



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 522 OF 2014

LYNETTE NDUTA NJENGAAPPELLANT

- V E R S U S -

ESTHER WACHUKA KABUE.....RESPONDENT

(Being an appeal from the judgment of Hon. M. C. Chepseba (Mrs) SPM delivered on 28th October 2014 in the Chief Magistrate's Court Milimani in CMCC No. 2164 of 2011)

JUDGEMENT

1. Lynette Nduta Njenga, the appellant herein, filed a compensatory suit before the Chief Magistrate's Court, Milimani Commercial court Nairobi, against Esther Wachuka Kabue, the respondent herein, for the injuries she sustained in a road traffic accident she was involved on 23rd November 2009. It is said that on the aforementioned date at about 5.30pm, the respondent was lawfully travelling as a pillion passenger aboard motorcycle registration no. KMCE 0845U along Langata road in Karen area, Nairobi, when the appellant's motor vehicle registration no. KBB 546Z veered off the road and ramming into the motor cycle where the appellant was a pillion passenger. As a result of the accident, the appellant suffered serious injuries. The suit was heard and determined in favour of the respondent by Hon. M. C. Chepseba, learned Senior Principal Magistrate. The respondent was awarded ksh.500,000/= all inclusive. It is important to note that when the suit came up for hearing, learned counsels recorded a consent on liability as follows:

i. The plaintiff (now appellant) to shoulder 20% liability while the defendant (Now respondent) shoulders 80% liability.

ii. The medical reports to be admitted as exhibits in evidence by consent.

2. The suit therefore proceeded to hearing by way of written submissions on quantum thus giving rise to the award of ksh.500,000/= less contribution.

3. Being aggrieved on the award of damages, the appellant preferred this appeal. On appeal, the appellant argued that the learned Senior Principal Magistrate erred in law and fact by assessing the quantum of general damages at a figure that is not commensurate to the injuries the appellant suffered.

4. When the appeal came up for hearing, learned counsel recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival written submissions. I have further re-evaluated the case that was before the trial court. It is important to set out the particulars of the injuries the appellant suffered as shown in the medical reports prepared by the two doctors namely Dr. Kodwarwala and Dr. Wokabi.

The appellant is said to have sustained the following injuries:

i. Swelling of the brain and loss of conscience after the accident.

ii. Soft tissue pelvic injuries

iii. Clip fracture of the pubic bone.

iv. Fracture of the left distal radius and ulna.

5. The trial magistrate also identified the above stated injuries as those the appellant suffered. She formed the opinion that an award of kshs.500,000 was sufficient as general damages for pain, suffering and loss of amenities and kshs.2,000/= as special damages.

6. It is the appellant's submission that the award is inordinately low and not commensurate with the injuries the appellant sustained. It is submitted that the trial magistrate failed to take into account the nature of the injuries disclosed in the medical reports in assessing the quantum of general damages. It is also argued that the learned Senior Principal Magistrate did not take into account comparable awards in respect of near similar injuries made by superior courts. The appellant relied on the case of **Anthony Maina =vs= Samuel Gitau Njenga (2006) eKLR** where this court awarded ksh.1,200,000/= for near similar injuries. The appellant also cited the decision in **James Katua Peter =vs= Simon Mutua Munyasia (2008) eKLR** where this court awarded ksh.2,000,000/= for near similar injuries. The appellant proposed to be awarded ksh.4,000,000/= less 20%.

7. The respondent is of the view that the award given to the appellant is commensurate with the injuries the appellant sustained hence the appeal lacks merit. The respondent was emphatic that the trial magistrate considered the submissions, authorities cited and the nature of injuries.

8. The principles to be considered by an appellate court before interfering with the trial court's decision on quantum are well settled. That is to say that the appellate court will interfere with the exercise of discretion of the lower court where the latter court has failed to take into account a relevant factor or has taken into account an irrelevant factor or the award is inordinately low or high that the award is wholly erroneous. There is no dispute that the learned senior principal magistrate indicated in her judgment that she considered the medical reports, the authorities cited and the submissions. I have on my part re-evaluated the evidence presented and the authorities cited and I have come to the conclusion that the learned Senior Principal Magistrate merely gave lip service to the authorities cited. Has she given those authorities serious attention she would have noticed that this court had previously given awards ranging between ksh.1,200,000 and kshs.2,000,000 for near similar injuries. The award of kshs.500,000/= in comparison to other previous awards is inordinately low. I am convinced that the appeal has merit.

9. After taking into account past decision, I am convinced a sum of ksh.1,850,00/= represents an award which is commensurate with the injuries the appellant sustained.

10. In the end, I allow the appeal by setting aside the order awarding ksh.500,000/= and substitute it with an order awarding the appellant kshs.1,850,000/= as general damages and kshs.2,000/= as special damage. The aforesaid figures be subject to 20% of liability.

11. The final figure award therefore is tabulated as follows:

i. General damages ksh.1,850,000/=

ii. Special damages ksh. 2,000/=

Gross total ksh.1,852,000/=

Less 20% contribution ksh. 370,000/=

Net total

ksh.1,481,600/=

12. The appellant to have costs of the appeal and those arising from the suit.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent