REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 134 OF 2013

1. JOSEPH WAMBURU TUMBU

2. SIMON KIMANI TUMBU……………………….............................APPELLANTS

VERSUS

JANE MWENDE MBATHA……………………......…………………..RESPONDENT

(An appeal arising out of the judgment of Hon. D.G. Karani PM delivered on 21st November 2012 in Kithimani Principal Magistrate's Court Civil Case No. 85 of 2011)

JUDGMENT

Introduction

The Respondent sued the Appellants seeking recovery of damages arising from an accident alleged to have occurred on 25th May 2011, by way of an Amended Plaint dated 19th April 2012 filed in the trial Court on 27th April 2012. The 1st Appellant was sued as the registered owner of motor vehicle registration number KXZ 781 a Leyland Lorry, and the 2nd Appellant as the driver of the vehicle.

The Respondent's case was that on 25th May 2011, while travelling aboard motor vehicle registration number KAR 549B as a fare-paying passenger, the 2nd Appellant drove motor vehicle registration number KXZ 781 so negligently that it collided with KAR 549B. As a result of the said collision, the Respondent stated she sustained blunt trauma to the right infra-orbital area, blunt trauma to the right knee, blunt trauma to the chest and blunt trauma to the lower back. The Respondent further claimed that she incurred a cost of KShs. 16,000/- for medical related expenses and KShs. 500 for conducting a search.

The Appellants filed an Amended Defence dated 18th April 2012 and filed in the trial Court on 16th May 2012, in which they denied the Respondent's claim. In the alternative, they averred that the Respondent and the owner and/or driver of motor vehicle registration number KAR 549B were to blame solely and/or contributed to the accident, and gave particulars of their negligence.

The parties entered a consent in the trial Court on 10th October 2012 on the issue of liability, at the ration of 80:20 in favour of the Respondent. The parties proceeded to file submissions on the issue of quantum. The trial Court in its judgment awarded the Respondent Kshs 150,000/= as general damages which was reduced by 20%, and special damages of Khs 6,000/=. Judgment was thus entered against the Appellants for a total sum of Kshs 126,000/=.

The Appeal

The Appellants are aggrieved by the judgment of the trial Court, and filed this appeal by way of a Memorandum of Appeal dated 28th June 2013 and filed in this Court on 2nd July 2013. The grounds of appeal are as follows:

a) That the learned 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) That the learned magistrate erred in law and fact by applying wrong principles of law in assessing general damages, hence arriving at manifestly excessive damages.

c) That the learned magistrate erred in law and fact by ignoring the Appellants' submissions in his judgment without proper reason to do so.

d) That the learned magistrate erred in law and fact by awarding excessive special damages that had not been proved.

It is now settled law that the duty of this Court as the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661 , Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424.** The duty of this Court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

The Appellants and Respondent canvassed the present appeal by way of written submissions. Manthi Masika & Company Advocates for the Appellants filed submissions dated 26th June 2017, while the Respondent's Advocates, L.M. Wambua & Company Advocates, filed submissions dated 11th May 2017.

The Appellants contended that the trial Court made an excessive award considering the injuries suffered by the Respondent, which Dr. Mutuku in a medical report filed in the trial Court termed as soft tissue injuries, and that she was therefore expected to make full recovery. Further, that the case law cited by the Respondent did not have comparable injuries, which injuries were more severe than the injuries she suffered.

It was further submitted by the Appellants that in assessment of general damages, the general method should be that comparable awards should as far as possible be compensated by comparable awards. The Appellants cited the decisions in **Robert Ngari Gateri vs Maningo Transporters (2005) eKLR** and **Sokoro Saw Mills vs Grace Nduta (2006) eKLR** where the Courts awarded Kshs 60,000/= and Kshs 30,000/= respectively as damages for soft tissue injuries.

