

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 38 OF 2017

DAVID ABDALLA TIEGO 1ST APPELLANT

KISAKA JOHN GEDION t/a PRINCE BUS SERVICES 2ND APPELLANT

NATIONAL INDUSTRIAL CREDIT LIMITED 3RD APPELLANT

VERSUS

MARGARET SAYO EBITONYE RESPONDENT

(An appeal arising from the judgment and decree of the Hon. B. Ochieng, Chief Magistrate in Kakamega CMCCC No. 134 of 2015 of 15th March 2017)

JUDGMENT

1. The appellant lodged herein a memorandum of appeal dated 7th April 2017, in which it was averred that the trial court had treated the evidence and submissions on quantum superficially and thereby came to the wrong conclusions thereon, had failed to analyse the authorities submitted as against the injuries suffered by the respondent, had not considered the evidence tendered in totality, had proceeded on the wrong principles when assessing the awards of damages to be made and had made an award that was inordinately high in the circumstances. It is sought that the said decision of the lower court be aside and substituted with an award that is appropriate.
2. This is a first appeal and I am conscious of the requirement pronounced in *Selle vs. Associated Motor Boat Company Limited* (1968) EA 123, that in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.
3. The respondent's injuries, as recorded in her plaint dated 8th April 2015, were inversion of two upper incisor teeth, fracture of the right clavicle, blunt injury on the chest, and a laceration wound on the right forearm. At the hearing on 24th August 2016, the respondent did not recite the injuries that she suffered, instead she referred to her treatment notes and the medico-legal report prepared by her doctor. The medical treatment notes from the Provincial General Hospital –Kakamega, which are undated, states her injuries to be a deep cut wound at right arm and left chest injuries. The medico-legal report by Dr. Charles M. Andai of Lubinu Medical Clinic, dated 18th October 2012, records that she had inversion of two upper incisor teeth, fracture of right clavicle, blunt injury to the chest and a laceration wound to the right forearm. She was admitted in hospital for four days, and there was readmission for a further one day on account of the non-union of the clavicular fracture. The doctor opined that the fracture had sufficiently reunited, the chest injury had eased off, the laceration wound had healed leaving a scar and the two upper incisor teeth were likely to be extracted. He advised the respondent to visit a dentist.
4. The trial court made an award of Kshs. 400, 000.00 general damages for pain and loss of amenities. The court did not cite any authorities to justify the award. I note though that the respondent had proposed an award of Kshs. 800, 000.00 but did not cite any authority. The appellants had cited the decision in *Wambaira and 47 others vs. Kiogora and 2 others* (2001) eKLR, where the court had awarded figures ranging from Kshs. 50, 000.00 to Kshs. 100, 000.00, as the case involved eighteen (18) plaintiffs. The said decision of the Court of Appeal had been made on 17th December 2004.
5. The parties have urged the appeal by way of written submissions. The respondent has urged me to uphold the judgment of the lower court, on the basis that the same was made after the court considered what it ought to have considered. The appellants argue that the award of damages made by the trial court was not supported by case law or evidence. They assert that the injuries sustained by the respondent were mainly soft tissue in nature. It is argued that the court ought to have relied more on the discharge summary rather than the medico-legal report put in evidence. It is averred that the award was excessive and the court is urged to reduce the same to Kshs. 50, 000.00. The appellants have cited the decisions in *Mokaya Mochama vs. Julius Momanyi Nyokwoyo* (2013) eKLR and *Ndung'u Dennis vs. Ann Wangari Ndirangu & another* (2018) eKLR.
6. I have looked at the record before me. I am not convinced that the injuries sustained by the respondent were restricted to the soft tissues. Soft tissue injuries refer to injuries to the soft tissues, such as wounds, bruises, abrasions and lacerations. The medico-legal report and the discharge summary indicate that the respondent had a fracture of the clavicle and inversion of the teeth. The injuries to the clavicle and the teeth cannot be described as injury to the soft tissues. In my view the injuries were severe, necessitating that the respondent be admitted, and later readmitted, in hospital for an aggregate of five days. I note too that whereas the injury to the clavicle and the blunt trauma to the chest have sufficiently healed or eased, the rest have left permanent marks, the healing of the wound left a scar, while the inverted teeth may have to be removed.
7. I have noted that the appellants urge the court to disregard the medico-legal report presented at the trial, and to rely more on the discharge summary and the treatment notes. The judicial officers who have to handle cases of this nature are not trained to interpret documents prepared for consumption of medical personnel. The device of the medico-legal report came in handy to have doctors reduce the documents

prepared for their own consumption to a language that judicial officers can readily understand. Treatment notes and discharge summaries are documents made by medical personnel for their own purposes. The courts rely on them mainly as evidence that the party in question did receive medical attention. The document that the court relies on to assess damages is the medico-legal report. If the appellants did not agree with the contents of the medico-legal report relied on by the respondent, they ought to have availed themselves of the opportunity to have the respondent examined by a doctor of their choice for preparation of a medico-legal report that they would have then placed on record for consideration by the court.

8. I have looked at the authorities cited by the appellants herein for the purpose of the appeal. The injuries suffered by the respondent in *Ndung'u Dennis vs. Ann Wangari Ndirangu & another* (supra) are not comparable to those suffered by the respondent herein. The party in that case sustained injuries to the soft tissues, as there were no fractures suffered nor loosening or loss of teeth. In my view, the injuries sustained by the respondent herein were a lot more serious as discussed in paragraph 6 here above. Although the appellants cited *Mokaya Mochama vs. Julius Momanyi Nyokwoyo* (supra), a copy of the decision was not availed, and I therefore had no occasion to look at the same.

9. In view of the foregoing, I find that the appellants have failed to demonstrate that the trial court fell into error in making the award of damages that it did make in the case before it. They have not discharged the burden cast upon them. I find no merit in the appeal before me, and I accordingly dismiss the same. The respondent shall have the costs of the appeal, as well of the suit below. The appellants have a right of appeal to the Court of Appeal, within the next twenty-eight (28) days of date of delivery of this judgment, should they be aggrieved by the same.

DATED, SIGNED and DELIVERED at KAKAMEGA this 25TH DAY OF SEPTEMBER, 2018

W. MUSYOKA

JUDGE