



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 141 OF 2015

1. ARTAN HUSSEIN

2. ARTHAN HAULIERS LIMITED

3. PETER CHARO.....APPELLANTS

VERSUS

SAID HAMADI UPEPO.....RESPONDENT

(An appeal against part of the Judgment of Hon. D. Karani,

Senior PrincipalMagistrate, delivered on 18th August, 2015

in Mombasa SRMCC No. 428 of 2013)

JUDGMENT

1. This appeal arises from a road traffic accident case wherein the Hon. Magistrate awarded general damages in the sum of Kshs. 900,000/= less 25% contributory negligence thus reducing the sum to Kshs. 675,000/=. Costs of the said suit and interest were also awarded. Special damages were awarded in the sum of Kshs. 33,900/=.

2. The defendants (appellants) being dissatisfied with the above decision delivered on 18th August, 2015 filed a memorandum of appeal on 15th September, 2015 raising the following grounds of appeal. That:-

(i) The Learned trial Magistrate erred in law and in fact in awarding general damages which was (sic) manifestly too high and excessive;

(ii) That the Learned trial Magistrate erred in law in applying wrong principles while assessing general damages and the decision therein being exorbitantly high and excessive in the circumstances;

(iii) That the Learned trial Magistrate erred in law and facts in disregarding the evidence adduce (sic) in the trial and thus (sic) arriving at a wrong decision in assessing the general damages exorbitantly high and excessive in the circumstances; and

(iv) That the Learned trial Magistrate erred in law and in disregarding the written submissions of

the appellants.

For the aforesaid reasons, the appellants pray for:-

- (a) This court to set aside the Judgment of the subordinate court and reassess the general damages payable, if at all;
- (b) Any other or further orders that this court may deem just and expedient to grant; and
- (c) The respondent to be condemned to pay the costs of this Appeal.

3. The appeal proceeded by way of highlighting of written submissions. The appellants' Counsel filed her written submissions on 17th March, 2017 and the respondent's Counsel filed hers on 27th March, 2017. Ms. Kaguri, Learned Counsel for the appellants condensed her grounds of appeal and submitted that the trial court erred in awarding general damages in the sum of Kshs. 900,000/= for the reason that 1st medical report produced by Dr. Ajoni Adede which forms part of the supplementary Record of Appeal confirms that the respondent had not had a second CT scan done on him. Thus when the said Doctor examined the respondent, he did not confirm if there had been further damage to the respondent's brain.

4. Counsel informed the court that the 2nd medical report by Dr. Sheth, a qualified orthopedic surgeon was produced by consent on 26th September, 2013. The said Doctor said that the injuries were mild to the head with only temporary loss of consciousness and confirmed that the haematoma had resolved. According to Doctor Sheth, the respondent had recovered with no permanent incapacity.

5. In praying for general damages to be reduced to Kshs. 380,000/= and for costs to be awarded to the appellants, Counsel stated that in the lower court, the respondent's Counsel submitted two authorities to wit, Meru HCCC No. 17 of 1993, **Lucy Ntibuka vs Bernard Mutwiri and Others** where an award was made in the year 2001 for cerebral concussion. The said Counsel had also relied on the case of **Mariam Athuman vs Obuya Express Ltd. and Another**, Nakuru HCCC No. 477 of 1998, where awards were made on 8th February, 2007 and 14th June, 2000, respectively. Ms. Kaguri further submitted that the Hon. Magistrate failed to consider the authorities she cited in the lower court. These were, **Cecilia Mwangi and Another vs Ruth W. Mwangi** [1997] eKLR where the injuries sustained were concussion, cut wound over the vertex of the scalp and cut of the lower leg and injury to the pelvis, where an award of Kshs. 350,000/= was made in the year 1997. She had also relied on the case of **Paul Kiviu Nzuma and Another vs Jackson Mwilu** [2006] eKLR which involved injuries in the nature of a 3cm cut on the right occipital region, injuries to both temporal scalp regions, blunt injury to the hyperemic left and right eye and a blunt injury to the left shoulder joint, where Judge Wendo awarded Kshs. 300,000/= in the year 2006.

6. Ms. Mango, Learned Counsel for the respondent opposed the appeal. She submitted that after liability was agreed on, the general damages awarded to the respondent came to Kshs. 675,000/=. She relied on the case of **China Wuyi Company Ltd. vs Andrea Githinji Gitonga**, Nakuru Civil Appeal No. 194 of 2011, where the court cited the case of **Butt vs Khan**, Civil Appeal No. 40 of 1997, where Law J.A., held that an appellate court will not disturb an award of damages unless it is so inordinately high or low.

