



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 19 OF 2013

JOHN WACHIRA GATHAGU

AGRICULTURAL FINANCE CO-OPERATION.....PETITIONERS

VERSUS

BENJAMIN MURIUKI KITHUMBU.....RESPONDENT

JUDGEMENT

This is an appeal against an award of damages in the sum of Kshs 523,000/- against the judgement of the court of the Senior Principal Magistrate at Embu dated 25th March, 2013. The award is in respect of the injuries sustained by the plaintiff which consisted of a fracture of the tibia around and involving the knee of the respondent. The issue of liability was settled at trial by consent and does not therefore fall for resolution in this court.

The appellants have listed three grounds of appeal in their memorandum to this court. These are:

1. That the learned trial magistrate erred in law in awarding judgement of Kshs 650,000/- on general damages for injuries that do not deserve such a high award.
2. That the learned trial magistrate erred in law and fact in failing to consider sufficiently or at all the appellant's evidence and submissions as to facts and the law placed before him.
3. That the learned trial magistrate erred in law and fact in awarding the plaintiff a sum that was manifestly excessive in the circumstances.

Furthermore, counsel for the appellants has put in written submissions supported by authorities. In short, they are urging the court to reduce the award on the ground that it is manifestly excessive to warrant interference by way of reducing it.

The respondent has supported the award made in his favour by the trial court. His counsel has also put in written submissions to which are annexed authorities in support of the award made by the trial court.

The evidence upon which the awards were made was that the respondent was a passenger on a motorcycle which was driven along Embu-Siakago road. It is in the course of the driving that the motor vehicle of the appellants was driven in a negligent manner and as a result it hit the respondent causing a fracture of his tibia around the knee area.

During trial, the trial court accepted the authorities cited in that court in particular the case of Ali Abdallah Mbarak v. Jagdish Udani Mombasa HCCC No 3 of 2002 in which an award of Kshs 450,000/- was made for similar injuries. The court also relied on the case of Edward Nyaga v. Mombasa Liners

Machakos HCCC No. 197 of 1999 in which an award of Kshs 400,000/- was made in favour of the plaintiff for similar injuries. The trial court then proceeded to take into account the incidence of inflation and then ended awarding the sum of Kshs 650,000/- as general damages. It is from this award from which 20% contribution of negligence was reduced with the result that the plaintiff being awarded Kshs 520,000/- and a sum of Kshs 3,000/- was added to the award totaling Kshs 523,000/-. The trial court also awarded costs and interests in favour of the plaintiff.

This is a first appeal. According to the case of *Selle v. Associated Motor Boat Company* (1968) EA 123, I am required to re-assess the evidence that was tendered at the trial and come to my own conclusions and findings. There were two medical reports that were tendered as evidence in support of the injuries sustained by the respondent. One such report was prepared by Dr John Macharia. According to this doctor, the respondent sustained a fracture of his right tibia around and involving the knee. He also found that healing had occurred but with mal-alignment and gross osteo-arthritis, which the doctor found to be a permanent incapacity. The second report was prepared by Dr Richard Gichohi. According to him, the respondent sustained fractures of the right proximal tibia and fibula involving the articular surfaces. The doctor found that there was delayed union of the fracture and the healing was mal-aligned. He also found that the respondent had developed post-traumatic osteo-arthritis with limited and painful mobility at the right knee. Because of this development, the respondent has now to use a crutch, crepe bandage and analgesics. He concluded that the respondent requires long term orthopedic follow up for the right knee.

I have on my own re-assessed the injuries sustained by the respondent and the other evidence that was produced in the trial court. I have also considered the award of general damages made in favour of the respondent. Upon my own assessment of the general damages awarded and taking into account the incidence of inflation and after taking into account the comparable awards, I find that the award by the trial court was manifestly excessive. I therefore reduce the award of general damages to Kshs 500,000/- less 20% contributory negligence. The net result is that the plaintiff is hereby awarded Kshs 400,000/- I do hereby add to this the sum of Kshs 3,000/- being general damages. The appellant's appeal succeeds as indicated.

As regards costs, I take into account that the appellants' appeal has succeeded. They will therefore have the costs of this appeal.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this..27th .. day of **OCTOBER .2015**

In the.....

.....

Court clerk R. Njue

J. M. BWONWONGA

JUDGE

27.10.15.