



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 91 of 2016

SAMMY KIPKORIR KOSGEI.....APPELLANT

VERSUS

B O L.....RESPONDENT

*(Being an Appeal from the Judgment of Hon. M. Agutu (RM) in Kisumu CMCC NO.166 of 2014
delivered on 4th November 2016)*

JUDGMENT

B O L (*hereinafter referred to as respondent*) sued **Sammy Kipkorir Kosgei** (*hereinafter referred to as appellant*) in the lower court claiming damages for injuries he suffered when he was knocked down by the appellant's M/V KBB 197P while he was cycling along Kakamega-Kisumu Road on 7th May 2014.

The defendant/appellant filed a statement of Defence and denied the claim. On 4.8.16, parties entered into consent on liability at 70:30% in favour of the respondents as against the appellant.

In a judgment delivered on **4th November 2016**, the learned trial Magistrate awarded damages in the sum of Kshs.1, 000,000/- which was subject to the agreed contributory negligence ratio of 30%.

The Appeal

The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 5th December 2016 filed the Memorandum of Appeal dated 2nd December 2016 which sets out 9 grounds of appeal that may be summarized into the following two major grounds that:-

- 1) The Learned trial Magistrate erred in law and in fact in awarding general damages for injuries and effects of such injuries that were not pleaded and/or proved as required by law**

- 2) The Learned trial Magistrate erred in law and in making an award of general damages that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent**

SUBMISSIONS BY THE PARTIES

This appeal was argued by oral submissions supported by a list of authorities filed for the appellant.

Appellant's submissions

The appellant's Counsel Mr. Karanja, submitted that the trial court concentrated on Dr. Onyimbi's report

and ignored that of Dr. Olimbi which shows that the respondent suffered lacerations on scrotum and perineum and that he did not suffer any inability to perform his marital obligations. The learned trial magistrate was faulted for awarding Kshs. 1,000,000/- which counsel submitted was not supported by evidence and cited authorities.

On this end, appellant's counsel relied on various authorities. In the case of **Morris Mugambi vs Isaiah Gitiru [2014] eKLR**, the Court of Appeal stated as follows:

"..... we wish to state that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases".

In **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR**, the Court of Appeal observed thus:

"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".

In **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR**, the Court of Appeal interfered with an award of damages by the trial court and stated:-

"Further, we observe that the learned trial Judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases".

Counsel further submitted that the principles upon which an appellate court may interfere with award of damages by a trial court are well settled. He cited the case of **Arrow Car Limited vs. Bimomo & 2 Others [2004] 2 KLR 101** where the Court of Appeal said:-

"In this appeal we are being urged to interfere with the awards made by the superior court. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia [1982 – 88] 1 KAR 727 at page 730 Kneller J.A. said:-

"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 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 addition, counsel urged the court to reduce the amount of general damages and relied on the case of **West Kenya Sugar Ltd V Zablon Ndula Kayugira [2012] eKLR** where an award of Kshs. 500,000/- was upheld on appeal for head injury; scalp swollen and tender; left cheek swollen and tender; a depressed fracture of the left temporal bone of the skull; right forearm swollen and tender; a fracture dislocation of the right wrist; right hip swollen and tender; a dislocation of the right hip joint; a fracture of the right iliac crest; a fracture of the right acetabulum and right leg was ½ cm shorter and the case of **Ali Ahmed Naji v Lutheran World Federation [2010] eKLR** where the court of appeal enhanced an award of Shs.200,000/- to Shs.500,000/- for fracture of the pelvis with displaced hip bones; shortened left leg; urinary incontinence and psychiatric depression.

Respondent's submissions

Mr. Odino, counsel for the respondent urged the court to reject the appeal and submitted that Dr. Onyimbi's report considered all the injuries suffered by the respondent including his inability to perform conjugal rights while the one by Dr. Olimbi did not. He further submitted that Dr. Olimbi's report was corroborated by the initial treatment notes and the P3 form. Finally, it was submitted for the respondent

that the cases cited by the appellant were irrelevant to the injuries suffered by the respondent.

Analysis and Determination

This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR** and **Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of quantum. The main issue revolves around injuries to the respondent's scrotal and perianal areas. The appellant holds the quantum is inordinately high, erroneous, oppressive and punitive. The respondent on the other hand holds the view that the quantum conforms to recent awards in comparable cases and urged the court not to disturb the decision of the trial court.

Having said that; I will consider whether the learned Magistrate applied the wrong principles in arriving at the sum of Kshs.1,000,000/- in general damages.

In her judgment; the learned trial magistrate stated as follows:

“I am in agreement with the defendant that the injuries mentioned in the authorities cited by the plaintiff do not bear any similarities to the injuries sustained by the plaintiff. In any event; they are more severe.”

The learned trial magistrate further stated as follows:

“The authorities cited by the defendant bear close resemblance to the injuries in the present case save for the fact that the injuries are more extensive in the latter case. It is not lost to me that the plaintiff's sexual life was affected by the injuries. This was emphasized by Dr. Onyimbi in his medical report.”

I have considered the authorities cited by the respondent and I am in agreement with the trial court's finding that they relate to more severe injuries and do not bear any similarities to the injuries sustained by the plaintiff. I have similarly considered the authorities cited by the appellant and I absolutely agree with the trial court that the injuries suffered by the respondent are more extensive than in the cited cases.

By the same token, I have considered Dr. Onyimbi's and Dr. Olimi's reports. The initial treatment notes from Jaramogi Oginga Odinga Teaching and Referral Hospital refer to the respondent's injuries as deep perianal cut and degloving injury to the scrotum among other injuries. Dr. Onyimbi's report shows that respondent suffered massive damage of the genital organs involving the scrotum and that this had placed his marital status in jeopardy and peril. Surprisingly; Dr. Olimi refers to the same injuries as lacerations. I am in agreement with Mr. Odino's submission that Dr. Olimi's report belittled the serious injuries suffered by the plaintiff. In my considered view, the trial magistrate's finding that plaintiff's sexual life was affected by the injuries is buttressed by the evidence of the respondent which was corroborated by Dr. Onyimbi.

As stated hereinabove; the learned trial magistrate found that the respondent cited authorities with more serious injuries while the defendant cited cases with less serious injuries. It was the duty of the advocates to guide the court by citing relevant cases and they can hardly complain if the court makes an award enhancing or reducing the sums in the cited cases to satisfy itself that the award it makes is a reasonable recompense for injuries suffered.

To my mind; I have no doubt that the discretion of the trial court was exercised judiciously. As a result;

this court finds no reason to interfere with the learned trial magistrate decision on quantum. Consequently, the appeal is dismissed in it's entirety. The lower court's decision is confirmed. The respondent will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 29th DAY OF June, 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Ms. Barasa h/b for Mr. Karanja

Respondent - Ms. Oketch h/b for Mr. Okoth