



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 88 OF 2011

RAYAN INVESTMENTS LIMITED.....APPELLANT

VERSUS

JEREMIAH MWAKULEGWA KASHA.....RESPONDENT

(An appeal from the judgment delivered by Hon. M. K. Mwangi, S.R.M on 13th May, 2011 in Mombasa SRMCC No. 378 of 2009).

JUDGMENT

1. The appellant on 30th May, 2011 filed a memorandum of appeal raising the following grounds of appeal:-

- i. That the Learned Senior Resident Magistrate erred in law in awarding the plaintiff Ksh. 500,000.00 for general damages in that the said sum is so excessive as to amount to an erroneous estimate of the damages payable to the plaintiff; and
- ii. That the Learned Senior Resident Magistrate erred in failing to adequately consider the medical report of Dr. Udayan Sheth dated 21st June, 2010 on the injuries sustained by the plaintiff which was tendered in evidence and the written submissions filed by Counsel for the appellant.

The appellant therefore prays for the appeal to be allowed with costs and for the judgment dated 13th May, 2011 to be set aside or varied as this court deems appropriate. The appellant also prays for costs of the lower court case and this appeal.

2. Mr. Mwabonje, Learned Counsel for the appellant informed the court that the appeal hinges on quantum and that liability was apportioned at 80% against the Defendant/appellant and 20% against the Plaintiff/respondent. It was submitted that the Hon. Magistrate failed to consider the medical report by Dr. Sheth in support of the appellant's case. Counsel therefore submitted that any finding by the Hon. Magistrate was erroneous as he entirely relied on the medical report produced in support of the respondent's case. In making reference to the medical report relied upon by the appellant, Counsel stated that the Doctor's finding was that at present, the respondent has fully recovered with no deformity or permanent incapacity.

3. Counsel submitted that by failing to consider the report in support of the appellant's case, the Hon. Magistrate failed to arrive at a proper quantum by making an award of Ksh. 500,000/= which in his view was too high considering the injuries suffered by the respondent. Mr. Mwabonje relied entirely on the cases he had cited in the lower court. He further submitted that the Hon. Magistrate in his judgment relied on a case submitted by the respondent where an amount of Kshs. 550,000/= was awarded. He stated that the said case was distinguishable from the current one in that the said case, the victim suffered more serious injuries, was admitted in hospital for 5 days, had metal plates inserted that were to be removed, had a plaster of paris fixed and walked with crutches. He prayed for the appeal to be allowed.

4. Mr. Nyabena, Learned Counsel for the respondent relied entirely on his written submissions. He stated that the Hon. Magistrate referred to Dr. Ndegwa's report to cite the injuries the respondent suffered, but he made no specific reference to Dr. Sheth's medical report. It was his submission that the amount awarded was commensurate with the injuries sustained. In making reference to the judgment relied upon by the Hon. Magistrate in the lower court case, Counsel stated that the award therein was made in the year 2010, yet the respondent herein was awarded Ksh. 500,000/= in the year 2011, which is in keeping with trends of inflation. He added that the authorities that were relied upon by Counsel for the appellant in the lower case, had been decided earlier than the one he had relied upon. He cited the case of **Edith Mary Owuor vs Across Africa Safaris Ltd**, HCC No.1054 of 1996 where an amount of Kshs. 460,000/= was awarded in the year 2000.

5. Counsel also relied on the case of **P.A. Okelo & MM Nsereko t/a Kaburu Okelo & Partners vs Stella Karimi Kobia & 2 Others**, Civil Appeal No. 183 of 2003 ([2012] eKLR) where the Court of Appeal gave guidelines for assessment of general damages. He submitted that in the said case, the court held that it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing witnesses. Counsel therefore submitted that a strong case had not been made to merit interference by the court. He added that Dr. Sheth in his

report indicated that the respondent still had pain in his leg during cold weather.

6. In response to the foregoing submissions Mr. Mwabonje stated that at the time the respondent was examined by Dr. Ndegwa, he had not fully recovered and needed another examination thus he was contesting the findings of the two Doctors which were different. He prayed for the appeal to be allowed with costs to the appellant.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should interfere with the award of quantum of damages.

