



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 9 OF 2016

MBARACHU NJANE.....APPELLANT

Versus

BONIFACE MWANGI.....RESPONDENT

(Being an appeal from the Judgement and Decree delivered on 25/2/2010 by the Senior Resident Magistrate's Court at Kajiado in Civil Case No. 210 of 2008 – Holden by Hon. W. Kaberia SRM)

JUDGEMENT

This appeal concerns assessment of quantum by the trial court.

MBARACHU NJANE hereinafter referred to as the appellant filed this appeal against one BONIFACE MWANGI IRUNGU hereinafter referred as the respondent in respect of a judgement and decree of the Senior Resident Magistrate given on 25/2/2010 whereby the learned trial magistrate awarded the respondent/plaintiff a gross award of Ksh.500,000/= in respect of general damages for pain and suffering.

As liability had been settled by consent and apportioned at a ratio of 75%25% in favour of the plaintiff/respondent, the net award on contributory negligence awarded in favour of the plaintiff was therefore 376,500/- inclusive of specials award of Ksh.2000/=. Liability therefore is not contested in this appeal.

Case at the Trial:

The issue of quantum was disposed off by way of written submissions prepared and filed respectively by both counsels. From the record the plaintiff's counsel submitted and referred to the medical reports by Dr. S.K. Mwaura dated on 20/8/2008 and a second medical report by Dr. R.P. Shah dated 15/5/2009 which were admitted also by consent without calling the maker. Learned counsel contended in reference to the medical examination conducted by the doctors that they were in agreement that plaintiff sustained the following injuries; cerebral concussion, fracture of right femur midshaft and right clavicle, cut wound on the left forehead, lacerated wound on the left lateral aspect of iliac region. Blunt trauma of the right knee.

The counsel further relied on the following authorities in his arguments before the trial court on assessment of damages namely; **Sisco E. Murungu Ndanyi & 2 Others v Coast Bus Services Ltd Nairobi HCC No. 4425 of 1990** which involved a plaintiff who suffered a head injury leading to unconsciousness for one day, fractures of the right clavicle, trauma of the bladder and urethra. The court awarded Ksh.500,000/= for pain and suffering and loss of amenities. **Iqtidar Ahmed Mir v A.O. Latipan & Another Nairobi HCCC No. 181 of 1986** in which the plaintiff involved sustained fracture of the ischial tuberosity left side of the pelvis and thigh. The plaintiff was awarded Ksh.300,000/=. Counsel submitted and proposed an award of Ksh.600,000/= for the plaintiff/respondent in this appeal.

The defendant's counsel on her part submitted on general damages making reference to the two medical reports by Dr. Mwaura and Dr. R.P. Shah who examined the plaintiff/respondent. The defendant's counsel submitted and proposed quantum of Ksh.350,000/= be assessed as adequate compensation for the plaintiff. Counsel placed reliance on the following authorities; Philip *Kipkorir v Nebco (K) Ltd & Another HCCC No. 70 of 2000 Kericho, Bethuel Mutua v China Road & Bridge Corporation HCCC No. 200 of 2007 Mombasa, Mary Anyango t/a Kwega Bus & Another HCCC No. 671 of 1995 Nakuru.*

In the three cases referred to by the defence counsel, the plaintiff similarities of injuries involved fracture of the left femur, fracture of the right pubic ischium loss of consciousness, fracture of the humerus, head injury. The awards in those cases ranged between Ksh.500,000/= in general damages.

The learned trial magistrate in his judgement placing consideration on the severity of injuries suffered by the plaintiff and submissions made by counsels assessed on quantum in favour of the respondent/plaintiff at Ksh.500,000/= and specials of Ksh.2,000/=. In view of the consent judgement on liability apportioned at 75%:25% the net award was Ksh.376,500/=.

This is the bone of contention on this appeal.

Being dissatisfied with the award on quantum, the appellant filed an appeal before this court relying on the following grounds:

- 1. That the learned trial magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the plaintiff herein.**
- 2. That the learned magistrate erred in law in making such a high award so to show that the magistrate acted on a wrong principle of law.**
- 3. That the learned magistrate's award on damages was so high as to be entirely erroneous.**
- 4. That the learned magistrate's award was made without considering the appellant's submissions and authorities, hence making an excessive award in view of the medical evidence presented before the court.**
- 5. That the whole judgement was against the weight of evidence before the court.**

This is a first appeal and I am bound to reappraise the evidence before the trial court and come up with my own conclusions but be vigilant not to differ from the learned trial magistrate on findings made on facts. However, as an appellate court, I can only do so only if it appears that the decision reached by the trial magistrate failed to take into account particular circumstances or material that his impression of the facts was inconsistency with the evidence in the case before him. See the case of *Ephantus Mwangi & Another v Duncan M. Wambugu [1982 – 1988] 1KAR 278.*

Submissions by the Appellant Counsel on appeal:

The appellant's counsel submitted that the trial magistrate erred and misdirected himself on awarding exorbitant damages without due regard to prevailing comparable authorities on such awards. The learned counsel further faulted the trial magistrate for failure to consider the submissions and authorities submitted to guide him in assessing quantum.

The appellant's counsel further argued that the trial magistrate failed in his duty by drawing an inference that the injuries were serious in absence of any evidence to support that proposition. The appellant's counsel relied on the following authorities to support his appeal that this court has the jurisdiction to exercise discretion to review or set aside the trial magistrate's decision:

(1) KEMFRO Africa Ltd t/a Meru Express Service Gathogo Kanini v A.M.M. Lubia & Another [1982 – 88] 1KAR 777

(2) Denshire Muteti Wambua v Kenya Power & Lightning Co. Ltd Court of Appeal at Nairobi Civil Appeal No. 60 of 2004

(3) Arrow Car Ltd v Bimomo & 2 Others [2004] 2 KLR 101

The appellant counsel argued and urged this court to allow the appeal

Respondent's Counsel Submissions:

The respondent's counsel on his part submitted that there are no compelling grounds placed before this court by the appellant to exercise discretion and impeach the findings of the learned trial magistrate on quantum. The respondent's counsel further contended that the trial was conducted by way of written submissions without calling any of the witnesses in support of their case.

The respondent's counsel argued that pursuant to a consent judgement on liability apportioned at 75%:25% in favour of the plaintiff/respondent assessment of quantum was vide written submissions. It is not therefore true counsel argued that the trial magistrate misdirected himself on fact and principle in making a decision on quantum of Ksh.500,000/=.

The appellant's counsel invited the court to peruse the record of the trial court in regard to the nature of submissions made by both parties on the issue of quantum. The respondent's counsel relied on the following authorities and urged this court to dismiss the appeal:

(1) Philip Kipkorir v Neglo (K) Ltd Kericho HCCA No. 70 of 2000

(2) Bethuel Muthi v China Roads & Bridge Corporation Mombasa HCCA No. 200 of 2007.

(3) May Anyango v Shem Onyango Nakuru HCCA No. 671 of 1995

(4) Sisco Mwangi v Coast Bus Services Nairobi HCCA No. 4425 of 1990

Analysis and Determination:

The concern of this court would therefore be whether indeed the learned trial magistrate failed to take into account the circumstances of the accident, the injuries suffered and the medical reports admitted in evidence by consent of both counsels. Secondly whether the assessment of damages was so inordinately high that it occasioned a miscarriage of justice.

It is not in dispute that at the trial, directions were taken in the manner the suit was to be heard and disposed off. There was no viva voce evidence on any of the issue and facts of the case emerging from the pleading. The issue of liability was settled by way of a consent judgement. What remained for the trial magistrate was to assess general damages due for the plaintiff. The trial magistrate assessed the damages for pain and suffering and also specials.

There is no cross appeal by the plaintiff/respondent against the award of damages. The grant of damages to a claimant is a discretionary matter for the trial court. That exercise of discretion generally would not be interfered with unless it has been shown there was an error of principle or misdirection on fact. This position was set out way back in 1968 in the case of ***Mbogo v Shah [1968] EA 93*** Clement Deleburg Vice President of the Court of Appeal for East Africa had this to say:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or

because it has failed to take into consideration and in doing so arrived at a wrong conclusion.”

It therefore follows that 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. In the case of ***KEMFRO Africa Ltd v A.M. Lubia & Another [1988] 1KAR 727*** the Court of Appeal laid down the following principles; the appeal court must be satisfied either that the judge, in assessing damages, took into account an irrelevant factor, or left out of account of a relevant one, or that the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage. What therefore the appellant is expected on appeal is to demonstrate with the provisions of law and fact that the trial magistrate misdirected or partly or wholly took into account an irrelevant matter or ignored a relevant one in exercising discretion to award damages.

From the record and judgement of the lower court, the trial magistrate is emphatic as having considered submissions by both counsels. The defendant/appellant herein submitted on quantum making reference to three authorities. The range on award of damages for those cases ranged between Ksh.500,000/= to 800,000/=. It is not in dispute that the defendant/appellant making reference to his own authorities opined for Ksh.350,000/= be awarded in favour of the plaintiff. To the extent that the trial magistrate relied on the medical reports by Dr. Mwaura and Dr. Shah and heard no evidence at all from either of the parties.

The fault being attributed to the trial magistrate lacks basis

In appraisal of the record and submissions made on quantum, I am of the conceded view that the trial magistrate decision was in line with the principles in the persuasive authority of ***Wes (H) & Son Ltd v Shephard [1964] AC 326 at 345 Lord Morris of Borth – Y- Gesy*** stated thus:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

I have taken into account the submissions made before the trial court and the injuries suffered by the plaintiff/respondent. While taking into account the principles of assessment and the material available at the trial court, the assessment was fair and reasonable. The respondent as observed from the medical reports suffered serious injuries. The amount awarded by the trial court cannot renew her physical frame battered and shattered by the accident. It is only one of the way to say sorry for the wrong which occurred. The defendant tortfeasor becomes the one to meet the costs of compensating the injured party.

DECISION

Applying the above principles to this appeal, I am satisfied that the learned trial magistrate was perfectly entitled to exercise the discretion the way he did to assess quantum of Kshs.500,000/= in favour of the plaintiff/respondent. The grounds advanced by the appellant on error or misdirection by the learned trial magistrate must fail. For the appellate court to interfere with exercise of discretion the nature of legal principles and fact a misdirection has occurred ought to be presented clearly to the court. That is not the case in this appeal.

That being the view of this court, this appeal is hereby dismissed. The judgement of the lower court is hereby affirmed. Costs of this appeal to the respondent.

It is so ordered.

Dated, delivered in open court at Kajiado on 13th day of October, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. E. Maina for Mwaura Kamau for the respondent

Muchemi for the Appellant – absent but date taken in court

Mr. Mateli Court Assistant