



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO. 137 OF 2012

(Appeal from the Ruling of Hon. Kibet Sambu (PM) dated and

delivered on 18TH October, 2012, in the original

KISII C.M.C.C No.485 of 2008)

HUSSEIN DAIRY LIMITED.....APPELLANT

VERSUS

SAMWEL MOKAYARESPONDENT

JUDGMENT

1. This is an appeal on quantum only arising from the judgment and decree of Kibet Sambu Principal Magistrate delivered on 8th October, 2012 in Kisii CMCC 485 of 2008.
2. By the consent of the parties made on liability was agreed at 85% to 15% in favour of the Respondent. The Respondent was thereafter awarded damages as follows:-
 - a. **General damages for pain and suffering - Kshs. 800,000/=**
 - b. **Costs of future medical expenses Kshs. 200,000/=**
 - c. **Proven special damages- Kshs. 66,680/=**

Total Kshs1,066,680/=

Less 15% contribution Kshs. 160,002/=

Net Total Kshs. 906,678/=

Plus costs and interests.

3. It is this judgment on quantum that has precipitated the instant appeal in which the appellant, who was the defendant before the lower court has set down the following grounds of appeal:
 1. **The Learned Trial Magistrate erred in fact and in law in making an award of Kshs. 800,000/- as general damages for pain, suffering and loss of amenities which the Respondent had allegedly suffered, which amount is inordinately high and manifestly excessive in the circumstances and this constitutes an erroneous estimate of the alleged damage suffered.**

2. **The learned trial Magistrate erred in fact and in law when he awarded to the Respondent the sum of Kshs. 66,680/= as special damages without proof and or basis at all and which sum had not been specifically pleaded nor specially proved in the suit before him.**
 3. **The Learned Trial Magistrate erred in law and in fact when he erroneously and thereby used his discretion wrongly in awarding excessive damages in the circumstances and in failing to consider the pleadings and the submissions urged on behalf of the Appellant before him and to take into account the fact that comparable injuries should always attract comparable awards.**
 4. **The Learned Trial Magistrate erred in law and in fact when in his judgment he relied on documentary evidence and exhibits which were illegally produced at the trial by the Respondent herself without the makers thereof being called to produce them contrary to the provisions of the Evidence Act.**
4. The respondent filed a cross appeal on 27th November, 2012 citing the following grounds:
1. **The learned trial magistrate erred in law and in fact in refusing to consider the magnitude of the injuries the Respondent/Appellant sustained and the authorities tendered for consideration and failure to award as submitted as there was no compelling argument by the Appellant/Respondent.**
 2. **That the Respondent/Appellant herein be allowed to enter additional evidence that due to the injuries sustained, the effects resulted into an inability to perform sexual intercourse.**
 3. **That the learned trial magistrate erred in law and in fact in awarding a minimal award of quantum even after noting the seriousness of the injuries sustained by the Respondent/Appellant vide the evidence pertinent thereto adduced which evidence could have attached a higher award.**
5. Being an appeal on quantum only, this court will go straight to the injuries that the respondent suffered that gave rise to the award of damages mentioned hereinabove.
6. The background of the case is that on 30th August, 2007, the respondent was travelling in the appellant's motor vehicle **Registration number KAN 464D** along Kisii – Keroka Road when an accident occurred involving the appellant motor vehicle **Registration No. KAX 3082** which collided with the vehicle **Registration No. KAN 464D** in which the respondent was a passenger thereby causing him the following injuries:
- a. **Fracture of the right hand radius.**
 - b. **Fracture of the right hand ulna.**
 - c. **Chest injuries.**
 - d. **Deep cut wound on the right leg.**
 - e. **Fracture of the left pelvis joint.**
 - f. **Back injuries.**
 - g. **Injuries on the abdomen.**
 - h. **Loss of consciousness.**
7. The respondent called evidence to prove his injuries and provided receipts in support of his claim on special damages.
8. In this appeal, it is not contested that the respondent sustained injuries as a result of the accident. What is contested is the quantum of damages awarded which the appellant says is inordinately high and manifestly excessive in the circumstances and constitutes an erroneous estimate of the alleged damage suffered.
9. The appellant further states, in his memorandum of appeal that the special damages awarded were not specifically proved.

10. On 12th March, 2015, the parties took directions that the appeal be canvassed by way of written submissions.

Appellant's submissions

11. In his submissions filed on 25th June 2015, the appellant reiterated the grounds contained in the memorandum of appeal and stated that the award of Kshs. 200,000/= made for future medical expenses was not merited because it was neither pleaded nor proved nor a basis laid for it in the plaintiff's/respondent's evidence.

12. In respect to the cross appeal, the appellant submitted that the same was incompetent and filed out of time without leave. The appellant argued that the court should not allow additional evidence at the appeal stated as that would prejudice the appellant who will not get a chance to cross-examine the respondent on his evidence and further, that leave to present additional evidence can only be granted through a formal application and not as a ground of appeal.

Respondent's submissions

13. In his submissions filed on 15th October, 2015 the respondent submits that he indeed suffered serious injuries in the said accident that necessitated his admission to Kisii Level 5 Hospital for 11 days and later to Tenwek Mission Hospital after his inability to attend Kenyatta National Hospital for specialized treatment due to his inability to afford the cost of treatment at the said Kenyatta National Hospital.

14. The respondent submits that he still has to undergo further treatment and operation in order to remove the metal plates that were placed in his hands following the accident. The respondent could not however estimate or prove the cost of his further medical attention.

