



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 72 OF 2014

BETWEEN

KENYA SUGAR RESEARCH FOUNDATION.....APPELLANT

AND

G A O MINOR SUING THROUGH

NEXT FRIEND J A O.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C.N.Njalale, RM

dated 5th June 2014 in the Senior Resident Magistrates Court

at Winam in Civil Case No. 22 of 2009)

JUDGMENT

1. The respondent, G A O, a child, filed suit through her mother and next friend, J A O, claiming damages against the appellant for injuries sustained because of an accident which took place on 3rd December 2008 along Usenge-Bondo Road at Usigu market. According to the amended plaint, appellant's motor vehicle registration number KAW 147Z was so carelessly driven that it veered off the road and knocked the respondent from behind thereby occasioning her serious injuries. The appellant denied liability and blamed the accident on a motorcyclist who rode his motor cycle carelessly and without regard to road. The appellant took out third party proceedings against the motor cyclist. The trial court found the appellant fully liable for the accident and assessed general damages at Kshs. 170,000/-.

2. The thrust of the appellant's case contained in the memorandum of appeal dated 23rd June, 2014 is that the learned magistrate did not consider the appellant's evidence that a motor cyclist was responsible for the accident and thus arrived at a wrong conclusion that the appellant was fully liable. Mr Mushindi, counsel for the appellant, submitted that the respondent had a duty to prove the particulars of negligence pleaded in the plaint and the respondent failed to establish liability on the part of the appellant. Counsel further submitted that the award of damages was excessive considering the injuries sustained by the respondent. He suggested that a sum of Kshs. 50,000/- was reasonable in the circumstances.

3. Counsel for the respondent did not attend court despite being served with a hearing notice.

4. As this is a first appeal, the court must be guided by the principle that the duty of the first appellate

court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it is the trial Court that saw and heard the witnesses (see ***Selle v Associated Motor Boat Co.***[1968] EA 123).

5. According to the record, *ex-parte* judgment was entered against the appellant and the matter fixed for formal proof. G A O (PW 2) and her mother J A O (PW 1) testified. Thereafter, the judgment was set aside by consent. It appears that during the proceedings, the parties adopted the respondent's testimony and admitted the respondent's health book, P3 form and police abstract by consent where after the matter proceeded for the defence case.

6. G A O (PW 1), aged 12 years, testified that on 3rd December 2008, she was selling fruits along the Bondo-Usenge Road along the edge of the road when a motor vehicle hit a cyclist then hit her and her friends.

7. The appellant's driver, John Movedi Obeli (DW 1), denied hitting the respondent and testified that while was driving towards Usigu there was a motor cycle which was being driving at the edge of the road on his lane. The motor cycle went ahead of him and suddenly turned to the right. The motor cyclist jumped off the motor cycle and fell in a ditch. To avoid hitting the motor cycle, he also swerved to the right where there were two girls standing and when they saw the motor vehicle approaching they ran and unfortunately fell on each and suffered injuries. DW 1 testified that the injuries were from the fall and not from the accident.

8. The main issue arising from this appeal is the burden of proof. **Sections 107 to 119** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** provide that the burden of proof as to the correctness of any fact lies on that person who wishes the court to believe in its existence. The respondent's testimony was uncontroverted and it was up to the appellant to prove that it did not cause the incident or that it was caused by someone else. DW 1 did not dispute the plaintiff's version of events but stated that he was forced to veer off the road and the respondent was only injured because she fell while trying to avoid the accident. Even if the appellant's case were to be believed, the respondent's injuries were a direct and foreseeable act of the appellant's driver's negligent act. He was travelling too fast at a market centre and was unable to slow down to avoid the accident. The appellant failed to establish on a balance of probabilities that it was not responsible for the accident.

9. During the proceedings, the appellant filed an application for leave to take out 3rd party proceedings against Sospeter Wanyama Nyongesa, the owner of the motorcycle. Leave was granted by the court but the third-party notice was neither served nor directions taken. Since no action was taken on the third party proceeding the appellant must should full liability as against the respondent.

10. On the issue of quantum, it is settled that an appellate Court can only interfere with an award of damages where it is demonstrated that the trial court in reaching the award based its decision on wrong principles or that the award is so inordinately high or low as to be a wholly erroneous estimate of the injury suffered (See ***Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini v A.M. Lubia And Olive Lubia*** [1982-1985]1 KAR 727).

11. Ordinarily, an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards made in the past for comparable injuries. In ***Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal 26 of 2013[2014]eKLR*** the Court of Appeal observed that, "*The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.*"

12. Before the trial court, the respondent suggested that a sum of Kshs. 350,000/- was reasonable in the circumstances. She called in aid the case of ***Victor De Meo v Abdullahi Hemed Khalil & Another MSA CA Civil Appeal No. 5 of 1993 (UR)*** where the plaintiff was awarded Kshs 350,000/- in 1994 for suffering a head injury, abrasions on the face and both legs, dislocation of the hip and back injury. The appellant cited the case of ***Gilbert Odhiambo Owuor v Nzoia Sugar Company Ltd BGM Civil Appeal No. 46 of 2010 [2012]eKLR*** where the plaintiff suffered swollen and tender left foot and ankle and was in severe pain and was awarded Kshs. 50,000/- in 2012.

13. From the P3 form, the respondent suffered cut wounds on the forehead, chest injury, back injury, cut wound on the left hand, injury to the hip joint and both elbows and pain all over the body. In my view, the award of Kshs. 170,000.00 was not inordinately high considering the decisions cited by the parties and the injuries sustained.

14. The appeal is therefore dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 24th day of November 2016.

D.S. MAJANJA

JUDGE

Mr Mushindi instructed by L. G. Menezes Advocates for the appellant.

Ms Kyamazima instructed by S.O. Madialo and Company Advocates for the respondent.