on **10 August 2009**, she was travelling from **Kampala, Uganda to Nairobi** aboard the Appellant's bus **Registration No. KAW 715** and that on reaching **Kipkaren Area**, the bus hit something, skidded and rolled. She thereby sustained injuries on her hands and leg which included a fracture of the right hand and bruises on the left hand and leg. She was rushed to **Lugari District Hospital** where she was admitted from **10 August 2009 to 14 August 2009**. It was the Respondent's evidence that she sought and obtained further treatment at **Kenyatta National Hospital** and **Mbagathi District Hospital in Nairobi**; and that an operation was recommended which was immediately done at the **National Spinal Injury Hospital, Nairobi**. During the hearing, the Plaintiff stated that she had not healed and could not use her right hand fully. She could not rotate it as it and could not lift anything heavy.

[10] The evidence of the Respondent was corroborated by the evidence of **Dr. Samuel Aluda (PW2)**, who examined the Respondent and prepared the Medical Report that was produced before the lower court as the **Plaintiff's Exhibit 2a**. The Doctor confirmed that the Respondent sustained injuries as hereunder:

[a] **Swollen right arm;**

[b] Fracture of the right radius, distal third;

[c] Bruises on the left hand which was tender;

[d] Bruises on the right hand.

[11] PW2 confirmed that the fracture had a mal-union during the healing process, which necessitated an operation to insert a permanent pin on the Respondent's wrist; which the Respondent will have to live with for the rest of her life. To augment the evidence of PW1 and PW2, the primary treatment documents were produced by a Clinical Officer at **Lugari District Hospital, Mr. Julius Masinde (PW4)**. He too confirmed that the Respondent had been admitted at the Hospital on account of injuries sustained by her in a road traffic accident; and that the fracture was plastered.

[12] It was in the light of the foregoing evidence, which was entirely uncontroverted, that the Learned Trial Magistrate assessed General Damages due at **Kshs. 400,000/=**. Here is how the Learned Magistrate reasoned on the matter:

"...The Plaintiff's Counsel proposed an award of Kshs. 950,000/- as general damages for pain, suffering and loss of amenities. The defendant's counsel proposed an award of Kshs. 180,000/-. The defendant relied on cases where injuries were on the legs. The Plaintiff relied on various cases. The one with injuries close to the present case was Mushambi and Gona vs. Associated Vehicles Assemblies Ltd. Mombasa HCC 9191. The plaintiff suffered severe comminuted fracture of his radius and ulna left arm cut wound on the scalp with mild commission [concussion] abrasion on the right hand both knees and chest. The fracture healed with a permanent restrictive movement. The plaintiff was awarded general damages in the sum of Kshs. 380,000/-.

Based on the evidence on treatment undertaken and the opinion of Dr. Aluda, upon considering the cited cases and the duration since they were decided, I award the plaintiff Kshs. 400,000/- as general damages for pain suffering and loss of amenities..."

[13] I have given due consideration to the authorities cited by the Appellant and note that in Eldoret High Court Civil Appeal No. 29 of 2012: George Kinyanjui t/a Climax Coaches & Another vs. Hassan Musa Agoi, the Plaintiff had sustained injuries that included fracture of the left clavicle and fractures of the 4th and 5th ribs, as well as two loose teeth. The court awarded Kshs. 452,000/= in 2016; while in **Nakuru High Court Civil Appeal No. 232 of 2001:Imco Engineering & Building Contractors Limited vs. Joseph Macharia**, wherein an award of **Kshs. 160,000/=** was made for pain, suffering and loss of amenities, the Plaintiff had slipped and fallen from a ladder while removing shutters from a wall about 20 feet high, and as a result, sustained a fracture of the right leg and severe soft tissue injuries on his right ankle joint. The High Court overturned the lower court award of **Kshs. 300,000/=** on the ground that it was excessive.

[14] In **Nairobi High Court Civil Appeal No. 870 of 2002: Samwel Mungai Njau vs. Wananchi Sanitary Hardware Ltd**, is similarly a case that involved injuries to the legs. The Plaintiff in that case suffered the following injuries:

[a] crushed right leg with compound fracture of right tibia- fibula;

[b] Extensive wound over right leg with broken bone and crushed muscles and skin loss;

[c] Fracture of 1st, 2nd, 3rd and 4th metatarsal of the right foot with swollen foot;

[d] Superficial multiple wounds over right arm.

An award of **Kshs. 150,000/=** was made for pain and suffering on **27 May 2004**.

[15] It is noteworthy too that the authorities relied on by the Respondent's Counsel were cited to support the submission that an appellate court should be slow upset an award of damages unless it is shown that the award is so inordinately high or low as to represent an entirely erroneous estimate.

[16] Indeed, as was acknowledged in **H. West & Son Ltd vs. Shephard [1964] AC 326**, the task awarding money compensation in a case of this kind is a matter of opinion and discretion. It was further observed that:

"...In a sphere in which no one can predicate with complete assurance that the award made another is wrong the best that can be done is to pay regard to the range of limits of current though. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[17] With the foregoing in mind, I have endeavoured to ascertain what the current thinking is and noted that in **Rose Makombo Masanjui vs. Night Flora alia Nightie Flora & Another [2016] eKLR** in which the Plaintiff had sustained a fracture of the left wrist, comminuted fracture of frontal bone and deep cuts on the forehead, and in which the trial magistrate had awarded general damages of **Kshs. 300,000/=**, the High Court enhanced the award to **Kshs. 500,000/=** on **22 November 2016**.

[18] In the result, there is no sufficient cause for disturbing the award made by the Learned Trial Magistrate. Hence, the Judgment of the

lower court dated **22 April 2014** in **Eldoret CMCC No. 715 of 2010** and the Decree ensuing therefrom are hereby upheld, with the result that this appeal, being without merit as it is, is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY 2018

OLGA SEWE

JUDGE