



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 31 OF 2016

COLLINS OMONDI MUGANDA.....APPELLANT

VERSUS

OCEANIC OIL LTD.....1ST RESPONDENT

JOSEPH KARUBA.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon T. Obutu P.M in
Kisumu CMCC No. 537 of 2014 delivered on 7th April 2015)

JUDGMENT

Collins Omondi Muganda (hereinafter referred to as respondent) sued **Oceanic Oil Ltd and Joseph Karuba (hereinafter referred to as appellants)** in the lower court claiming damages for injuries allegedly suffered on 5th April 2014 while the respondent was lawfully riding a motor cycle that collided with the 1st appellant's vehicle KBB 824 F which was allegedly driven negligently by the 2nd the appellant.

Defendants/appellants filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.

In a judgment delivered on **7th April 2015**, the learned trial Magistrate **apportioned liability at 100% as against the appellant and** awarded the respondent general damages in the sum of Kshs. 2,000,000/- and special damages in the sum of Kshs. 642,201/-.

The Appeal

The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 4th May 2016 which set out 5 grounds that:-

- 1. The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same**
- 2. The Learned trial Magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities cited in the written submissions presented and filed by the appellants**

3. The Learned trial Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable

4. The Learned trial Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate *vis a vis* the respondent's claim

5. The Learned trial Magistrate failed erred in awarding the sum of Kshs. 5,000/- in respect of assessor's charges when the said sum was not pleaded

SUBMISSIONS BY THE PARTIES

Appellant's submissions

When the appeal came up for hearing on 4.4.17, the appellant's Counsel Mr. Maganga submitted that the learned trial Magistrate's finding on quantum was based on wrong principles and was so inordinately high in the circumstances, He further submitted that although the respondent stated that he paid the medical bills in cash, he only produced invoices with no evidence of payment.

Respondent's submissions

The respondent's Counsel Mr. Ojuro submitted that appellant suffered serious injuries that necessitated his admission in hospital twice and that the quantum on general damages awarded was based on injuries suffered and authorities cited by both parties. He conceded that the appellant testified that he paid the special damages in cash and submitted that the issue on special damages was not raised in the grounds of appeal.

The evidence

The plaintiff in his testimony stated that on 5th April 2014; he was riding motor cycle GKB 675A when he was knocked down by an oncoming trailer as a result of which he suffered injuries. The pleadings in the plaint filed on 23rd October 2014 show that plaintiff suffered:

- a. Head injury with base of skull fracture
- b. Extensive laceration on the face
- c. Right posterior 2nd, 3rd and 4th rib fractures with lung contusion
- d. Comminuted fracture right femoral shaft in subtrochanteric region and distal fibia (tubular fracture compound)
- e. Pulmonary haemorrhage of right lung

The plaintiff's claim was supported by a medical report by Dr. Okombo. It shows that he suffered;-

- a. Head injury with cut wound and loss of consciousness
- b. Facial injury
- c. Injury to chest
- d. Injury to right leg with fracture
- e. Injury to right ankle joint with fracture

Analysis and Determination

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif v Ali Mohammed Solan (1955, 22 EACA 270).”

I have perused the entire record of appeal and considered the submissions by counsels for both parties. I note that the entire appeal revolves around the question of quantum. The appellant holds the view that the award to the respondent was inordinately high. The respondent on the other hand holds the view that the award is adequate.

In **Makube v Nyamuro (1983) KLR 403**, the Court of Appeal reiterated that

“a Court on Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

In assessing damages as is the norm, the court will consider comparables to arrive at an opinion bearing in mind the principles set out in making considerations in appeals of this nature. In **Stanley Maore & Geoffrey Mwenda at Nyeri Civil Appeal No.147 of 2002** the Court of Appeal relied on the authority of **Kemfro Africa Limited t/a Meru Express Services Gathogo Kanini A. Jubia and Olive Lubia [1982 – 88] 1 KAR 727** at page 730 where Kneller J. A said:

“The principles to be observed by the appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that, it must be satisfied that 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 a wholly erroneous estimate of the damage.”

In a judgment delivered on 23rd January 2012 in **Isaac Waweru Mundia V Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR** cited by the respondent, the court awarded Kshs. 1,000,000/- for

- a. Fracture of the base of the skull
- b. Comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of left lower incisor tooth;
- c. Right eye vertical dystopia and diplopia on left gaze with marked ptosis of the upper eyelids
- d. Resultant facial asymmetry caused by the above injuries
- e. Wounds and abrasions on the lip, chin, and both lower limbs
- f. Loss of blood, physical and psychological pain.

The doctor noted that plaintiff displays symptoms of post-traumatic stress disorder and will likely require future treatment for that. He will also need further maxillofacial/dental follow-up and replacement of the missing tooth. He approximated the extent of the permanent and functional incapacity as a result of the injuries at twenty percent.

In a judgment delivered on 10th day of May 2006 in *Edward Mzamili Katana V CMC Motors Group Ltd [2006] eKLR* also cited by the respondent, plaintiff was awarded Kshs. 1,300,000/- for :-

- a. Head injury leading to concussion.
- b. Cut wound and bruises of the scalp.
- c. Fracture of the left scapula.
- d. Compound fracture dislocation of the left elbow.
- e. Chest injury with multiple fractures of left 5th, 6th and 7th ribs.
- f. Fracture of the left femur upper 1/3 shaft.

The appellant relied on *Francis Mwangi Muchiri -vs- Francis Kimani Mbugua Nairobi HCC No. 2637 of 1994* where the court awarded Kshs. 100,000/- for 25% disability after finding that the plaintiff had old fractures.

It is not doubtful that the serious injury sustained by the appellant was the fracture of the right leg and ankle. At the time of examination by Dr. Okombo on 14.8.14 which was 6 months after the accident; the injuries had not fully recovered. He had 36 cm scar on right leg, 12 cm scar on right ankle joint, pain on chest, right leg and right ankle joint.

The authorities cited by the respondent are 5 and 11 years old and relate to more serious injuries while the one by the appellant is 23 years old and relates to less serious injuries. It is the duty of the advocates to guide the court by citing relevant cases to enable the court arrives at a fair decision. The respondent did not suffer any permanent incapacity and although money cannot renew a physical frame, I find that the sum of Kshs. 2,000,000/- awarded to the respondent was high compared to the injuries he suffered.

Therefore the appeal succeeds. The judgment of the trial court is set aside and judgment is entered for the sum of Kshs. 1,000,000/- as general damages. The sum of Kshs. 642,201/- on special damages is set aside and substituted with the sum of Kshs. 12,800/- which is supported by receipts. The appellant will have costs of the appeal while the respondent will have costs of the proceedings in the lower court.

DATED AND DELIVERED THIS 20TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Winnie.

Appellant Mr Eriho holding brief for Mmboga

Respondent Mr Okello/Ojuro.