15. The respondent contends that his cross appeal is merited and should be allowed, the award enhanced and the appellant's appeal dismissed.

Analysis and determination

16. As I have already stated in this judgment, the gist of this appeal is the award of damages on quantum which the appellant argues is on the higher side and therefore manifestly excessive.

17. On the award of special damages for future medical expenses, I note that the same was neither pleaded nor proved. The law on special damages is quite clear that the same not only has to be pleaded, but must be specifically proved during the hearing (see. In the instant case, it was proved that the respondent underwent an operation that involved the inserting of plates in his fractured right hand that would require a future operation to remove. However, there was no proof of the sum of Kshs. 200,000/= awarded under this heading for future medical attention and I therefore allow this ground of appeal.

18. On general damages on quantum the courts have time and again held that the appellate court should not interfere with the award of damages unless the damages awarded are so high or so low as to be wholly erroneous estimate and an error of principle must be inferred (see **Charles Mokua vs Judy Wairimu Mirangu (1996) eKLR 2** and **Butt vs Khan [1981]KLR 349**).

19. In the case of **Selle vs Associated Motor Boat Co. Ltd [1968]EA 123**, the guidelines on the exercise of judicial discretion in making award of damages were stated as precedents of previous recent judgments, the nature of the injuries sustained together with their severity, the consequences of incapacity and/or deformity and lastly, the influence of inflation on the value of the shilling.

20. This being a first appeal, the court is under an obligation to re-evaluate the evidence on record with a view to making its own determination on the same while bearing in mind the fact that it neither heard nor saw the respondent or his witnesses testify.

21. During his testimony, the respondent who testified as PW3 before the lower court stated he got “a fracture of the right hand with a plate inserted to date, back injuries and on the legs and on the chest.”

22. The respondent was examined by Dr. Ajuoga whose medical report was produced as PExhibit 9a. The medical report showed the respondent’s injuries as follows:

- a. **Fracture of the right radius bone.**
- b. **Fracture of the ulna bone**
- c. **Chest contusion**
- d. **Deep cut wound on the right leg.**
- e. **Fracture of the left pelvic bone.**
- f. **Bruises on the back**
- g. **Cerebral concussion.**

23. At the conclusion section of the medical report, the doctor had the following to say:

“He suffered fractures of the right forearm, of the pelvic bones which have healed well leaving him with no permanent disability.”

24. The P3 form produced as PExhibit 8 during the trial assessed the degree of injury as “grievous harm”.

25. The trial magistrate had this to say on the injuries and damages in his judgment:

“having considered the nature of the injuries sustained by the plaintiff, the issue of monetary inflation of the Kenya (sic) currency and taking regard to the comparable cited local authorities particularly that of Mombasa HCC NO. 752 of 1993 Mutinda Matheka vs Gulari Yusuf, do hereby award the plaintiff the sum of Kshs. 800,000/= on general damages for pain and suffering and loss of amenities.”

26. The principles for assessment of damages were laid out by the court of appeal for east Africa, and subsequently adopted by our Court of Appeal in the following cases:

1. **Kanga vs Manyoka [1961]EA 705, 709, 7013.**
2. **Lukenya Ranching and farming Coop. Society Ltd. Vs Kavoloto [1979] EA 414, 418, 419.**
3. **Kemfro Africa t/a Meru Express & Another vs A. M. Lubia & Another [1982-88]IKAR 727.**

27. From the above authorities, the Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court;

- a. **Took into account an irrelevant fact or;**
- b. **Left out of account a relevant fact or;**
- c. **The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

28. In the instant case, I find that the trial magistrate’s exercise of discretion was in line with the principles stated hereinabove and was therefore exercised judiciously. The trial court took into account the seriousness of the injuries, the awards proposed by the parties and the relevant authorities cited before making his finding on the most appropriate award. The trial court even went further and considered the inflationary effect on the Kenyan currency and factored it in to the award.

29. I have looked at the authorities cited by both parties in their submissions and noted that for similar injuries, the awards made were not way off the mark compared to the award made by the trial

magistrate in this case.

30. On the respondent's cross appeal, I agree with the appellant's submissions that the same was filed out of time without leave and that additional evidence can only be allowed if a formal application was made for the same. I therefore disallow the cross appeal in its entirety. The trial court's findings on special damages for the cost of future medical expenses were neither pleaded nor proved. Consequently I allow the appellant's argument that the award for cost of future medical treatment was not warranted. I find no reason to interfere with the findings of the trial magistrate on the other aspects of the award. Consequently, I allow the appeal partly, set aside the judgment of the trial court dated 8th October, 2012 and substitute the same with a judgment in favour of the respondent for Kshs. 736,678/= made up as follows:

- a. General damages for pain, suffering and loss of amenities Kshs. 800,000/=
- b. Proven special damages Kshs. 66,680/=

Total Kshs. 866,680/=

Less 15% contribution Kshs. 130,000/=

TOTAL Kshs. 736,678/=

31. Interest shall accrue on the said amount from the date of this judgment until payment is made in full.

Since the appeal has succeeded partly, each party shall bear their own costs of the appeal. The respondent shall have the costs of the subordinate court's case.

Dated, signed and delivered in open court this 25th day of April, 2016

HON. .W. A OKWANY

JUDGE

In the presence of:

- Mr. Nyasimi for Okongo Wandago for the Appellant
- Mr. Anyona for the Respondent
- Omwoyo court clerk