



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 29 OF 2015

SIMON MUNGAI KARIUKI..... APPELLANT

VERSUS

FATMA HASSAN RESPONDENT

(Appeal from the Judgement delivered by the Honourable L.N. Wasige (Senior Resident Magistrate)
delivered on 11th May, 2015 at Kilifi)

JUDGEMENT

The respondent was involved in a road traffic accident on 5.8.2012 along the Kilifi – Mombasa road. She filed Civil Suit No. 61 of 2013 before the Kilifi Magistrate’s Court and was awarded Kshs.230,000/= as general damages. Parties consented on liability whereby the appellant was held 90% liable while the respondent absorbed 10% liability. The appeal herein is on the amount of quantum awarded to the respondent.

The grounds of appeal are that the damages awarded are excessive. That the trial court awarded a high compensation to the respondent. That the appellant’s evidence and submissions on quantum were not considered and that the injuries suffered by the respondent were exaggerated.

Counsel for the appellant submitted that the award is excessive. The appellant’s evidence on the injuries noted that the respondent did not suffer any fracture. This evidence was dismissed by the trial court. The fractures were not seen or noted by the appellant’s doctor. The appellant had urged the trial court to award Kshs.100,000/= based on the case of **ZIPHORAH WAMBUI WAMBAIRA & 17 OTHERS V GACHURU KIONGORA & OTHERS (2004) eKLR**. In that case Kshs.100,000/= was awarded for some fractures.

It is further submitted that PW2, Dr. Malik Taher testified that the respondent sustained a hairline fracture on her right forearm, soft tissue injuries and cut wounds on her legs. A hairline fracture is less severe yet the trial court awarded excessive damages. A second medical report by Dr. Sophia Opiyo was produced by consent. The report indicates that the respondent had no physical disability as a result of the sustained injuries.

Counsel for the respondent opposed the appeal. Counsel submit that Dr. Ndegwa prepared a medical report which indicate that the respondent sustained a hairline fracture of the styloid process on the radius of the right forearm. Those injuries are also stated on the P3 form and treatment notes. The trial magistrate based her decision on the evidence on record and acted on the right principles. The respondent had sought a sum of Kshs.750,000/= as general damages while the applicant offered only Kshs.80,000/=.

Assessment of damages is at the discretion of the trial court. The amount awarded is not erroneous.

This appeal raises only two issues. Firstly, the extent of injuries sustained by the respondent and whether the amount of damages awarded by the trial court is excessive and should be reviewed. The record of the trial court show that only two witnesses testified. PW1 was the respondent. She told the court that she sustained a fracture on her right hand, cut wounds on both legs. She was seen by two Doctors who prepared medical reports. Dr. Were and Dr. Faraj Taher. PW2 Dr. Mahd Tahir was based at the Kilifi District hospital. His evidence was that an x-ray on PW1 revealed a hairline fracture on her right forearm. A plaster of paris was applied for five weeks. PW1 also sustained cut wounds on her legs. The record includes a medical report by Dr. S.K. Ndegwa. The report indicates that the respondent sustained a hairline fracture of the styloid process on the radius of the right forearm and cut wounds on the anterior aspect of both legs. The doctor indicated that the respondent had early features of post traumatic arthritis on the right wrist joint.

The above report was based on treatment notes from Kilifi District hospital. The P3 form that was produced has given similar injuries. There is a medical report by Dr. Sophia Opiyo dated 15.6.2013. The report indicate on the part titled **“History of the injury In Accordance With Treatment Records Availed”** as follows: -

“Was a passenger in a PSV involved in RTA on 05/08//12 at 1615 hours at Msambarauni in Mtwapa. She was then attended to at the Kilifi Hospital as an outpatient. According to the treatment note from the said facility she sustained hairline fracture right wrist. Analgesics administered. POP applied.”

The doctor indicated in the report that no fracture or dislocation was seen.

I have gone through the judgement of the trial court. The trial magistrate did observe that Dr. Sophia Opiyo’s report was done after a period of about nine months from the date of the accident. The fracture could have healed. It is evident that an x-ray was taken on 5.8.2012 and it revealed a hairline fracture. This is stated in the evidence of PW2. Dr. Maliki indicated that such a fracture should heal within four weeks. Dr. Opiyo’s report was done after several months. There is no reason as to why other doctors could have falsely stated that the respondent had a fracture. The doctors interpreted the x-ray. Dr. Opiyo could not have seen the fracture as it had already healed. I do find that the injuries suffered by the respondent were clearly stated in the P3 form. The trial court did not exaggerate the injuries. The report by Dr. Opiyo did note in its historical background that the respondent suffered a hairline fracture.

The trial court awarded Kshs.230,000/= as general damages. Reference was made to the authorities relied upon by both parties. The court relied on the case of **FAST CHOICE CO. LTD & ANOTHER V HELLEN NUNGARI NGURE, HCCA No. 6 of 2010, Nakuru**. In that case, Kshs.180,000/= was awarded for fracture of the right humerus and soft tissue injuries.

It is now established that an Appeal Court can only interfere with an award of damages by a trial court if it can be shown that: -

- i. The award is inordinately high or low as to present an erroneous estimate.
- ii. The awarding court proceeded on wrong principles or misapprehended the evidence.
- iii. The court took into account irrelevant factors or left out relevant factors in assessing the damages.

The main question is whether the awarded damages is excessive. The respondent told the court that she experiences pain on her hand. The trial magistrate observed that she saw the scars on PW1’s legs. The plaster of paris was applied for five weeks. The effect of that is that the respondent could not have done any meaningful work for the five weeks she had the plaster on her right hand. The inconvenience suffered by an accident victim has to be considered. There was no claim for loss of income for those five

weeks. The damages awarded is a global figure which caters for everything. I do not find the amount awarded to be excessive. The award is extremely fair in the circumstances. Apart from the hairline fracture, the respondent also sustained soft tissue injuries. Even if the fracture had completely united, the bottom line is that it had bene sustained. There was pain and suffering and loss of use of the right hand for some time. A global award of Kshs.230,000/= cannot be erroneous. I do find that the trial magistrate's assessment of damages is fair and correct.

In the end, the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated, signed and delivered in Malindi this 28th day of March, 2017.

S. J. CHITEMBWE

JUDGE