7. She also relied on **Kemfro Africa Limited and Another vs A.M. Lubia and Another** [1982-1988] KLR. Counsel argued that the appellants had not made out a case to justify interference with the lower court decision. She added that the plaint was amended to include oedema and loss of consciousness. She stated that Dr. Sheth examined the respondent 8 days after he testified in court and the present complaint by the respondent at that time was that he had headaches. Ms. Mango contended that the only point of departure of the said report from that of Dr. Adede was that the plaintiff suffered dizziness, forgetfulness and inability to withstand loud noise and that PW3 testified as to the respondent's forgetfulness. Counsel stated that the foregoing were after effects of the accident. It was submitted that Dr. Adede relied on the CT scan that was available and so did Dr. Sheth as there had been no repeat CT scan done on the respondent.

8. In closing her arguments, Ms. Mango stated that the trial court considered the authorities availed by both the appellant and the respondent and found the latter's comparing favorably with the respondent's case. She prayed for the appeal to be dismissed.

9. In response to the foregoing, Ms. Kaguri submitted that PW3 who testified as to the respondent's difficulty in hearing could not testify on a medical fact. She also stated that in the authorities she had relied on, the plaintiffs therein suffered more injuries than the respondent herein.

ANALYSIS AND DETERMINATION.

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

10. This court takes cognizance of its duty as the 1st appellate court as set out in the case of **Selle vs Associated Motor Boat Company** [1968] EA, in that it has neither seen nor heard the witnesses testify. Dr. Ajoni Adede adduced evidence as PW1 before the lower court. He examined the respondent on 15th June, 2013 following a road traffic accident which occurred on 22nd December, 2012. His findings were that the respondent suffered injuries with loss of consciousness, bleeding in the brain, swelling of the brain and brain contusion. He was admitted at Mewa hospital where he was treated and a CT scan was done. At the time of examination, the respondent complained of headache, dizziness, forgetfulness and inability to tolerate loud noise. He walked unaided but looked drowsy and was slow in answering questions. The Doctor relied on the CT scan and treatment notes from Mewa hospital. He produced his report as plf. exh. 1 and a receipt for the sum of Kshs. 2,000/= for the report as plf. exh. 2. He also produced a receipt for the sum of Kshs. 3,000/= for court attendance, as plf. exh. 3.

11. On being cross-examined, the Doctor stated that the bleeding had been resolved and that he did not propose another brain scan as the respondent did not need another CT scan. He explained that the respondent suffered brain injury whose complications are lifelong with risks.

12. The respondent, Said Hamadi Upepo testified as PW2. It was his evidence that on 22nd December, 2012 at 8:00 (sic) while crossing a two-way road, a vehicle came from the wrong side and knocked him while he was standing in the middle of the road. He lost consciousness. He was treated at Mewa hospital where he was admitted with a head injury for 6 days. The accident motor vehicle was registration No. KAR 384F. The accident was reported to Port Police Station after 2 months. He stated that a CT scan was done and he incurred expenses to the tune of Kshs. 31,420/=. The treatment notes, were marked as PMFI-4, he produced a bundle of receipts as plf. exh 5, a police abstract was marked as PMFI-6 and a P3 form as PMFI-7. PW2 conducted a search of the motor vehicle particulars from Kenya Revenue Authority (KRA) where he paid Kshs. 500 for the search certificate. He produced it as plf. exh. 8 and the receipt for payment for the same as plf. exh. 9. He was examined by Dr. Adede to whom he paid Kshs. 2,000/=. The respondent stated that his Advocate wrote a demand letter, which he produced as plf. exh. 10.

13. It was the respondent's evidence that the Driver of the accident motor vehicle was driving on the wrong side of the road at a high speed and did not warn him that he was approaching. The respondent had informed the lower court that he had not fully recovered as he feels dizzy, has pain and is forgetful. He denied that he was running when the accident occurred. The respondent testified that there were some containers that blurred his view. He denied contributing to the accident and prayed for damages and costs of the suit.

14. PW3, Peter Abii Agali, who is the respondent's colleague at work witnessed the accident. It was his evidence that the accident motor vehicle was using the wrong way as the respondent was crossing the road. They took the respondent to Mewa hospital after the accident. PW3 testified that he had known the respondent for 10 years prior to the accident and that they were neighbours. It was his evidence that the respondent was affected by the accident as he cannot work without supervision. He stated that the respondent is always confused and he forgets things.

15. The appellants called no witnesses in support of their case. Liability was by consent, apportioned at

75:25 as against the appellants and the respondent, respectively. The medical report of Dr. Udayan Sheth dated 26th September, 2013 was produced by consent as def. exh. 1.

