



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 177 OF 2011

JOSEPH MWANGI THUITA.....APPELLANT

-VERSUS-

JOYCE MWOLE.....RESPONDENT

(Formerly CMC Civil Case 10688/2007 Milimani Commercial Courts, Nairobi)

JUDGEMENT

INTRODUCTION

1. The Appellant lodged in Law court a suit seeking compensation for injuries sustained as a result of motor accident. The Respondent filed defense to oppose the suit.
2. On 25/03/2009, the parties recorded consent on liability in which the Defendant was to bear 60% blame and the Appellant/Plaintiff 40%. The matter was to proceed on assessment of the damages.
3. However, the Trial Court forgot the consent and after hearing the suit did apportion liability at a rate of 50:50.
4. The Appellant was aggrieved by the Trial Magistrate Court verdict thus lodged instant appeal and set out the following grounds of appeal:-

1) That the Learned Magistrate erred in law and in fact in failing to consider that the parties to the suit had recorded a consent on liability on 25-03-2009 apportioning liability of 60:40 percent in favor of the Plaintiff and further erred in apportioning liability at 50:50 in her judgment.

2) That the Learned Magistrate erred in law and in fact in finding that the Plaintiff had only pleaded and proved Kshs.7,700/= in special damages against the weight of evidence by the plaintiff.

3) That the Learned Magistrate erred in law by awarding general damages at a sum of Kshs.100, 000/= which was inordinately too low and inconsistent with the severity of injuries sustained by the Plaintiff.

4) That the Learned Magistrate erred in law by failing to consider and appreciate the weight of evidence adduced by the Plaintiff.

5) That the Learned Magistrate erred in law and in fact in awarding the Plaintiff damages of Kshs.53, 850/= only.

5. The court directed the appeal be canvassed via Written Submissions but only Respondent filed the same.

THE DUTY OF 1ST APPELLANT COURT

6. As first Appellate Court, its duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusion about it; bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See case of **SELLE & ANOR – VS- ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123.**

EVIDENCE

7. It was his evidence that he was scampering for a motor vehicle public transport popularly known as matatu when the driver of the matatu got in motion as the Plaintiff was boarding and he fell and sustained the injuries that Dr. Moses Kinuthia so spells out in his detailed medical report.

ISSUES, ANALYSIS AND DETERMINATION

8. After going through the evidence on record and the submissions, I find the issues are:-

1) Whether court ignored consent on liability recorded by party herein?

2) Whether the award was inordinately low?

3) Whether pleaded special damages were proved.

9. The court has perused record and confirmed that, there was consent on liability agreed at a ratio of 60:40 between parties. Thus Magistrate erroneously made judgement on liability and apportioned it at a ratio of 50:50. Same is adjusted to 60:40.

10. The liability that is apportioned as agreed at a ratio of 60:40% in favor of Appellant.

11. The guide principles for an Appellate court in disturbing award of damages are to wit,;

“An Appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”

12. On quantum, the one page judgment assessed the award in total disregard of the Appellant submissions.

13. The court did not even base the award on any authorities of similar injuries. It was a figure plucked from the air.

14. It is not enough to say “*I have considered rules and authorities filed*” then proceed to impose figures without weighing the considerations.

15. The cited authorities states:-

Ø HCC 2216/1993 MUHIHO -VS- PATEL, injuries fracture right tibia and fracture right radius and ulna award of Kshs.600,000/=.

Ø HCC 2797/1997 MUSOGA -VS- KARIUKI, the injuries fracture right tibia, right fibula, femur and dislocation of the right elbow award Kshs.800,000/=.

16. In the instant case, the Applicant sustained;

- *Fractures right femur.*
- *Compound fracture (r) tibia.*
- *Compound fracture right fibula.*
- *Shortening right leg.*
- *Episodic pain (r) thigh with inability to walk without support.*

17. The above injuries are within the range of injuries in the above (2) two cited authorities, thus the court finds that the award of Kshs.100,000/= as general damages was inordinately low.

18. The court thus awards Appellant Kshs.700,000/= as general damages, and on special damages specifically pleaded and proved Ksh.35,220/= thus entitled to that amount and no more.

19. Thus the court makes the following orders:-

The Appeal succeeds as follows:-

1) The judgment is entered in favor of the Appellant in the following terms;

a) Liability 60:40 in Appellant favor.

b) General damages - Kshs.700,000/=.

c) Special damages - Kshs.35,220/=.

d) Total - Kshs.735,220/=.

e) Less 40% - Kshs. 294,088/=

Award: Balance - Kshs.441, 132/=.

2) Costs and Interest.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE