



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 5 OF 2013
EASY COACH LTD.....PLAINTIFF
VERSUS
EMILY ATIENO ONYANGO.....DEFENDANT

JUDGMENT

This is an appeal arising from a judgment delivered by **Hon. Ezra Awino-SPM**, as he then was, in which he found the Appellant wholly to blame for an accident that occurred along Kisumu -Ahero road on **10th October, 2004** and awarded damages to the Respondent as follows:

- 1. General Damages – Ksh. 1,000,000/-**
- 2. Further medical expenses – Ksh. 500,000/-**
- 3. Special damages - Ksh. 3,000/-**
- Total Ksh. 1,503,100/-**

The appeal is against both liability and the award of damages.

Briefly, the facts of the case are that on the material day the Respondent and her husband were traveling in a motor vehicle (matatu) **Reg. NO. KAH 435 S** when at a place called Rabuur along the Kisumu-Ahero Road a Bus **Reg. NO. KAK 885 M** belonging to Easy coach, the Appellant, veered from its side of the road to avoid a pothole and collided with the matatu. The plaintiff sustained injuries and lost consciousness. She was treated in **Busia, Aga Khan Hospital Kisumu, Aga khan Nairobi** and at the **Nairobi Hospital** for injuries which are summarised as follows in a medical report prepared by Dr. D.O. Raburu:-

- 1. Lacerated cut wound at the forehead with avulsion of the scalp**
- 2. Head injury due to brain concussion with amnesia and disorientation for two weeks.**
- 3. Cut wound on the left arm.**
- 4. Lacerated cut wound on the posterior aspect of the right leg with partial loss of skin and muscles**

5. Bilateral dislocation of temporo-mandibular joints.

6. Severely comminuted supracondylar fracture of the left femur.

7. Compound comminuted fracture distal right femur.

8. Lacerated wound on the right thigh

9. Burn wound on the left hand dorsally.

His prognosis was that the injuries were severe and involved intensive management by several specialists medical disciplines and use of expensive implants. The results were however magnificent. He recommended removal of the implants a few years later and opined that the several scars would remain permanent. He assessed permanent disability at **40%**

The appellant did not adduce any evidence at the hearing as its witness was not present at the adjourned hearing.

Directions were given that this appeal be canvassed by way of written submissions and the same were duly filed.

The advocate for the appellant submits that there was no basis for finding the appellant wholly liable for the accident and has cited several decisions in support of his submission that the two drivers ought to have been found equally to blame. This is because even the police officer could not apportion blame and did not produce a sketch plan at the hearing; That moreover PW2 and PW3 gave contradictory evidence as to the side of the road the collision occurred. On the damages he submitted that the award of 1,000,000/- for pain, suffering and loss of amenities was excessive and proposed Ksh. 200,000/-. On the future medical expenses he submitted that the sum of ksh. 500,000/- ought not to have been awarded as it was neither specifically pleaded nor strictly proved. He places reliance on several authorities, both in the High Court and the court of Appeal.

On his part Counsel for the Respondent submitted that no evidence had been tendered beyond reasonable doubt to warrant the apportionment of liability equally and that the general damages were not excessive and should not be reduced. On the future medical expenses he contended that it was clear from the injuries sustained by the respondent the award was necessary in order to determine the dispute between the parties. He urged this court not to allow the appeal but to instead dismiss it with costs to the respondent.

I have considered the pleadings in this matter, the evidence adduced at the hearing and the submissions made before me. In this case the evidence of the Respondent was not controverted as the appellant did not call a witness to prove the averments in the statement of defence. That evidence clearly shows that the driver of the appellant's bus was to blame for the collision. The matatu in which the plaintiff was traveling was being driven on its correct side of the road and the collision only occurred because the bus veered from its side to avoid a pot hole and in the process collided with the matatu. The police officer who testified did so on behalf of the investigating officer who died. He told the court that the police file had been destroyed in a fire. He only tendered a police abstract which indicated that the accident was PUI(pending under investigations). This evidence was of no probative value at all but as I have stated there would be basis upon which to find the parties here equally to blame the evidence, that the appellant's driver was to blame being un-controverted. I shall therefore, not interfere with the finding of the trial magistrate on liability.

As for the general damages the trial magistrate based his assessment on the injuries sustained and past awards. The authorities cited by the appellant are more than ten years old and even twenty five years and the injuries sustained by the plaintiffs there are in no way comparable to those of the Respondent. Moreover the court must also take inflation into account when assessing damages.

I am not therefore not persuaded that the sum of ksh. 1000,000/- awarded for pain, suffering and loss of amenities is excessive- To the contrary I am persuaded that it is based on correct principles. I must however interfere with the award of ksh. 500,000/- for the future medical expenses. This was neither specifically pleaded nor strictly proved. On this I need look no further than the decisions of the court of Appeal cited by counsel for the appellant- see **Tracom Ltd & Joseph Macharia V. Mohammed Adan Hassan (2009) eKLR** where the court held:-

“ We readily agree that the claim for further medical expenses is a special claim though within general damages, and need s to be specifically pleaded and proved before a court of law can award it”

In the end the appellant succeeds partially in having the sum of ksh. 500,000/- awarded for future medical expenses set aside. The awards for ksh. 1000,000/- general damages and ksh. 3,100/- special damages are however upheld.

Accordingly the appellant shall get half the costs of this appeal.

Dated, signed and delivered at Kisumu this 19th day of March, 2015.

E.N. MAINA

JUDGE

In the presence of:-

Mr. P.J. Otieno for plaintiff/Respondent

Miss Ongira for defendant/Applicant

Moses Okumu Court clerk