



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 178 OF 2014

JOSEPH WAMBURU TUMBU

SIMON KIMANI TUMBU.....APPELLANTS

VERSUS

MUTHINI MUSYOKA.....RESPONDENT

(Being an appeal from the judgement of Principal Magistrate's Court at Kithimani delivered by Honourable D. G. KARANI, (Principal Magistrate) on 21st November, 2012 in KITHIMANI SRMCC NO. 83 OF 2011)

JUDGEMENT OF THE COURT

1. The Appeal arises from the judgement of Hon. Karani in Kithimani Principal Magistrate's Court Civil Suit Number 83 of 2011 delivered on the 21/11/2012 wherein the Respondent was awarded general damages of Kshs.180,000/= subjected to 20% contributory negligence plus costs and interest.

2. The Appellant being aggrieved again the said judgement filed this Appeal and raised the following four grounds of appeal namely:-

(a) The learned Principal Magistrate erred in law and fact by making an award on general damages which was manifestly excessive given the injuries sustained by the Respondent and the relevant case law produced by the Appellants.

(b) The learned Principal Magistrate erred in law and fact by applying wrong principles of law in assessing general damages hence arriving at manifestly excessive damages.

(c) The learned Principal Magistrate erred in law and fact by ignoring the Appellants submissions in his judgement without proper reason to do so.

(d) The learned Principal Magistrate erred in law and fact by awarding excessive special damages that had not been proved.

3. The Appellants seek this Honourable Court to allow the Appeal and set aside the lower Court's judgment on quantum and substitute it with a fair judgment on quantum that it deems fit with costs of the Appeal to the Appellants.

4. As this is a first Appeal this Court is obligated to re-evaluate the evidence tendered at the Court below afresh and come to its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testifying and to make an allowance for that (see **SELE VS ASSOCIATED MOTOR**

BOAT CO. LTD [1968] EA 123).

5. The record of the lower Court reveals that parties did not adduce evidence and that they had entered into a consent on liability in the ratio of 20% to 80% in favour of the Respondent as against the Appellants. The parties further agreed to file written submissions on quantum and to annex medical reports P.3 forms, receipts for special and treatment notes. The said consent was duly adopted as an order of the Court and matter was thus reserved for judgement by the learned Principal Magistrate which he duly delivered on the 21/11/2012 and which is now the subject of this Appeal. The learned Counsel for the Respondent in the lower Court had proposed the sum of Kshs.350,000/= as general damages whereas the counsel for the Appellant had proposed the sum of Kshs.90,000/= as general damages.

6. Parties agreed to canvass this Appeal by way of written submissions. It was submitted for the Appellant that the sum of Kshs.180,000/= awarded by the lower Court was high and that the authority cited by Appellants namely **KIWANJANI HARDWARE LTD =VS= LABAN KIILU MUTHOKA [2008] eKLR** should have been of good guidance since the Plaintiff who had suffered serious injuries was awarded Kshs.175,000/= as general damages. Appellant's counsel urged this Court to set aside the award of Kshs.180,000/= and substitute it with Kshs.120,000/= plus costs and interest in the lower Court.

It was submitted for the Respondent that the award of Kshs.180,000/= by the trial court was not manifestly high but that the same was reasonable and fair in the circumstances and it should not be disturbed. The Respondent's counsel urged this Court to dismiss the Appeal with costs to the Respondent.

7. Determination:

I have considered the submissions by the counsels for the Appellant and the Respondent as well as the cited authorities. I have also considered the submissions that had been presented before the trial Court. The Respondent herein had sustained injuries through a road traffic accident and that he had been examined by doctors for the Respondent and Appellants as per the medical reports availed before the trial Court. The parties herein had entered consent on liability before the trial Court is one ratio of 20% to 80% in favour of the Respondent. Hence the issue for determination before the trial Court was the quantum of damages to be awarded. As the Appellant has appealed against the award of damages, the issue for determination by this Court is whether or not the award of damages granted by the trial Court was manifestly excessive in the circumstances. The guiding principles in regard to this issue is found in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE AND GATHOGO KANINI =VS= LUBIA AND OLIVE LUBIA [1982 – 1985]KAR 728** where it was held thus:-

“The principle 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 to be that it must be satisfied that either the judge in assessing damages took into account an irrelevant factor or left out an account a relevant one, or that short of this the amount is so inordinately high that it must be a wholly erroneous estimate of damages.”

The Respondent had first been examined by Dr. P. N. Mutuku who noted the following injuries:-

(a) Blunt head injury

(b) Blunt chest injury

(c) Blunt trauma to right knee

(d) Blunt trauma to left orbital area and zygomatic bone

(e) Blunt trauma to upper incisor with loose dentition

The said doctor in his report dated 8/6/2011 formed the opinion that the Respondent suffered serious facial injuries with fractures of zygomatic buttress on left. Fractured teeth and peri orbital soft tissue

injuries and there was need for follow up in dental and ophthalmology clinic.

The Respondent later underwent a second medical examination by the Appellants doctor Wambugu on the 16/03/2012 who noted the following injuries:-

(a) Blunt trauma to the chest and both knees.

(b) Blunt trauma to the mouth with loosening of upper incisors

(c) Blunt trauma to the left cheek.

According to the said doctor the Respondent had sustained soft and dental tissue injuries from which he has since made adequate recovery and would benefit from crowing of the broken teeth at an estimated cost of Kshs.18,000/=.

Looking at the injuries sustained by the Respondent I find the authority that had been cited by the Appellant in the trial Court and in this Court quite relevant. The case of **KIWANJANI HARDWARE LTD =VS= LABAN KIILU MUTHOKA [2008] eKLR** involved a Plaintiff who sustained injuries such as blunt injury to the right eye, cut wound to the neck, blunt injury to the mouth with loss of upper incisor tooth, Coles fracture of the right arm and cut wound on the right wrist over the fracture bones. In that case a lower Court awarded Kshs.250,000/= as general damages but which was reduced to Kshs.175,000/= on appeal on the 25/09/2008. I find the Respondents injuries more or less similar to those of the Plaintiff in the above cited authority. It is noted that the said authority had been decided way back in 2008 and that by the year 2012 the effect of the inflation on the economy would have been felt and the award would have been higher than the Kshs.180,000/= granted by the trial Court. Hence I am unable to fault the learned Principal Magistrate since there is no evidence that he considered irrelevant factors so as to arrive at the award of Kshs.180,000/=. I find the award of Kshs.180,000/= to have been quite reasonable in the circumstances of this case. Consequently I decline to interfere with the award made by the trial Court on special damages. I note the sum of Kshs. 6,350/= was pleaded and receipts therefor presented to court alongside the written submissions before the trial Court pursuant to the consent entered into by the parties. Hence the special damages of Kshs.6,350/= shall not be disturbed as well.

8. In the result it is the finding of this Court that the Appellant's Appeal lacks merits and is ordered dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at **MACHAKOS** this **19th** day of **September, 2017**.

D. K. KEMEI

JUDGE

In the presence of:

Kavita for Respondent

C/A: Kituva