7. This court is alive to its duty to consider and re-evaluate the evidence tendered in the court below and reach its own decision, bearing in mind that it neither saw nor heard the witnesses who testified. See **Selle vs Associated Motor Boat Co. [1968] E.A.123, Williamson Diamonds Ltd V. Brown [1970] E.A 1 and Peters V. Sunday Post Ltd [1958] E.A. 424.**

8. The respondent herein, Jeremiah Mwakulewa (sic) testified as PW1. His evidence was that on 16th November, 2008 while he was riding a motor cycle registration No. KAT 762G along Tononoka road, he was hit by motor vehicle registration No. KBB 028B which suddenly emerged onto the road. He was injured on both legs; on the elbow and other parts. He was rushed to Coast General Hospital (CGH) for treatment. His treatment notes were marked by the court as MFI-1. He reported the accident to Makupa Police Station where he was issued with a P3 form, it was marked as MFI-2. He paid Kshs. 1,200/= at CGH and was issued with a receipt which was marked as MFI-3 by the court. He was issued with a police abstract that was marked by the court as MFI-4. He stated that the appellant was the owner of the motor vehicle.

9. PW1's further evidence was that he was examined by Dr. S.K. Ndegwa who prepared a medical report for which he paid Ksh. 1,500/=. The medical report was marked as MFI-4 and the receipt for the same was marked as MFI-5 by the court. The respondent blamed the Driver of the motor vehicle for failing to stop. He further stated that in the cold season, he feels pain in his legs and he uses painkillers. He sought general damages, special damages and costs of the suit.

10. PW2, Dr. S.K. Ndegwa's evidence was that he examined the respondent on 17th December, 2008 following the injuries he sustained on 16th November, 2008 in a road traffic accident. The respondent sustained a fracture of the right fibula, severe blunt trauma on the left ankle joint, bruises on the right elbow and blunt trauma on the right wrist. The Doctor further testified that the respondent's ankle at the time of examination was in a plaster of paris. It was still swollen and that he had a scar on the right elbow joint. The injuries were bone and soft tissue injuries. PW2 prepared a medical report and which he produced as plf. exh. 5, he charged the respondent Ksh. 1,500/= for the same and issued a receipt for the said amount which he produced as plf. exh. 6. PW2 issued a receipt for the sum of Kshs. 3,000/= to the respondent for court attendance which he produced as plf. exh. 7. It was his evidence that he also relied on MFI-1 and MFI-2, to prepare the report. On cross-examination PW2 stated that the respondent had healed with no permanent incapacity.

11. PW3 was No. 73008, PC Peter Gatebe attached to Makupa police station. He stated that an accident occurred on 16th November, 2008 involving motor vehicle KBB 028B Toyota Corolla and motor cycle registration No. KAT 6726, at Tononoka area. He informed the court that the Investigating Officer one Corporal Kariuki was on transfer. He stated that the Driver of motor vehicle registration No. KBB 028B was charged with the offence of careless driving and fined Kshs. 2,000/= through traffic case No. 13072 of 2008. A P3 form was issued to the respondent which PW3 produced as plf. exh. 3. He produced the police abstract as plf. exh. 4. PW3 testified that the motor vehicle in issue was insured in the appellant's name.

12. PW3, Christopher Maroa (who should have been PW4) testified that on the 16th November, 2008 he was traveling as a pillion passenger when at Tononoka cross junction, they were knocked down by motor vehicle registration No. KBB 028B. He too sustained injuries.

13. I have considered the argument by Mr. Mwabonje on the quantum of damages awarded and I am in agreement with him that it was on the higher side. The case that was relied upon, in the lower court by Counsel for the respondent of **Matano Mbiti Ngati & Madrasa Resource Centre vs Ali Rajab Bindo**, shows that the plaintiff therein sustained severe injuries being fracture of the tibia and fibula a compound fracture occasioning fragments which took a long time to be held together. The plaintiff in that case was admitted to hospital from 14th June to 19th June, 2002 being on a plaster and was discharged when moving with the aid of crutches. He was re-admitted to hospital from 26th July, 2002 to 30th July, 2002 for an operation that entailed insertion of metal plates, he was again admitted in hospital from 6th April, 2003 to 8th April, 2003 for removal of the said metal plates. In that case an award of Kshs. 550,000/= was made on 23rd July, 2010.

14. Counsel for the respondent in the present case had prayed for an award of Kshs. 550,000/= before the Hon. Magistrate. This court bears in mind that as at the time of testifying in court on 7th September, 2010, PW2 stated that the respondent had fully recovered with no permanent incapacity. The medical report of Dr. Sheth dated 21st June, 2010 also stated that the respondent had fully recovered, with no deformity or permanent incapacity.

