



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 4 OF 2015

(FORMERLY HCCA NO 161 OF 2014- MOMBASA)

VOI SISAL ESTATES LIMITED.....APPELLANT

AND

MATILDA MAJALA MWASHILA.....RESPONDENT

(Being an appeal from the whole Judgment of Hon S.M. Wahome, Senior Principal Magistrate delivered on 24th November 2015 in SPMCC No 149 of 2013 Voi Law Courts)

MATILDA MAJALA MWASHILAPLAINTIFF

VERSUS

VOI SISAL ESTATES LIMITEDDEFENDANT

JUDGMENT

INTRODUCTION

1. In his judgment delivered on 24th November 2014, Hon S.M. Wahome, Senior Principal Magistrate at Voi Law Courts awarded the Respondent herein a sum of Kshs 500,000/= being general damages, Kshs 3,000/= being special damages together with interest thereon and costs. The said judgment was subject to twenty five (25%) contributory negligence on the part of the Appellant. This apportionment of liability had been recorded by consent of both the Appellant and the Respondent herein on 7th July 2015.
2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed its Memorandum of Appeal dated 18th December 2014 on 19th December 2014. The grounds of appeal were as follows:-
 - a. **THAT the Learned Principal Magistrate erred in law and in fact in awarding a sum of Kshs 500,000/= by way of general damages without taking into consideration the nature of the injuries sustained by the Respondent.**
 - b. **THAT the Learned Principal Magistrate erred in law and in fact in failing to find that the Respondent had proved the case on assessment of damages on a balance of probabilities.**
 - c. **THAT the Learned Principal Magistrate erred in law and fact in failing to make any or any proper findings on the facts placed before him in light of the submissions.**
 - d. **THAT the Learned Trial Magistrate erred in law and fact in awarding Kshs 500,000/= to the Plaintiff by way of general damages which award was excessive and inordinately high with due regard to the injuries suffered on the part of the Respondent that were moderate and completely healed.**
3. The Appellant's undated Record of Appeal and Supplementary Record of Appeal were filed on 20th May 2015 and 13th July 2015 respectively. Its Written Submissions were dated 21st October 2015 and filed on 26th October 2015 while those of the Respondent were dated 19th October 2015 and filed on 21st October 2015.

4. When the parties appeared before the court on 10th November 2015, they requested for a Judgment date herein having relied entirely on their respective Written Submissions.

LEGAL ANALYSIS

5. Having looked at the Appellant's grounds of appeal and in particular to its Written Submissions, it was clear that the said grounds were all related to the question as to whether or not the Learned Trial Magistrate was justified in awarding the said of Kshs 500,000/= as general damages,

6. The Appellant was categorical that the damages awarded to the Respondent herein were excessive as she had fully recovered and that the Learned Trial Magistrate had absolutely no justification to award the sum of Kshs 500,000/= general damages.

7. It based its argument on the evidence of Dr Kaale who opined in his Medical Report dated 15th August 2014 as follows:-

“...MATILDA MAJALA MSHILA Sustained Fracture of the Right Femur and was treated as above. She has now FULLY RECOVERED...”

8. It also referred the court to the proceedings on the lower court where on being cross-examined, the Respondent stated as follows:-

“I am now a farmer. I cultivate a bit...”

9. It placed reliance on the cases of Sowen Peterson 7 Another vs Charles M. Isinga [2008] eKLR and Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR where the appellate courts reduced the general damages that had been awarded by the lower courts and urged the court to reduce the award of general damages from Kshs 500,000/= to Kshs 95,000/=.

10. On her part, the Respondent had submitted before the Trial Court that a sum of Kshs 550,000/= general damages was adequate compensation. However, on being awarded the sum of Kshs 500,000/= as general damages, she was of the view that the same was commensurate with the injuries that she sustained and prayed that the court does not disturb the award by the lower court.

11. A perusal of the proceedings in the lower court shows that she referred the trial court to the case of Mahinder Sembi vs Hon AG No 817 of 1983 (unreported) which was decided in the year 2000 where the plaintiff therein had sustained a fracture of the femur and was awarded a sum of Kshs 500,000/= as general damages.

12. It is not in doubt that the Respondent herein had healed from her injuries. Unfortunately, the Appellant did not furnish the court with recent case law to guide the court. Indeed, the court notes that a sum of Kshs 95,000/= being general damages as was submitted by the Appellant herein would be inordinately low for the injuries that were sustained by the Respondent herein.

13. In the case of Margaret T. Nyaga vs Victoria Wambua Kioko (Supra), the plaintiff therein had sustained ruptured urinary bladder, fracture of the fibula and superficial injuries to the right axle, left hand and both knees. The doctors had concluded that the plaintiff had healed and there were no residual disabilities and no long term complication was expected. In that case the trial court therein awarded her a sum of Kshs 450,000/= which on appeal was reduced to Kshs 300,000/= as the appellate court found the same to have been excessive.

14. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of Margaret T. Nyaga vs Victoria Wambua Kioko (Supra)

15. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

16. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

17. In the case of Kigaraari vs Aya(1982-88) 1 KAR 768, it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

18. In the case of Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR , on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of the femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screwsor.

19. In the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR, the Court of Appeal referred to the cases of Antony Mwangi vs Martin Muiruri (2008) eKLR, where the plaintiff therein sustained a fracture of the femur and was awarded Kshs

400,000/= as general damages and the case of **Joseph Suri Nyateng vs H.P. Mashru (1999) eKLR** where the plaintiff therein sustained a fracture of the femur and a dislocation of the shoulder and was awarded Kshs 450,000/=.

20. Having had due regard to the aforesaid cases, it did therefore appear to this court that the award of Kshs 500,000/= which was subjected to 25% contributory negligence on the part of the Respondent was not unreasonable in the circumstances of the case herein.

21. Secondly, the court assessing general damages must bear in mind the inflationary trends prevailing at any given time. In the case of **Margaret T. Nyaga vs Victoria Wambua Kioko** (Supra) that was relied upon by the Appellant, the appellate court awarded the plaintiff therein a sum of Kshs 300,000/= being general damages. The said case was decided in 2004. It is almost eleven (11) years since the said case was decided and inflationary trends have been on an upward trajectory or trend.

22. Accordingly, having considered the Appeal herein, the Written Submissions in support of the respective parties' cases and the case law, the court was not persuaded that this was a suitable case for it to exercise its discretion to interfere with the lower court's finding for the reason that the Appellant was not able to demonstrate that the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same.

23. For the avoidance of doubt, having borne in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010, this court opted to determine this matter on merits despite the Appellant's Records of Appeal having been undated.

DISPOSITION

24. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal was not merited and the same is hereby dismissed with costs to the Respondent.

25. It is so ordered.

DATED and DELIVERED at VOI this 30th day of November 2015

J. KAMAU

JUDGE