



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 181 OF 2014

ANWARALI & BROTHERS LIMITED.....1ST APPELLANT

GEORGE ONYANGO.....2ND APPELLANT

- V E R S U S -

PETER GIKANDI GITHINJI.....RESPONDENT

(Being an appeal against the judgement of Hon. Magistrate delivered on 17th April 2014 Senior Magistrate Court at Limuru SPMCC No. 520 of 2012)

JUDGEMENT

1) Peter Gikandi Githinji, the respondent herein, was involved in a road traffic accident on 3rd June, 2012 along Nairobi-Naivasha road. He consequently filed a compensatory suit against Auwarali & Brothers Ltd and George Onyango, the 1st and 2nd respondent's respectively before the Senior Principal Magistrate's Court, Limuru.

2) The suit was heard by Hon Oduor, learned Senior Principal Magistrate who eventually entered judgement in favour of the respondent. The respondent was found 20% liable while the appellants shouldered 80% liability.

3) In the end, the respondent was awarded as follows:

I. General damages ksh.1,200,000/=

II. Special damages ksh. 653,000/=

III. Cost of future treatment ksh.50,000/=

Gross total ksh.1,903,000/=

Less 20% contribution ksh. 380,600/=

Net total ksh.1,522,400/=

IV. Costs of the suit and interest.

4) The appellants were aggrieved by the decision on quantum hence they preferred this appeal and put forward the following grounds.

1. THAT the learned magistrate erred in law and fact and ended up misdirecting himself in awarding exorbitant quantum of damages of ksh.1.200,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the plaintiff herein.

2. THAT the learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.

3. THAT the learned magistrate's award on damages was so high as to be entirely erroneous.

4. THAT the learned magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.

5. THAT the learned magistrate erred in law and fact in awarding the plaintiff a sum of ksh.650,000/= as medical expenses which was not specifically proved so as to amount to a miscarriage of justice.

6. THAT the learned magistrate erred in law and fact by awarding special damages contrary to trite law that the same must be specifically pleaded and proved.

7. THAT the whole judgment on quantum and special damages was against the weight of evidence before the court.

5) When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. It is the appellants' submission that the damages awarded were not commensurate with the nature of injuries the respondent sustained. It was pointed out that the injuries had healed leaving an incapacitation of only 40% and 30% according to the medical reports filed by Dr. Omuyoma and Dr. Modi.

6) The appellant further argued that the award of general damages was exorbitant and in view of the injuries which were not pleaded but were included in calculating the damages. The appellant also argued that the trial magistrate did not indicate how he came up with the award of ksh.1,200,000 for general damages.

7) The other issue which the appellant raised is that the award of ksh.50,000/= as further medical treatment was not pleaded as a special damage hence it should not have been awarded.

8) It was also argued that the award of ksh.654,500/= though pleaded as special damage was never proved save for ksh.80,000/=.

9) The respondent on the other hand vehemently opposed the Appeal who argued that the trial court applied the correct principles in arriving at the decision to award ksh.1,200,000/= for general damages.

10) On special damages, the respondent stated that the amount awarded was pleaded and proved by the evidence tendered.

11) I have carefully re-evaluated the manner in which the trial magistrate assessed damages. I think it is appropriate to begin with the prayer and award of special damages.

12) It is not in dispute that the trial court awarded the respondent ksh.653,000/= for special damages. The respondent had applied to be awarded ksh.650,000/= as medical expenses.

13) In this case the trial magistrate awarded the respondent ksh.650,000 being the medical expenses as a special damage on the basis that it represents unsettled hospital bills. The trial magistrate relied on the case of **Husuni Alawi Husuni vs= Malindi Bus Services & Another H.C.C no 118 of 1998**. The respondent testified and told the trial court that he was taken to Kijabe Mission Hospital and got admitted for 3 months and at the point of discharge he came out with an outstanding hospital bill of ksh.650,000/=.

14) The respondent stated that he gave out his title deed as security to enable the hospital discharge him with an outstanding hospital debt. He produced an invoice for the same.

15) It is not in dispute that the respondent was slapped with a bill of ksh.650,000/= as the hospital bill. The same was pleaded and an invoice was produced to prove its existence. I am convinced that the respondent tendered evidence to prove the same. I therefore find no merit on the appeal against the award on medical treatment as a special damage.

16) The appellant has challenged the award of ksh.50,000/= for cost of future medical expenses because the award was not pleaded as a special damage. It is stated in the judgment by the trial court that the doctor had assessed permanent disability at 30% and assessed the cost of removal of the nail at ksh.50,000/=. With respect, I agree with the appellant's submission that the prayer for payment of future medical expenses was not pleaded. It was therefore erroneous for the trial magistrate to make the award.

17) The other award which was challenged on appeal is the award of ksh.1,200,000/= as general damages for pain and suffering. It is said the same is excessive. It is not in dispute that the plaintiff suffered compound fracture of the right tibia and fractures on the right ankle joint, right femur and left femur. The authorities cited by the parties shows this court that has awarded in the past between ksh.1,200,000 and ksh.2,500,000/= I am convinced that the award of ksh.1,200,000/= is not inordinately high.

18) In the end, I find the appeal as against quantum to be without merit save for the award of ksh.50,000 for medical expenses. Consequently the appeal as against quantum is dismissed save for the appeal against the award of ksh.50,000 is allowed.

19) For the avoidance of doubt the decision on appeal is as follows:

i. General damages ksh.1,200,000/=

ii. Special damages ksh. 653,000/=

Gross ksh.1,853,000/=

Less 20% ksh. 370,000/=

Net amount ksh.1,483,000/=

iii. Costs of the suit.

iv. Interest at court rates from the date of judgement until full payment.

v. Costs of the appeal awarded to the respondent.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents