



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 27 OF 2015

RAMADHAN KAMORA DHADHO.....APPELLANT

VERSUS

JOHN KARIUKI.....1ST RESPONDENT

ISHMAEL KARIUKI MBATHA.....2ND RESPONDENT

(Being an appeal from the judgement and decree by Hon. S.O. Temo (PM) delivered at Kajiado on 26/3/2013)

JUDGEMENT

This appeal involves a dispute regarding an award of quantum for general damages of Ksh.150,000 awarded by the learned trial magistrate in his judgement dated and delivered on 26/3/2013.

Factual background:

The appellant instituted the suit referred as CMCC No. 70 of 2010 against the respondent seeking general, special damages, costs of the suit and interest. According to the appellant on or about 21/9/2009 he was a lawful pedestrian along Ngong-Kiserian road when the 1st Respondent drove motor vehicle registration KAG 915U owned by the 2nd Respondent in a negligent manner that an accident ensued resulting in him sustaining personal injuries. In other words as pleaded under paragraph 5 of the plaint the circumstances of the accident gave rise to prima facie inference of particulars of negligence on the part of the Respondents. That by virtue of employment the 2nd Respondent was therefore vicariously liable for the accident.

The Respondents filed joint defence and both of whom denied any particulars of negligence or any claim for award of damages in absence of prove as to liability. The appellant had the burden of proof on both liability and quantum on a balance of probabilities before the trial court.

At the hearing in the court below the appellant called three witnesses in support of his case. The appellant who testified as PW3 gave evidence on how the accident occurred and the reasons he blamed the 1st Respondent for negligence. The appellant singled out the negligence manner and speed at which the 1st Respondent drove the subject motor vehicle registration number KAG 915U. According to the appellant the collision occasioned severe injuries to the right hand, right leg and the right side of the head as diagnosed and treated at Mbagadhi District Hospital.

The accident became a matter for police action from the evidence of PW2 PC Wycliff Mutiso. In the testimony of PW2 before the trial court motor vehicle KAG 915U lost control, crushing into stationary vehicle registration KAZ 288M parked on the left side of the road. He went further to state that on the basis of the collision motor vehicle KAZ 288M was thrown from its stationary position towards the direction of the appellant. According to PW2 on impact PW3 on patrol duties sustained bodily harm. Consequently Dr. George Mwaura who testified as PW1 had the opportunity on request by the appellant to examine him and prepare the medical report.

The Appellant's Submissions on Appeal:

Mr. Shiganga learned counsel for the appellant first complaint was with the award of damages for pain and suffering and loss of amenities. The bone of contention learned counsel submitted was that the appellant sustained multiple serious injuries comprising of bruises with a fracture of the right fibula bone. The award of Ksh.150,000 under the Head of Pain and Suffering as awarded by the trial magistrate was proportionately low that it represented an erroneous estimate compared to the injuries suffered lamented the learned counsel. Learned counsel further submitted that the trial magistrate erred in fact and law in classifying the degree of injuries suffered by the appellant as soft tissue in nature. The error according to learned counsel contention was the failure on the trial magistrate not to take into account the injuries involving a fracture on the right leg of the appellant. In support of his submissions learned counsel cited the following authorities; Rosemary *Wanjiru Kungu v Elijah Macharia Githinji & Ano. [2014] eKLR, Clement Gitau v GKK [2016] eKLR, Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR.*

On this aspect of the matter learned counsel argued and submitted that the trial magistrate should have made a global sum of Ksh.500,000 for pain and suffering.

Finally, learned counsel invited this court to be guided by the principles in the case of *Butt v Khan [1977] 1KAR* which renders the legal position that an appellate court may interfere with an award of a lower court where it has been shown that the trial magistrate proceeded on wrong principles or misapprehended the law or evidence in arriving at the quantum on damages.

Mr. Kairu McCourt for the Respondents filed submissions and contested the line of arguments advanced by learned counsel for the appellant that the assessment of general damages was erroneous. Learned counsel submitted that the figure in respect of general damages for pain and suffering should be based on the evidence by the appellant and the medical reports by PW1 Dr. George Mwaura; and also the second report by Dr. Ndeti. According to learned counsel contention the in identifying positive findings by the two doctors was the fact that appellant injuries had healed well with no permanent disability.

On the question of conflict of medical evidence learned counsel submitted that it is not in dispute that the three medical reports were in agreement as to the particular injuries suffered by the appellant. This was in addition to the medical report by Dr. Isaac Ndungu who testified on behalf of the Respondents as to the findings of the two reports produced by the appellant in support of his injuries.

In the course of his submissions learned counsel referred and relied on the following authorities; *Isaac Mwenda v Mutegi Murango [2004] eKLR, Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR, East Choice Company Limited & Anotehr v Hellen Nungari Ngure [2011] eKLR, Elizabeth Mulwa v Tawfiq Bus Services [2003] eKLR, Elizabeth Wanjiru Ngure & Another v Nyaka Agencies Limited & Another [2008] eKLR, Kisii Bottlers Limited v Josephine Akinyi Mwikwabe [2011] eKLR.*

What learned counsel canvassed through reference to the above cases was that the appellant has not demonstrated conditions for which this court can exercise discretion to interfere with the findings by the trial court on general damages. It was therefore undesirable to grant the orders prayed for on grounds that the award was not commensurate to the injuries argued the appellant's counsel.

Determination:

It is trite that an appellate court has jurisdiction over the court below to review the evidence to determine whether the trial judge judgement should stand. However this jurisdiction is exercised with caution. On well settled principles some of which i reiterate herein under to emphasize the position; in the case of **Bundi Marube v Joseph Mkoba Nyamuro [1982-88] 1KAR 108** the court held on this point:

“However, a court on appeal will not normally interfere with a finding of fact by the 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 the findings he did....”

Further in **Rahima Tayab & Another v Anna Mary Kinanu [1982-88] 1KAR 90 Law JA** stated inter alia:

“An appellate court will be slow to interfere with a judge’s findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.”

In the locus classic case of **Mbogo & Another v Shah [1968] EA at pg 93 Sir Clement Delestang VP** stated at pg 94 as follows:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it had acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In the same case **Sir Charles Newbold P** stated at pg 96 as follows:

“For myself i like to put it in the words that a court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

The question however i have to determine is whether this case falls within the scope of interference by this court. In arriving at such conclusion the factual and legal factors in light of the grounds raised on appeal have to be re-examined before exercising discretion to interfere with the award.

In the first instance i agree with both counsels submissions that the principles of assessment of such general damages shall include:

- (a) The gravity of the injuries sustained by the claimant.**
- (b) The medical opinion as to the pain, suffering and loss of a mentis occasioned by the injuries.**
- (c) The post-traumatic or disability whether permanent or temporary and its overall impact to the physical wellness of the claimant.**
- (d) Whether the claimant will be a subject to medication in the rest of his life.**
- (e) The length of time the claimant has suffered pain, suffering permanent to the accident/injury.**
- (f) The application of the legal principles and awards made involving comparable injuries with the claimant.**

It is against this background the English Court in the case of **West (H) & Son Ltd v Shephard [1964] AC 345** stated as follows:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

The dictate in West & Sons Case together with the decision in *Limphochoo v Canidea and Islington Area Health Authority [1979] 1 ALL ER* have shaped our jurisprudence on courts approach to award on general damages on personal injury claims. In the *Limphochoo Case Supra* Lord Denning said:

“In considering damages in personal injury claims, it is often said: the defendants are wrong doers, so make them pay up in full. They do not deserve any consideration. That is a tedious way of putting the case. The accident, like this one, may have been due to a pardonable error which as may befall any of it. I stress this so as to remove the misapprehension, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrong doers. They are simply the people who fool the bill. They are, as the lawyers say, only vicarious liable.”

The analogy to be drawn from this set of cases referred to is this:

There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.

This is an approach i will apply to this appeal to find out whether the appellant has placed before me relevant material to exercise discretion and interfere with the award on general damages. The evidence before the learned trial magistrate on the question of damages depended on the appellant and the medical reports by the three doctors. It is not in dispute that the major injury identified as suffered by the appellant is that of a fracture of the 1/3 fibula bone with soft tissue injuries to the head and face. From the record both counsels put up a strong case in favour and against the measure of damages to be considered by the learned trial magistrate.

All these were to the answer that comparable injuries should be as far as possible be equated with a similar awards. The only considerations to be accorded to inflationary trends since the decisions being relied upon were made by the court. The reported decisions and cited by learned counsels for the appellant and the respondents have been reviewed by this court.

From the medical reports attributable to the appellant there is no indication that the injuries occasioned any permanent disability. If anything the doctor opined that the fracture area realized union of the affected bone and full recovery was expected. That is the context with which the trial magistrate considered the decision together with the decided cases on the matter.

When I apply the above principles in the cases cited elsewhere in this judgement, i am satisfied that the appellant has not persuaded this court to interfere with the exercise of discretion by the trial magistrate. The fact that the appellant suffered a single fracture of the fibula bone is not enough to enhance general damages by this court. That seems to have been well taken into account by the trial magistrate in arriving at a quantum of Ksh.150,000.

When I take into account the circumstances and material evidence before the trial court and submissions on appeal, i find no inconsistency or variation that there is an error on law or fact to interfere with the discretion of the trial magistrate.

From this, it is plain beyond argument that the appellant has provided no basis to support the claim of misapprehension of the evidence or legal principles by the trial magistrate. This ground of appeal accordingly fails and as a result the appeal is dismissed in its entirety.

Dated, signed and delivered in open court at Kajiado on 26/9/2017.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Itaya for Muchiri for the appellant present

Mr. Kairu McCourt for the respondent absent

Mr. Mateli Court Assistant