



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 28 OF 2012

GEORGE KINYANJUI T/A CLIMAX COACHES.....1ST APPELLANT

EQUITY BANK LIMITED.....2ND APPELLANT

VERSUS

HUSSEIN MAHAD KUYALE.....RESPONDENT

***(Being an appeal from the original judgment of D. A. Alego, Principal Magistrate in Eldoret
CMCC No. 696 of 2010 delivered on 6th March 2012)***

JUDGMENT

1. The 1st appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 6th March 2012. The appellant has lodged a memorandum of appeal dated 13th March 2012. The appeal relates only to quantum of damages. The liability of the appellant for negligence had been settled by consent in the lower court at the ratio of 90% to 10% in favour of the respondent.
2. The appellant contends that the learned trial magistrate erred by awarding the respondent general damages of Kshs 650,000. The appellant's case is that the award was exorbitant considering the respondent suffered soft tissue injuries. The appellant contends that the learned trial magistrate misapprehended the evidence and applied erroneous principles in her judgment. The appellant relied on written submissions filed on 28th September 2015.
3. The appeal is contested by the respondent. There is no cross-appeal. In brief written submissions filed on 26th October 2015, the respondent stated that the award of damages was commensurate with the injuries. The respondent referred to pages 91 and 94 of the record. There are two medical reports showing the respondent suffered severe injuries. In a synopsis, the respondent's case is that the judgment of the lower court was sound. I was implored to dismiss the appeal.
4. On 27th October 2015, learned counsels for both parties informed the court that they were relying entirely on their written submissions. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
5. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.
6. It is common ground that the respondent was injured in a road traffic accident on 9th May 2010. Liability was settled by consent. The respondent testified that he suffered injuries on his chest, neck, knees and that he lost two teeth. PW2, Dr. Rono confirmed there were no fractures. The respondent was given analgesics and was discharged. He produced the medical treatment summary report by Dr. Imbenzi dated 7th April 2011 and treatment notes (exhibit 2). It indicates

that the respondent complained of chest and neck pains. The clinical examination confirmed tenderness on the posterior neck and stiffness.

7. That evidence was largely confirmed by the evidence of PW3, Dr. Aluda. From his medical report dated 15th May 2010 (exhibit 5), the respondent suffered tenderness in the neck, chest, lumbo saxral spine, left shoulder and knee. The treatment involved analgesics. The x-ray to the left shoulder revealed no fractures. The doctor opined that the injuries were severe but continued to heal; that the pain would subside with use of analgesics; and, that the two teeth needed replacement.
8. There is then the second opinion of Dr. Theuri appearing at page 94 of the record. The doctor found that “*the claimant has missing bilateral molars, which cannot be explained by the trauma he sustained from the accident*”. Fundamentally, the doctor found that the hospital records or the medical report from Trans Nzoia West District Hospital made no reference to loss of teeth. Dr. Imbenzi’s report at page 87 of the record (which referred to *treatment notes* made on the *date* of the accident) made *no* reference to loss of teeth. It is also instructive, that Dr. S. Aluda (who noted the loss of two molars) examined the respondent *six* days after the accident. On a balance of probabilities, I am *not* satisfied that the injuries to the teeth were the result of the suit accident. What is not in doubt is that the respondent suffered multiple *soft tissue* tissue injuries.
9. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Kemfro Africa Limited & another v Lubia & another [1987] KLR 30, Akamba Public Road Services Ltd v Omambia Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
10. From the respondent’s testimony and the two medical reports, the respondent suffered *soft tissue* injuries. I have found that the loss of two teeth was *unrelated* to the suit accident. I would then say that the award of general damages of Kshs 650,000 was *manifestly* high.
11. In Peter Kahugu & another v Ongaro, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In Mumias Sugar Company Limited v Julius Shibia, High Court, Kakamega, Civil Appeal 112 of 2011 [2004] eKLR the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000.
12. The respondent had submitted for an award of Kshs 800,000. His counsel cited the decision of Rimita J in Kibet Chelagat & another v Plan International High Court Civil case 261 of 1995 (unreported) where Kshs 840,000 was awarded. I note however that in that case, the plaintiff had suffered multiple bruises, severe head injury and a fracture of the thigh bone. That does not compare well or at all with the soft tissue injuries in this case. Here, the respondent suffered blunt trauma to the neck, limbo saxral spine, left shoulder and left knee.
13. Considering the *injuries*, the *pain*, the rate of inflation and the precedents, an award of Kshs 120,000 is *sufficient*. I will *not* disturb the award on special damages of Kshs 2,100. They were specifically pleaded and strictly proved. See Kampala City Council v Nakaye [1972] E.A 446.
14. In the result, the judgment of the lower court dated 6th March 2012 is hereby *set aside*. Judgment is now entered in favour of the respondent against the appellants as follows-
 - a. Liability is apportioned by consent at 10% to 90% in favour of the respondent.
 - b. General and special damages are assessed at Kshs 122,100 *less* 10% *contributory negligence* which is to say *Kshs. 109,890*.
 - c. I award the respondent costs in the lower court and interest. Costs of the appeal are at the discretion of the court. In the interests of justice; and considering the predicament the respondent finds himself in; I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 19th day of January 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Oduor for Ms. Mbugua for the appellants instructed by Kairu & McCourt Advocates.

Mr. Misoi for Mr. Andambi for the respondent instructed by Andambi & Company Advocates.

Mr. Lesinge, Court clerk.

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