15. The court has taken into consideration the case cited by Counsel for the respondent of **PA Okelo & M.M Nsereko t/a Kaburu Okelo & Partners vs Stella Karimi Kobia & 2 Others**, which cited with approval the cases of **Selle vs Associated Motor Boat Co. Ltd** (supra), **Jabane vs Olenja** [1986] KLR 661 and **Kemfro Africa Ltd. t/a Mere Express services** [1976] & **Another vs Lubia & Another** [1987] KLR 30.

16. This court takes cognizance that the Hon. Magistrate wrote half a page of a Judgment in the typed version, which translates to a page in the handwritten one, wherein no analysis of the evidence or submissions or the authorities cited was made. For the said reason, I am bound to interfere with the said Judgment.

17. I have considered the authorities cited by Counsel for the appellant in his written submissions filed in the lower court to wit, **Isaac**

Mwagona Malingi vs Rashid Mohamed, Nairobi HCCC 2691/1987 where the plaintiff sustained a fracture of the lower end of the fibula and abrasions over the inner knee. He was also hit on the right side of the chest resulting in severe pain when breathing where abrasions were dressed and plaster applied on the leg for a period of one month. The injury healed with a resultant permanent scar over the inner aspect of the knee. He was hospitalized for two weeks. General damages for pain and suffering and loss of amenities were assessed at Kshs. 120,000/-. This decision was rendered on 26th July, 1991. In the case of **Kibe Njoroge vs Agriquip Agencies (E.A) Ltd**, Nairobi HCC 3942 OF 1988, the plaintiff suffered a compound fracture of the right/tibia fibula and mid 1/3 region with small puncture wound on the leg, cut wounds over the right eye lid and head injury with loss of consciousness. He was admitted to the hospital for one month during which the leg was immobilized with a cast plaster. There was slight resultant disability. An award of Kshs. 200,000/- was made on 18th September, 1991. Other authorities were cited by the appellant's Counsel in the lower court where awards for general damages were ranged from Kshs. 115,000 and Kshs. 185,000. The said Counsel had prayed for an award of Kshs. 185,000/=. It is however worth noting that these decisions were made more than ten years ago.

18. In this case, the respondent suffered a fracture of the upper 1/3 of the right fibula, severe blunt trauma on the right wrist, bruises on the posterior aspect of the right elbow and a blunt trauma on the right wrist. Considering the nature of the foregoing injuries, it is my finding that the award of the sum of Kshs. 500,000/= awarded in general damages was excessive. The case cited in the lower court by Counsel for the respondent is indicative of a victim who had to undergo two operations to recover from the injuries he sustained.

19. In the case of **Maselus Eric Atieno vs Unitel Services Limited** [2017] eKLR, Majanja J., awarded general damages in the sum of Ksh. 250,000/= to an appellant who had suffered fractures of the right leg tibia/fibula bones, bruises on the right elbow joint, tenderness and swelling on the right knee, injury on the right knee, injury on the pelvic region, injury on the right thigh, injury on the right elbow joint and pain on the abdomen.

20. The award made in the **Maselus Eric Atieno** case (supra) was made on 17th January, 2017. Taking a cue from the said judgment, I hereby set aside the award of Kshs. 500,000/= awarded in this case as general damages and substitute thereof the sum of Kshs. 300,000/=. This award takes into consideration the variance in the buying power of the Kenyan shilling between January 2017 when the Judgment by Majanja J., was delivered and the time of the delivery of this Judgment.

21. In the case of **Kigarani vs Aya** [1982-88] 1 KAR 768, it was stated as follows:-

“Damages must be within limits set out by decided cases and also the limits the Kenyan economy can afford. Large awards are inevitably passed onto members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees”.

22. The end result is that the appeal herein partly succeeds. I hereby set aside the award made by the lower court and substitute it with the following:-

	Kshs.
General damages	300,000/=
Less 20 % contribution	60,000/=
Add special damages	<u>2,900/=</u>
Grand total	<u>242,900/=</u>

23. The appellant shall meet two-thirds of the costs of the lower court case and this appeal. Interest is awarded to the respondent at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omollo holding brief for Mr. Gor for the appellant

Mr. Nyabena for the respondent

Mr. Oliver Musundi - Court Assistant