



REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
HIGH COURT CIVIL APPEAL NO. 227 OF 2010

ANWARALI & BROTHERS LTD..... APPELLANT

=VERSUS=

PETER WANYOIKE RESPONDENT

(Being an appeal from the original judgment of Hon. A. Onginjo Senior Principal Magistrate in Eldoret CMCC No. 148 of 2008 delivered on 26th day of October, 2010)

JUDGMENT

1. The Appellant **Anwarali & Brothers Ltd** was the 1st defendant in the lower court. It is aggrieved by the judgment and decree of the Chief Magistrate's Court at Eldoret dated 26th December, 2010 in which the Respondent **Peter Wanyoike** who was the plaintiff was awarded general damages in the sum of Kshs. 800,000, costs of the suit and interest.

2. The Respondent had sued the Appellant together with two other defendants namely **Daniel Kipkoech Rono** and **James Nabachenja** seeking general and special damages for injuries sustained in a road traffic accident while travelling as a passenger in motor vehicle Registration Number KAE 964A which collided with a trailer Registration Number KAP 367T/ZB9047. The plaintiff (Respondent) blamed the accident on the negligence of the defendants, their drivers and or agents.

In the course of the trial, parties recorded consent on liability in the ratio of 80:20 in favour of the Respondent against the defendants. This appeal is therefore on quantum of damages only.

3. In the memorandum of Appeal dated 22nd November, 2010 and filed in court on 30th November, 2010, the appellant raised the following grounds of appeal.

1. That the Learned trial magistrate erred in law and in fact by awarding damages that were manifestly excessive and incommensurate with the injuries suffered.
2. That the Learned trial magistrate erred in law and fact in delivering judgment that was in contravention of the provisions of **Order XX Rule 1** of the **Civil**

Procedure Rules.

3. That the Learned trial magistrate erred in law and fact in failing to take into account the fact that the defendant had not filed its written submissions before delivering the judgement.

4. That the Learned trial magistrate erred in law and fact in basing her award of the damages on wrong principles of the law.

4. The appeal was prosecuted by way of written submissions :those of the appellant were filed on 22nd January, 2015 by the firm of ***Omangi & Company Advocates*** while those of the Respondent were filed on 14th January, 2015 by the firm of ***Roseline Odede & Company Advocates***.

The gist of the submissions made on behalf of the appellant was that the learned trial magistrate erred in making an award of general damages in the sum of Kshs.800,000/- since the two medical reports produced in support of the respondent's case did not classify the degree of injuries suffered by the Respondent nor did they apportion any disability and that therefore the award was excessive and incommensurate with the injuries sustained.

The appellant, relying on the case ***of Collins Ochieng Ondiek V Walter Ochieng Ogonde Civil Appeal No. 67 of 2008 Kisumu*** urged the court to set aside the award made by the Learned trial magistrate and substitute it with an award of Kshs. 300,000 which in the opinion of the appellant as adequate compensation for the pain and suffering endured by the Respondent.

5. On behalf of the Respondent, it was submitted that the award of Kshs. 800,000/- in general damages was sufficient and commensurate with the injuries suffered by the Respondent; that the trial magistrate did not apply any wrong principle as she considered the submissions before her and the Respondent's injuries before arriving at that award.

The Respondent urged the court to dismiss the appeal for lack of merit.

6. This is a first appeal to the High Court. I am alive to the duty of the first appellate court which is to reconsider, analyse and evaluate the evidence which was adduced before the trial court and draw its own independent conclusions. In doing so, the court must bear in mind that it did not have the advantage of hearing or seeing the witnesses. ***See: Williamson Diamonds Ltd v Brown (1970) EA I; Selle V Associated Motor Boat Company Ltd (1968) EA 123.***

7. I have considered the evidence on record; the grounds of appeal and the submissions made by learned counsel on behalf of the respective parties. From the submissions filed on behalf of the appellant, it appears as if the appellant abandoned grounds 2,3 and 4 in the memorandum of appeal as no submissions were made in their support. The appellant did not state in what respect the learned trial magistrate's judgment did not comply with ***Order XX Rule 1*** of the ***Civil Procedure Rules*** or which legal principles she wrongly applied in her judgment. The submissions mainly centered on the 1st ground of appeal which alleged that the award of damages were manifestly excessive and incommensurate with the injuries sustained by the plaintiff. This was the gravamen of the appellant's complaint on appeal.