The Respondent on the other hand contended that the award by the trial court was fair and reasonable in the circumstances. Reliance was placed on the decisions in **Equator Bottlers Limited v. Dennis Kimori Mecha Njenga & Another, Kisumu HCCC No. 108 of 2007,** where an award of damages of Kshs 130,000/= was made; **Douglas Mwirigi Francis v. Andrew Miriti, Meru HCCA No. 34 of 2005** where Kshs 150,000/= was awarded; and **Leah Nyaguthi v. Kenya Broadcasting Corporation Nairobi, HCCC No. 1128 of 1993,** where the Plaintiff was awarded Kshs 200,000/=, all for soft tissue injuries. On special damages, it was submitted by the Respondent that the amount of KShs. 16,500/= was proved by way of receipts.

The Issues and Determination

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are only contesting the findings of the trial Court on quantum of damages, as the issue of liability was settled by the parties by consent in the trial Court. The issue before this Court

for determination therefore is whether the trial magistrate applied the correct principles of law in assessing the damages payable to the Respondent.

It is an established principle of law that that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5)**.

In the present appeal, I have read the trial court's decision on quantum, and note that the trial magistrate found that the injuries suffered by the Respondent were soft tissue injuries for which she was expected to have made full recovery with no permanent incapacity anticipated. He considered the cases cited by the parties before making a decision to award KShs. 150,000/= as general damages. The trial magistrate also took into consideration the lapse of time since the adopted authority was decided and the inflation trends.

I have also considered the submissions and medical reports submitted by the Appellants and Respondent in the trial Court. I note that there were two medical reports submitted therein by the parties. The first medical report by Dr. P.N. Mutuku was prepared after an examination of the Respondent on 8th July 2011, and found that the Respondent sustained blunt trauma to the right oribital area, blunt trauma to the right knee, blunt trauma to the chest and blunt trauma to the lower back. The doctors opinion was that the Respondent suffered soft tissue injures consistent with a road traffic accident, and was expected to recover fully with continued orthopedic clinic follow-up.

The second medical report by Dr. P.M Wambugu was dated 6th March 2012 and was based on the history given by the Respondent, and x-rays undertaken by the doctor. The report found that the injuries sustained by the Respondent were blunt trauma to the right knee and blunt trauma to the back, and that no fractures or dislocation were noted. Further, that the Respondent injuries involved soft tissues only, and she had since made adequate recovery.

Given the conflicting medical reports, I find the medical report by Dr. Mutuku to be more reliable, for reasons that it was based on an examination of the Respondent and made just over one month after the accident, as opposed to the report by Dr. Wambugu which was made almost one year later.

I have also considered the authorities cited by the Appellants and Respondent, and particularly note that in **Douglas Mwirigi Francis v. Andrew Miriti, Meru HCCA No. 34 of 2005** which was decided in 2008, an award of Kshs 150,000/= as general damages for cuts on the face and head, cuts on the hands and cuts on the lower libs which had also since healed was upheld by the High Court.

Lastly, I am guided by the legal principles that apply to award of damages in such circumstances which are that a sum should be awarded which is in its nature of a conventional award in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard **Kemp & Kemp on The Quantum of Damages, Volume 1** paragraphs 1-003. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

I therefore find that the award by the trial magistrate of Kshs 150,000/= as general damages for the injuries suffered by the Respondent was reasonable in the circumstances.

On special damages, the Respondent produced a receipt for KShs. 1000/= dated 5th July, 2011; one for KShs. 3,000/= dated 8th July, 2011; one for KShs. 1,500/= dated 7th June, 2011, a deposit voucher for KShs. 500/= dated 16th June, 2011; and an invoice for KShs. 10,500/= dated 2nd June, 2011. The Appellants did not raise any objection or oppose to the production of the said documents.

However, I am of the view that as the invoice was not a proof of payment but an indication of the sum due for services provided, the amount of special damages proved to have been incurred by the Respondent was therefore Kshs. 6,000/=. The award by the trial magistrate of Kshs 6,000/= as special damages was accordingly in line with the applicable principle that for special damages to be awarded, they must be specifically pleaded and also strictly proved as held in **Maritim & Another –v- Anjere (1990-1994) EA 312.**

In the circumstances I find no reason to re-assess or interfere with the trial court's decision on general damages, and dismiss the Appellants' appeal for the foregoing reasons.

The Respondent shall have 80% of the costs of the trial and appeal.

It is so ordered.

DATED AT MACHAKOS THIS 30TH DAY OF OCTOBER 2017.

P. NYAMWEYA

JUDGE