



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.17 OF 2016

BETWEEN

SUKARI INDUSTRIES LIMITED APPELLANT

AND

MAXWEL OMONDI OTIENO RESPONDENT

(An appeal from the Judgment and Decree of M.A. Ochieng (SRM) in

Ndhiwa PMCC NO.36 of 2015 delivered on the 20th April, 2016)

JUDGMENT

1. This appeal is filed by **SUKARI INDUSTRIES LIMITED** (the appellant) against the decision made in favour of **MAXWEL OMONDI OTIENO** (the respondent) who had filed a claim for general damages following an accident which occurred on 7th March 2015 involving the appellant's motor vehicle Registration No.KBJ 277 E and the respondent who was a pillion passenger on a motor cycle along **RIAT-MARAM ROAD** at **OTENGE**. The accident was attributed to the negligence of the defendant's driver/employee and the respondent sustained injuries which **DUNCAN ODHIAMBO OLOO** (the clinical officer at Homa Bay Referral Hospital) (PW2) described as a deep cut wound on the left part, swollen limbs, a depressed skull fracture of left libia. Dr. Nyawade who examined the respondent compiled a medical report which noted that the respondent also had blunt chest injury, dislocation of the left ankle joint. The examination also revealed the residual effect i.e. Respondent had a scar on the left ankle joint which also had limited movement and he walked with a limping joint.
2. The appellant while admitting occurrence of the accident blamed the rider of the motorcycle which was ferrying the respondent saying it suddenly encroached into his lane. He explained that the whole area was engulfed in dust making visibility poor, and he only saw the rider in the middle of the road, about 10 metres away from him from the opposite direction.
3. He swerved to the right to avoid a collision, but the rider also swerved towards the same direction and they collided. The respondent was not wearing a helmet. He lamented that the motor cycle rider had not kept to his lane and also blamed the dust on the road which made visibility poor. He did not join the rider of the motor cycle as a Third Party in the suit.
4. Ultimately the appellant's driver, one **MARCELL OTIENO OPIYO** (DW1) was charged in Traffic Case NO.4 of 2015 for the offence of careless driving and fined Kshs.9000/=.
5. The trial magistrate in her judgment noted that the respondent was a pillion passenger who could not be

blamed for the accident nor would his lack of a helmet have prevented the occurrence of the accident. She also pointed out that the appellant was charged and convicted for a traffic offence for which no appeal was preferred. It was thus held that given the conditions prevailing at the time, as described by the Appellant's driver, then DW1 ought to have paid attention to other road users and found the appellant 100% liable.

6. The trial magistrate observed that at the time of medical examination, the respondent complained of pain in the leg, chest and back, walked with a limping joint and required physiotherapy for the right arm – I confirm this from the report by **DR. NYAWADE**. The respondent was awarded costs of Kshs.700,000/= for pain and suffering with costs and interest.

7. The appellant has challenged those findings on grounds that the trial magistrate misdirected herself and ignored crucial principles to be considered in awarding damages, resulting in damages which were inordinately high.

8. The appeal was disposed off by way of written submissions where Mr. Oduor argued on behalf of the appellant that going by the trend in past decisions the court ought to have awarded general damages ranging between 500,000 – 600,000/=. He cited the decision in **JULIUS CHELULE & ANOTHER – VS- NATHAN KINYANJUI (2013) e KLR** where the court awarded Kshs.600,000/= for fracture to the skull, head injuries, and injury to the left knee.

9. In opposing the appeal, Miss Kuke on behalf of the respondent urged the court to uphold the award saying the trial magistrate properly directed her mind to the evidence presented in court and appreciated that the respondent suffered previous injuries which permanently impaired his life. Further that the trial magistrate considered past awards but took into account the rate of inflation as well as the value of the Kenyan shilling and made no error in awarding the contested sum.

10. The principles that guide a court in awarding damages were set out in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS, GATHOGO KANINI –VS- A.M. LUBIA AND ANOTHER [1982-88]1 KAR 727** and basically revolve around whether the award is considerably high or low, because damages are not meant to enrich the victim, but are intended to try as much as possible to restore the victim to the position they were in before the accident.

11. Secondly the court ought to consider past awards bearing in mind the age, rate of inflation as well as the value and power of the Kenyan shilling.

12. At appeal the guiding factors as to whether a court ought to interfere with the award were spelt out in the case of **ARROW CAR LIMITED –VS- BIMOMO & 2 OTHERS C.A. 344 OF 2001** as being whether:

a) An irrelevant factor was taken into account or;

b) A relevant factor was left out;

c) The amount awarded is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimate.

13. I have re-evaluated the evidence presented before the trial court in terms of the injuries suffered. I have also considered the past decisions cited which are at least three years old. I am alive to the current economic trends in terms of inflation and the devaluating Kenyan shilling. Infact the sum awarded is not a runaway from the range given in the past decisions cited by the appellant's counsel once the factors mentioned in the **Arrow Cased Limited** (supra) case are considered.

14. I do not detect any irrelevant factors considered by the trial magistrate nor was any relevant factor left out. The sum awarded in my view was not inordinately high and I decline to interfere with the award and I confirm the sum awarded. Consequently the appeal has no merit and is dismissed with costs of the

appeal to the respondent.

Delivered and dated this 27th day of January, 2017 at Homa Bay

H.A. OMONDI

JUDGE