



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 600 OF 2012

RWAKEN INVESTMENTS LIMITED.....APPELLANT

VERSUS

ISAAC KIPROP CHELUNYEI1ST RESPONDENT

THE BOARD OF GOVERNORS

KENYA UTALII COLLEGE.....2ND RESPONDENT

(Being an appeal from the judgment and order of C. Obulutsa (Mr.) SPM delivered on 16th October, 2012 in Milimani chief Magistrate's Court Case No. 2265 of 2011)

JUDGMENT

1. The Appellant, Rwaken Investments Limited and the 2nd Respondent, The Board of Governor's Kenya Utalii College, were sued in the Lower Court as the 1st and 2nd Defendants respectively by the 1st Respondent, Isaac Kiprop Chelunyei who was the plaintiff. The 1st Respondent sustained injuries in a road traffic accident on 9th December, 2010 while travelling as passenger in Motor vehicle registration No. KAY 954X which collided with Motor vehicle Reg. No. KBB123X. The 1st Respondent attributed the accident to the negligence of the drivers of the two motor vehicles owned by the Defendants.

2. The Appellant filed a statement of defence and denied the 1st Respondent's claim. The 1st Respondent blamed the accident on the negligence of the 2nd Respondent's motor vehicle. The 2nd Respondent blamed the accident on the Appellant's side. Replies to the defences were filed. The Appellant and the 2nd Respondent who were the two defendants in the case also filed Notices of indemnity against each other.

3. The trial court in its judgment held the two defendants jointly and severally liable for the accident. General damages awarded was Ksh.1,200,000/=, special damages Kshs.2,500 plus the costs of the suit and interest.

4. The Appellant was aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:

- (a) That the trial magistrate failed to apportion liability between the two defendants.
- (b) That the judgment was against the weight of the evidence.
- (c) That the trial magistrate failed to consider the submissions and the authorities cited.
- (d) That the award of general damages was excessive.

5. During the hearing of the appeal, the counsels for the Appellant and the 1st Respondent filed written submissions. I have considered the said submissions together with the authorities cited. The 2nd Respondent did not participate in the appeal though served.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

7. The 1st Respondent gave evidence as PW1. He stated that he was in motor vehicle KAT 954X when upon reaching Moi Avenue motor vehicle KBB 123X hit their motor vehicle on the side. The 22 year old 1st Respondent was injured in the accident. PW1 Dr. Wokobi who examined the 1st Respondent produced a medical report as an exhibit. The 1st Respondent’s injuries were stated as follows:-

- Major avulsion wounds on the right side of the face.
- Fracture of the right maxillae
- Fracture of the right orbit
- Fracture of the right zygoma
- Bleeding within sinus of right maxillae

8. Admission was for one day. Treatment included surgical toilet and stitching of the facial wounds. The 1st Respondent healed in a few weeks’ time. He was left with extensive scars on the right side of the face. The fractures of the facial bones were expected to unite but would give rise to the appearance of fullness on the right side of the face.

9. The defence did not call any witnesses. The Plaintiff’s evidence on the accident was therefore not controverted. The Plaintiff’s evidence did not place the blame squarely on any of the two motor vehicles. His evidence was that the motor vehicle he was in was hit by the other motor vehicle. He further stated that their driver tried to swerve but he could not exactly tell what happened. The 1st Respondent was a passenger. The police abstract produced was not of much help as it stated that the accident was “pending under investigation”. Without any evidence from the defence, the trial magistrate cannot be faulted for finding both drivers liable for the accident.

10. In cases where a court is faced with such difficulty and particularly where two vehicles were involved

in a collision, the court resorts to apportioning liability equally. The court of Appeal in **Hussein Omar Farah v Lemto Agencies [2006] eKLR** held as follows:-

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

See also **Joyce Mumbi Ngugi (Administratrix of the estate of Celestine Mugi Maingi) vs the Co-operative Bank of Kenya Ltd & 2 others CA Nyeri 214/2004**, where the Court of Appeal held that liability ought have been apportioned on a 50%:50% basis between the two motor vehicles.

11. Turning to the issue of quantum, the Appellant’s side submitted for an award of Ksh.280,000/= as general damages. He relied on the following authorities:-

(a) **James Kirambu Mbugua v D.V. Shah Eco (K) Ltd & Another HCCC NBI No. 227/16** where Ksh.200,000/= was awarded as general damages in the year 2000 for general compound fractures of the tibia and fibula.

(b) **Hamisi Ngunga Baya v Salt Manufacturers Ltd & Another** where an award of Ksh.240,000/= was made general damage in the year 1995 for injuries to the maxillary area, Laceration of forehead, fracture of mandible, injury of lower front teeth, fracture humerus, chest injury and laceration of the chin.

(c) **World Concern International & another v Livingstone T Ragira & Another [2005] eKLR** where the court awarded Ksh.400,000/= as general damages for injuries which included a fracture of the Mandible, fracture of the occipital bone, fracture of the zygomatic complex, fracture of the roof of sphenoid sinus, left sphenoid fracture and fracture of the ethmoid.

(d) **James Ngugi Gakunju v William Njau Kamau & another (2561 of 1998)** The award of Kshs.400,000/= in the year 2000 was made for a fracture of zygoma, fracture of Maxilla Mandible and fracture of the nasal bones.

Although the injuries are comparable to the injuries in the case under consideration, it is noted that the said authorities are quite old. Inflation has since set in.

12. On the other hand the 1st Respondent counsel supported the award of general damages made by the trial court. The following authority was relied on:

Alphonse Mwatsuma Mwangamchi v Joseph Mwanza Mwanu & another [2005] eKLR. An award of general damages of Ksh. 1,200,000/= was made in the year 2005 for injuries to the mandible with loss of six (6) teeth and seven (7) others broken, fracture of mandible, contusion chest and severe back injury which involved the spinal cord. Seven teeth needed replacement.

The injuries in the case cited by the 1st Respondent’s counsel were clearly more severe than in the instant case.

13. I have also taken the liberty to look at other cases with comparable injuries:

a) **Peter Gichuru Mwangi v James Kabathi Mwangi [2001] eKLR.** The Plaintiff was awarded Ksh.600,000/= as general damage for the following injuries:

“- Head injury

- Ophthalmic injury to the right eye
- Severe face injuries
- Right Zygomatic complex fractures
- Orbital fractures
- Nasoethmoidal complex fracture
- Comminuted palatal fractures with evidence of bone loss on the left side.
- Compound comminuted lefort II fracture
- Complex dentoalveolar injuries
- Compound mandibular fracture
- Complex extra oral soft tissue injuries”

b) James Ngugi Gakunju vs William Njau Kamau & Another [2000] eKLR.

The injuries included the following fractures:

- zygoma
- Nasal bones
- Maxilla and mandible

General damages awarded for pain, suffering and loss of amenities Kshs.400,000/=.

Taking into account the injuries sustained by the 1st Respondent, I agree with the Appellant’s counsels submissions that the award of general damages awarded by the trial court was excessive and amounts to an erroneous estimate of the damages. I am therefore inclined to disturb the same.

14. I bear in mind the principles to be applied when disturbing the award of general damages made by the trial court. As stated by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727:**

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

15. With the foregoing, my considered view is that the sum of Kshs.800,000/= would be reasonable compensation in this case. Consequently, I set aside the award of general damages of kshs.1,200,000/= made by the Lower Court and substitute the same with the sum of Ksh.800,000/=

16. Judgment is hereby entered for the Plaintiff (1st Respondent) against the Defendants (Applicant and 2nd Respondent) on a 50% liability basis each as follows:

- (a) General Damages Ksh.800,000/=
- (b) Special damages Kshs.2,500/=

(c) The appeal having been partially successful, each party to bear own costs of the appeal. The costs in the Lower Court to the 1st Respondent (Plaintiff).

Dated, signed and delivered at Nairobi this 27th day of Oct., 2016

B. THURANIRA JEDAN

JUDGE