



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NO. 273 OF 2009

FAST CHOICE CO. LTD.....1ST APPELLANT

MORRIS KINYANJUI MWANGI.....2ND APPELLANT

VERSUS

CATHERINE DAMARIS MAINA.....RESPONDENT

(Appeal for the judgment and decision of Mr. Soita Senior Resident Magistrate in Molo Civil Case Number 41 of 2009 delivered on 8th December, 2009)

JUDGMENT

1. The appeal arises from the Judgment of Honourable Soita, Senior Resident Magistrate in Molo SRMC Number 41 of 2009 and delivered on the 8th December, 2009.

The appellant was aggrieved by the award on general damages and preferred this Appeal on the following grounds:

1. That the learned trial magistrate erred in law and in fact by awarding manifestly excessive amount of General Damages of Kshs.500,000/=.
2. That the learned trial magistrate erred in law and in fact by using wrong principles in the assessment of damages.
3. That the learned trial magistrate erred in law and in fact by wholly disregarding the medical reports put before the court.

This court has been urged to re-assess the general damages.

2. The Respondent sued the Appellants for compensation for injuries sustained following a road accident while she was travelling in the appellants motor vehicle registration KAX 628P on the 9th June, 2008. Two medical reports prepared by Dr. W. Kiamba dated 17th March, 2009 and Dr. K.P. Mahinda dated 14th September 2009, a P3 Form and Discharge Summary from Molo District Hospital treatment card were produced as exhibits by consent at the commencement of the case in the trial court. The issue of liability was concluded when a consent judgment was recorded by both counsel on the 22nd July, 2009 at 90% in favour of the Plaintiff/Respondent herein.

Upon assessment of damages, the trial court awarded the respondent a sum of Ksh.500,000/= in

general damages for pain and suffering.

3. The injuries sustained by the Respondent as stated in both medical reports were:
 1. Bilateral fractures of the superior and inferior ramii.
 2. Scars of the anterior aspect of the knees with full range movements and other systems normal.

The P3 form filled at the police Station on the 26th June, 2008 shows the injuries sustained as multiple fractures of the pelvis and bruises on the knees. Discharge summary from the Molo District Hospital filled in the 24th June, 2008 confirmed fractures of the pelvis.

4. Parties filed submissions upon which the trial court based its judgment delivered on the 8th December 2009. The trial Magistrate referred to the medical reports and considered submissions and authorities submitted by counsel and assessed general damages at Kshs.500,000/= for pain and suffering, less the agreed 10% contributory negligence to Kshs.450,000/= and Kshs.5,000/= as special damages agreed upon by consent.
5. The appellants in their submissions stated that the trial court erred in not making a determination as to which injuries the respondent proved, by stating that the injuries were captured in the two medical reports and said nothing further. It is their submission that there was a clear departure of opinion on the two medical reports in that Dr. Kiamba classified the degree of injury as grievance harm while Dr. Mahinda was silent on that but added that the respondent had sustained minor knee injuries and that the pelvis had united well. The Respondent is of a different opinion that the trial court considered all the availed medical records including the P3 form that indicated soft tissue injuries to the knees.
6. This court being the first appellate court is under a duty to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions.

In assessment of damages, the principles that this court ought to consider were laid down in the case of **Kemfro Africa Ltd t/a Meru Express Service Ltd and Another -vs- A.M. Lubia & another (1982-1988) I KAR 272**, and the court will only interfere with the exercise of discretion of the lower court only where the latter has failed to take into account a relevant factor, or taken into account an irrelevant factor, or the amount awarded is inordinately so low or so high that it amounts to a wholly erroneous estimate of damages.

7. The Court of Appeal in **B.G. Saint B. Kevin Hogan (1953) E.A.C.A. 85** held that as a general rule an Appeal Court will not disturb assessment of damages made by a trial court, but where there are no reasons stated, the Appeal Court may make its own assessment. It was further held that for personal injuries, while special facts of each case must be considered, it must be borne in mind that assessment should be in accordance with the general run of assessments made over substantial period of time.

This court has considered re-evaluated the trial court's proceedings leading to the Judgment under attack. By consent, counsel for the appellant and the respondent produced all the medical records and asked the court to base its judgment on the same. The appellant in its submissions proposed a sum of KShs.80,000/= while the respondents proposed a sum of KShs.500,000/=. Both relied on authorities in support of their propositions.

The Respondent relied on the case **Bint Ali Ganiko- vs- Hakika Transporters HCCC No. 291 of 1993** and **Peter Kinyanjui Chege -vs- L.G. Magnan HCCC No. 39 of 2002**. In both cases, an award of KShs. 500,000/= was made – for injuries more serious than the respondents injuries. These included fracture of the pelvis, rupture of bladder, abdominal injuries and fractures of the right and left iliac bones and acetabulum respectively.

8. The Appellant in support of its proposition relied on the case **Philip Gaichuhi Weru -vs- KDTA HCCC No. 2865 of 1992** and the injuries in that case were fracture of the left superior ramus pelvis and a sum of KShs.120,000/= was awarded in 1993.

On appeal, the appellants have proposed a sum of KShs.170,000/=200,000/=:, and relies on the case of **Kisii HCCA No. 99 of 2005 South Nyanza Co. Ltd -vs- John Owino**. In this case the injury sustained was to the chest and hip. No indication was given as to whether fracture was sustained. The court confirmed an award of KShs.50,000/=. Obviously, this was a minor soft tissue injury, and of no relevance to the present case.

9. I have analysed submissions by both counsel. It is clear that the trial Magistrate in his assessment of damages did consider the injuries in the authorities tendered by both counsel and awarded the amount proposed by the respondents counsel, and no reasons were advanced for awarding the said sum. I find that this is a case that this court ought to interfere with the assessment of damages for the reasons I have given.

I am satisfied that the award was not based on any sound investigation of the injuries and comparable authorities at the time.

10. In the case **Jane Muthoni Nyaga -vs- Nicholas Wanjohi Thuo HCCC No. 96 of 2007**, the court awarded a sum of Kshs.300,000/= in June 2010 for fracture of the right superior and inferior pubic ramii and other soft tissue injuries. Also in the case **Joseph Marulu Mutua -vs- Samuel Njoroje – HCCC No. 364 of 1998** the court awarded a sum of KShs.320,000/= General Damages for comparable injuries in 2003. The court notes that at the time of examination by the two doctors, in the year 2006, the fractures had united well and there were no complaints save for pain when cold. Doing the best I can in the circumstances, I shall award a sum of KShs.400,000/= as being a fair and reasonable award after taking into account the time lapse since the awards in above two cases.

11. For the above reasons the appeal succeeds in the following terms:

1. The trial Court's Judgment on quantum of damages for pain and suffering is set aside and substituted with an award of Kshs.400,000/= which shall be reduced by 10% agreed contributory negligence to Kshs.360,000/=.
2. Interest on the said sum of Kshs.360,000/= shall accrue from the date of the lower court's judgment.
3. The Award of Kshs.5000/= on special damages shall remain undisturbed.
4. Each party shall bear its costs on the Appeal, but costs in the lower court shall be borne by the appellants.

Dated, signed and delivered this 25th day of June 2015

JANET MULWA

JUDGE

In the presence of:

Ms. Kawira for Onyinkwa for Appellant

No appearance for Respondent

Court clerk – Linah.