



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NUMBER 640 OF 2013
HALIFAX MUTUA MWINZI. APPELLANT
VERSUS
EAGLE HAULIERS LTD. 1ST RESPONDENT
MOHAMMED ADEN NOOR. 2ND RESPONDENT

(Being an Appeal from the Ruling of the Honourable Mr. S N. Mbungi, Ag Chief Magistrate, Thika Chief Magistrate's Court Civil Case No. 748 of 2010 on 27th November, 2013)

J U D G M E N T

The appeal herein arises from the judgment of Honourable S. N Mbungi delivered on the 27th day of November, 2013 in CMCC No. 748 of 2010.

The Appellant herein who was the Plaintiff in the lower court matter filed the plaint against the Respondents on the 7th day of July, 2010 in which he claims general damages, special damages of Kshs.2,700/- and costs. His cause of action is based on a road traffic accident that occurred on the 14th November, 2009 along Garissa-Thika Highway near 12 – Kenya Army Engineers Gate.

It was pleaded that on the said date, the Respondent's motor vehicle registration No. KAH 541M was so negligently driven and/or controlled by its driver that an accident occurred as a result of which the plaintiff was injured. That as a result of the accident, the Appellant sustained injuries which are set out in the medical report by Dr. Theophilus Wangata which was produced as exhibit 9(b).

The Defendants filed a defence on the 24th August, 2010 but they did not call any evidence. When the matter came up for the hearing of the defence case on the 23rd July, 2013, the counsel who appeared informed the court that the Defendants have been unable to get witnesses and consequently they closed their case without calling any evidence.

On his part, the Appellant called one witness in support of his case. PW 1 Josephat Chesare a police officer attached to Thika Police Station confirmed the occurrence of the accident and produced the police abstract and a copy of the Occurrence Book.

PW 2 (Appellant) told the court that on the material day when the accident occurred, he had gone to repair a motor vehicle KAH 541M and after repairing it and while travelling to Nairobi from Garissa abroad the said motor vehicle, it stalled at 12th Engineering Barracks and he alighted to check what was happening. As he was checking the vehicle, it started moving and he was hit on the knee by the tyre

wheel. He was injured on the left leg and the small ring finger. The wheel caught his trouser and it rolled with him. He was rushed to St. Mulumba Hospital and then latter to Mbagathi and lastly to Kenyatta National Hospital where he was admitted for three weeks. He produced the medical report, treatment card, the demand letter and a bundle of receipts for the medical expenses, as exhibits in the case.

The learned magistrate delivered his judgment on the 27th November, 2013 and found the Defendant's 100% to blame for the accident and awarded a sum of Ksh.350,700/- as general damages and Ksh.2,700/- special damages.

The Appellant being dissatisfied with the judgment filed a memorandum of appeal on the 10th December, 2013 wherein he has listed three grounds of appeal as hereunder: -

1. The learned magistrate erred in law and in fact in failing to appreciate the relevant principles and case law in assessing damages for pain and suffering and thereby arrived at a very low award on general damages.
2. The learned magistrate erred in law in failing to properly evaluate the evidence on record, in particular the evidence on permanent incapacity of the appellant and thereby erroneously awarded a low award on general damages.
3. The learned trial magistrate misdirected himself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made a very low award.

When the appeal came up for hearing parties agreed to dispose it off by way of written submissions. This court has considered the submissions by both parties. Looking at the memorandum of appeal, it is clear that the Appellant has appealed against the quantum and there being no cross-appeal on liability, this court will only address itself to the quantum. It is also noted that the Respondents in their submissions have not submitted on liability which given the impression that they do not have an issue with liability and in any event, they did not adduce any evidence in the lower court.

The Appellant has raised three grounds of appeal which all narrow down to one ground, that the lower court awarded a low award on general damages. In the case of **Mbogo & Another Vs Shah (1968) EA 1993** the court held: -

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the 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 matters which it should have taken into account and consideration and in doing so arrived at a figure which was either inordinately high or low.”

This court has perused and considered the medical report by Theophilus Wangata dated the 26th May, 2010. According to that report, the Appellant sustained the following injuries: -

1. Fracture of the left femur.
2. Fracture dislocation of distal interphalangeal joint of left ring finger.
3. Blood loss, physical and psychological pains.

He was first admitted at Mbagathi District Hospital where outside reduction and internal fixation of the left femur with a plate was done in theater, K-wiring was done on the left ring finger but the K-wires were later removed. He was given analgesics, antibiotics and tetanous toxoid injection and was ambulated using crutches.

In the Doctor's opinion, he suffered grievous harm and the left ring finger remains stiff and deformed. As

a mechanic he needs to use both hands to work well. He is at risk of developing post traumatic osteoarthritis at the finger in future which is a chronic joint condition that presents with pain, swelling and stiffness and requires of the recurrent use of pain killers.

There is no doubt that the injuries sustained by the Appellant were serious but the proposed figure of Ksh.1,000,000/- is on the higher side considering the injuries that he sustained. On the other hand, the proposal of Ksh.350,000/- by the Respondents is on the lower side. In my view, this is a case which this court needs to interfere with the exercise of the discretion by the learned magistrate as the award made was low. Considering the injuries sustained by the Appellant and the extent of functional and permanent incapacity which the doctor has estimated at fifteen percent (15%), it's the finding by this court that a sum of Kenya Six Hundred Thousand Only (Ksh.600,000/=) is reasonable compensation for the injuries suffered by the Appellant.

In his submissions counsel for the Appellant has submitted on future medical expenses of Ksh.100,000/-. The doctor in the medical has indicated that the Appellant will require the aforesaid amount for future medical expenses. However, the same was neither pleaded nor prayed for and for that reason the learned magistrate was right in failing to award the future medical expenses. Similarly, the medical expenses that he incurred were not pleaded and proved, save for a sum of Ksh.2,700/- which the learned magistrate awarded.

In the premises, the appeal herein is allowed in the following terms.

- 1. Judgment of the trial court on quantum of damages is hereby set aside and the sum of Ksh.350,000/- is substituted with a sum of Ksh.600,000/-***
- 2. Costs of the appeal and those of the lower court are awarded to the Appellants.***
- 3. Judgment on liability at 100% against the Respondents remains undisturbed.***

Dated, signed and delivered at Nairobi this 24th day of November, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... ***for the Appellant***

..... ***for the Respondent***