REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 24 OF 2016

ANDY FORWARDERS SERVICES LTD……...1ST APPELLANT

JOSEPH MBOLETI MUTISYA…….2ND APPELLANT

GALCHA HUSSEIN…….....3RD APPELLANT

VERSUS

GODFREY GITHIRI NJENGA……....RESPONDENT

(An appeal from the judgment delivered by Honourable D.W. Mburu (Mr.) (Principal Magistrate) on 13th November, 2015 in Civil Suit No. 4711 of 2012)

JUDGMENT

1. The appellants were the defendants in the Lower court whereas the respondent was the plaintiff therein. In the aforesaid suit, the respondent filed a plaint dated 15th August, 2012 claiming damages for injuries sustained as a result of alleged negligence on the part of the appellants.

2. The respondent averred that while he was lawfully loading a pole into a lorry parked on the side of the road along Mombasa Road, the 2nd appellant negligently caused the subject motor vehicle to veer off the road and knock down the respondent, causing him to sustain serious injuries. The 1st and 3rd appellants were said to be vicariously liable for the actions of the 2nd appellant by virtue of the fact that they were the previous and current registered owners of the subject motor vehicle respectively.

3. In their defence filed on 24th October, 2012, the appellants denied both ownership of the subject motor vehicle and the occurrence of the accident. The appellants in turn denied the particulars of negligence set out in the plaint and the allegation that the injuries sustained resulted from the alleged accident. The appellants in the alternative pleaded contributory negligence on the part of the respondent.

4. When the suit came up for hearing before the trial court, parties recorded a consent on liability in the ratio of 85%:15% in favour of the respondent. As such, the trial court was left to consider the quantum of damages only. The parties filed their respective submissions and the trial magistrate delivered his judgment on 13th November, 2015 thereby making an award of Kshs.800,000/= in general damages and special damages of Kshs.8,260/= in favour of the respondent.

5. Being dissatisfied with the abovementioned decision, the appellants lodged an appeal to this court. The memorandum of appeal is premised on six (6) grounds, namely:

> ***i) THAT the learned magistrate erred in law and in fact and misdirected himself in awarding an exorbitant quantum of damages of Kshs.800,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted for injuries similar to those sustained by the respondent.***
>
> ***ii) THAT the learned magistrate erred in law in making such a high award.***
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> ***iii) THAT the learned magistrate's award on damages was so high as to be entirely erroneous.***
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> ***iv) THAT the learned magistrate's award was made without considering the medical evidence before the trial court and he failed to appreciate the nature of injuries sustained by the respondent and also failed to be guided by authorities on comparable awards and hence ended up making an excessive award.***
>
> ***v) THAT the learned magistrate erred in law and in fact in failing to consider the defendant's submissions and authorities in***

making a finding on quantum.

vi) THAT the whole judgment on quantum was against the weight of evidence before the trial court.

6. The appeal was canvassed by way of written submissions. In essence, the appellants submitted that the trial court failed to justify the award made *vis-à-vis* the injuries sustained by the respondent and that the award was inordinately high. According to the appellants, the learned magistrate also did not indicate how he arrived at the award of Kshs.800,000/=.

7. The respondent on the other hand largely submitted that the trial magistrate's decision was reasonably made and should not be interfered with.

8. This court has perused the record of appeal. It is noteworthy that whereas the appeal is premised on six (6) grounds, this court is of the view that the grounds are correlated in the sense that they concern quantum of damages. In view of this, the court will sum them up into two (2) main grounds.

9. The first ground of appeal is whether the learned magistrate erred in failing to consider the appellants' submissions in making a finding on quantum of damages.

10. The appellants contended that the trial magistrate did not appreciate that their submissions had been filed together with authorities. The respondent on his part argued that the authorities cited by the appellants are irrelevant as they do not relate to the injuries sustained.

11. In his judgment, the magistrate admitted that he could not trace the appellants' submissions in the court file. This court has perused the file and established that the appellants did in fact file submissions on 23rd July, 2015. Furthermore, when the matter went before the trial magistrate on 21st September, 2015 he ascertained that the submissions had been filed. However, the circumstances under which the submissions supposedly went missing are unclear. It follows that the trial magistrate did not take into account the appellants' submissions and authorities in arriving at his decision on quantum and in failing to do so, he erred.