8. This being an appeal on quantum of damages, it is essential to re - examine the injuries that formed the basis of the impugned award.

In the plaint filed on 24th April 2002, the Respondents injuries were pleaded as follows:-

1. Right Periorbital frontal glabellar laceration
2. Degloving lower eyelid laceration with loss of 70% of lid
3. Periorbital oedema
4. Right eye enophthalmos
5. Sub conjunctival haemorrhage

9. The award of damages is at the discretion of the court. As a general rule, an appellant court should not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. ***See: Arkay Industries Ltd V Amani (1990) KLR 309, Karanja V Malele (1983) KLR 42, Kemfro Africa Ltd & Another V Lobia & Another (1987) KLR 30.***

10. From a reading of the learned trial magistrate's judgment, it is evident that she considered the medical reports compiled by both **Dr. Kahugu** and **Dr. Aluda** before arriving at her decision. There were two reports from **Dr. Erick Kahugu** one dated 26th April, 2005 and another one dated 16th May, 2005.

Both reports confirmed the Respondent's pleadings regarding the injuries sustained in the accident. The report of 26th April, 2005 shows that CT scans done on the Respondent revealed orbital

complex fractures with medial wall and floor of orbit fractures and detailed the treatment accorded to the Respondent. This was a day after the occurrence of the accident. A month later, the same doctor reviewed the Respondent and made a prognosis that he would require skin grafting to lengthen the lower eyelid to protect the affected eye.

Dr. S.I Aluda who examined the Respondent well over two years after the accident noted in his report dated 21st August, 2007 that the injuries sustained by the Respondent were severe; that they had healed save for occasional pains which will subside with the use of analgesics but that the scars will remain a permanent feature on his body. He also noted that the Respondent could not see clearly during bright light but that this would subside with time. He did not however specify the kind of time it will take for the occasional pains to subside or when the Respondent's ability to see clearly even during bright light will be restored.

11. Though it is true that the injuries described in **Dr. Aluda's** and **Dr. Kahugu's** reports are different, this was to be expected since from the dates of the reports, **Dr. Kahugu** examined and treated the Respondent a day after the accident when the injuries were fresh while **Dr. Aluda** saw him two years later when most of the injuries had healed. As stated earlier, the learned trial magistrate in assessing the general damages addressed her mind to both reports and noted the nature and extent of the injuries the Respondent had sustained and their effect on his physical appearance. It is important to note that both doctors were in agreement that the scars left by the injuries were permanent.

12. In my view, the award of Kshs.800,000 in general damages for pain and suffering given the injuries suffered by the Respondent cannot be said to have been manifestly excessive or inordinately low as to lead to an inference that it was based on wrong legal principles. I cannot also say that the amount was arbitrary. I therefore find no reason to interfere with the said award. The same is consequently upheld.

As the Respondent had conceded to 20% liability, the appellant shall only pay the Respondent Kshs.640,000. Interest shall apply from the date of this judgment until full payment.

13. In the result, this appeal is not merited and it is accordingly dismissed with costs to the Respondent. The appellant shall also bear the Respondent's costs in the lower court.

Orders accordingly.

C. W. GITHUA

JUDGE

Dated, Signed and Delivered at Eldoret this 12th Day of March 2015

In the presence of:-

Mr. Kenei holding brief for Ms. Ruto for the Respondent

No appearance for the Appellant.

Mr. Paul Ekitela Court Clerk.