16. The injuries sustained by the respondent as per the medical report of Dr. Adede produced as plf. exh. 1, were loss of consciousness, bleeding in the brain, acute subdural haematoma, brain oedema swelling and contusion (right temporo-parietal region and both frontal lobes). The respondent was admitted to hospital for 6 days. The Doctor's conclusion was that the respondent suffered head injury with loss of consciousness which is life threatening which at the time of examination were present in the form of headaches, dizziness, forgetfulness and inability to tolerate loud noise. The Doctor further stated in his report that the risk of head injury related health complications is carried throughout life.

17. The respondent was examined on 26th September, 2013 by Dr. Udayan Sheth. His opinion was that the respondent had fully recovered, there was no deformity and no permanent incapacity.

18. As observed by Counsel for the appellants, the plaintiff in the case of **Mariam Athuman vs Obuya Express Limited and Another**, Nakuru HCCC No. 477 of 1998, suffered more severe injuries than the respondent in this case. That was however not the case that the Hon. Magistrate relied upon in assessing damages in the present case. He relied on the case of **Lucy Ntibuka vs Benard Mutwiri and Others** (supra) that was decided on 8th February, 2007. He found it to compare favorably with the injuries sustained by the respondent. In that case the plaintiff was rendered unconsciousness at the time of accident. He sustained head injuries with a resultant cerebral concussion, lacerations on the lateral side of the right eye, lacerations and cut wound on the left arm (elbow). The plaintiff experienced headaches on and off due to brain concussion and weakness in her left hand. General damages for pain and suffering and loss of amenities were assessed at Kshs. 500,000/=.

19. The appellants in the lower court relied on the case of **Cecilia W. Mwangi and Another vs Ruth W. Mwangi** where an award of Kshs. 350,000/= was made in the year 1997 by the Court of Appeal for head injury, cerebral concussion, cut wound over the vertex of the scalp, cut wound over the right lower leg and injury to the pelvis resulting into fractures of the right pelvic rami. They also relied on the case of **Nzuma and Another vs Jackson Mwilu** [2006] eKLR where an award of Kshs. 200,000/= was made in the year 2006 by the High Court, for a 3cm cut on the right occipital region, injuries to both temporal scalp regions, blunt injury to hyperemic, left and right eye, blunt injury to the left shoulder joint and multiple bruises and cut wound on shins.

20. The principles that guide an appellate court in handling a complaint on the award of damages were well settled in **Butt vs Khan** [1977] KLR, where the court stated as follows:-

“an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapplied the evidence in some material respect and so arrived at a figure which was inordinately high or low.”

21. In the case of **Boniface Waiti and Another vs. Michael Kariuki Kamau** HCCA 705 of 2003, Nambuye J (as she then was) stated the following principles in assessment of damages:-

(i) Award of damages is meant to compensate but not to enrich the victim;

(ii) Award should be commensurate to the injuries;

(iii) Award in decided cases are mere guides, each case should be treated on its own facts and merit. Awards in decided cases taken into consideration, the issues of own element of inflation has to be taken into consideration. (emphasis added);

(iv) Awards should not be inordinately too high or too low.

22. It is clear from principle No. (iii) above that it is next to impossible to find two cases that are similar

in all fours and as such, each case must be decided in its own circumstances. The Magistrate who heard the lower court case considered the submissions and authorities relied upon by Counsel for the parties. He also considered inflationary trends as the authority he found applicable to the present case was decided in the year 2007, yet this case was decided on 18th August, 2015.

23. PW3 stated that the respondent whom he has known for 10 years as a work colleague and a neighbor, had become confused and forgetful. The said witness, I hold, was the best suited person to address the court on the said issue as he interacts with the respondent at work. Dr. Sheth's report of 26th September, 2013 indicates that the respondent had fully recovered with no deformity or permanent incapacity. The said report must be read alongside that of Dr. Adede, dated 15th June, 2013 who stated that the risk of more head injury related health complications is carried throughout life. As at the time of testifying before the lower court, the respondent stated that he suffered from headaches, dizziness, forgetfulness and could not withstand loud noise. Those are things that are perceived by the respondent and as Ms. Mango correctly put it, are after effects of the accident.

24. In the foregoing circumstances, it is my finding that the award made by the Hon. Magistrate was well merited and the same is upheld. Costs of the lower court case and this appeal are awarded to the respondent. Interest is also awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of October, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gikandi holding brief for Ms. Kaguri for the appellants

Mr. Mohammed holding brief for Mr. Maundu for the respondent

Mr. Oliver Musundi - Court Assistant