12. The second ground of appeal is whether or not the award made by the trial magistrate was so manifestly high as to be deemed erroneous. In considering this ground, the court takes guidance from the case of ***Kemfro Africa Ltd T/A Meru Express Services V Am Lubia & Another [1987] KLR 27*** cited by the respondent in his submissions, wherein the court wisely reasoned as follows:

> ***"the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge...it must be satisfied either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."***

13. The first and second principles concern whether the trial magistrate left out a relevant factor or took into account an irrelevant factor. The appellants submitted that the medical examination report (P3 form) annexed to the record of appeal indicated that the injuries were blunt in nature. They went ahead to argue that the aforesaid report contradicted the two (2) medical reports prepared subsequently and that the trial magistrate failed to consider the discrepancy. The appellant further submitted that the learned magistrate did not appreciate the injuries sustained, in addition to failing to indicate the manner in which the award was arrived at and that no reference was made to the medical evidence adduced.

14. In opposition thereto, the respondent supported the trial magistrate's decision, contending that there was no indication that the injuries sustained were blunt in nature; rather, the description given concerned the probable weapon that caused the injury, which weapon was presumed to be blunt. The respondent submitted that the trial magistrate rightly awarded damages commensurate to the injuries suffered since the magistrate considered the authorities cited by the respondent and which authorities addressed injuries similar to those of the respondent.

15. Ultimately, the respondent submitted that the award by the trial magistrate was made in consideration of all relevant factors and applicable authorities.

16. A close reading of the judgment delivered on 13th November, 2015 reveals that the learned magistrate made reference to the medical documents adduced and in particular, the medical report by Dr. G.K. Mwaura. In addition, the learned magistrate looked at the authorities cited by the respondent; the injuries sustained; the respondent's age inter alia in awarding Kshs.800,000/= in general damages for pain, suffering, loss of amenities and loss of earning capacity.

17. According to the medical report prepared by Dr. G.O. Afulo and dated 15th May, 2012, the prognosis was that the respondent had a tender left ankle and fracture of the medial malleolus. This finding was confirmed by Dr. G.K. Mwaura vide his report dated 6th August, 2012. The two (2) medical reports also ascertained that the respondent was experiencing pain and swelling on the affected area at the time of examination, and that such pain would persist. Further, the medical reports assessed the permanent degree of disability at 10%.

18. Suffice to say, the question remains: was the award on general damages so inordinately high as to be deemed erroneous? The appellants' submission is that the damages awarded were exorbitantly high and thus unreasonable and unfair; while the respondent submitted that the award was reasonable and justified.

19. It is worthwhile to appreciate that an award of damages is purely a matter of the court's discretion. However, the court should not make an award that is unreasonably low or high. The case of ***Butt vs Khan (1977) 1 KAR*** contextualizes this principle hereunder:

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

20. The appellants' concern was that the learned magistrate acted on a wrong principle of law and did not draw guidance from authorities on comparable awards. As this court may recall, the appellants' submissions and cited authorities were not referred to by the trial court. Likewise, the appellants did not quote additional authorities in their submissions before this court. The respondent challenged the authorities cited in the appellants' earlier submissions, submitting that they are irrelevant since they do not relate to the injuries sustained.

21. The medical report by Dr. G.K. Mwaura disclosed that the wound has fairly healed, though the respondent was reported to be experiencing persistent pains. It is assumed that the respondent may require medication for such pain. Similarly, the permanent incapacity has been assessed at 10%.

22. This court is alive to the fact that the injuries sustained were to the ankle area. It would appear that the injuries were relatively minor save for the finding that the pain and swelling are likely to persist and that there is a permanent degree of functional incapacity assessed at 10%.

23. In regard to the above and without negating the permanent incapacity assessed, this court is convinced that the award made by the learned trial magistrate was manifestly high given the nature of the injuries sustained and progression in healing. Under the circumstances, it is reasonable to opine that the said award was erroneously made and naturally ought to be interfered with.

24. Accordingly, this court is of the considered view that an award of Kshs.500,000/= in general damages is sufficient compensation for the injuries sustained by the respondent.

25. In the end, the award of Kshs.800,000/= on general damages is hereby set aside and replaced with an award of Kshs.500,000/= on general damages. The respondent shall have the modified sum together with the special damages awarded by the trial court subject to the 15% contributory negligence on the part of the respondent making a total of Kshs.425,000/-. Each party shall bear their own costs of the Appeal.

Dated, signed and delivered at **NAIROBI** this **20th** day of December, 2018.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellants

……. for the Respondent