



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 63 OF 2010

***(AN APPEAL FROM THE JUDGMENT/DECREE OF HON. B. KITUYI – R.M.,
NAKURU DELIVERED ON 5TH MARCH 2010 IN NAKURU CMCC NO. 165 OF 2009)***

CATHERINE NGORE OBARE.....APPELLANT

VERSUS

STEPHEN MULATYA KULA.....1ST RESPONDENT

POLLY KANANU MUNGAI.....2ND RESPONDENT

BENARD O. AGOLLA.....3RD RESPONDENT

JUDGMENT

The Appellant sued the Respondents in a Plaint dated 16th February 2009, for general and special damages arising out of a road traffic accident. In a judgment delivered on 5th March 2010, the Appellant was successful in her suit and was awarded Ksh 50,000/= as general damages, with no order as to costs on the ground that there was no notice to institute suit.

Aggrieved with the decision the Appellant moved to this court by way of Appeal. In a Memorandum of Appeal dated 19th March 2010 but filed on 30th July 2010, the Appellant cites two grounds of appeal -

- 1. that the learned trial magistrate erred in law and in fact in considering the injuries suffered by the Appellant and hence awarded an inordinately low figure in the circumstances, and*
- 2. that the learned trial magistrate erred in law in finding the Respondents liable but erred in refusing to award the Appellants costs.*

Counsel filed written submissions which I have considered. The appeal raises those two issues, whether the award made by the magistrate was inordinately so low that this court should interfere with it, and secondly whether the Appellants should have been denied costs.

The principles upon which an appellate court may interfere with an award of damages have been stated. They were restated by Sir K. O'Connor P. in the case of **HENRY H. HANGA VS. M. MANYOKA [1961] E.A. 705** where the learned President of the Court of Appeal for Eastern Africa applied those principles as first enunciated by the Privy Council in the case of **NANCE VS. BRITISH COLUMBIA ELECTRIC RAILWAY CO. LTD (d) [1951] A.C. 601 at p. 613** when discussing the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge -

“The principles which apply under this head are not in doubt. Whether the assessment of damages by a Judge or a jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, when before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one), or, short of this, that the amount awarded is so inordinately or so inordinately high that it must be a wholly erroneous estimate if the damage (Flint vs Lonell, [1933] 354), approved by the House of Lords in Davies vs Powell Duffan vs. Associated Collieries Ltd [1942] A.C. 60.”

In this case, the Appellant suffered the following injuries -

- (a) a fracture of the distal end of the humerus,
- (b) soft tissue injuries of the right elbow.

In accordance with comparable decisions made by the High Court, the Appellant's counsel had suggested a figure of Ksh 200,000/= as general damages. The Respondent's counsel had offered a figure of shs 80,000/=. The learned trial magistrate determined an award of Ksh 50,000/=. The reason given was that high awards give rise to payment of high premiums charged by insurance companies.

In a proper case, this might have been a valid argument. It was not in this case. The figure suggested by the Appellant's counsel in light of awards made in comparable cases, and taking inflation into account, the sum of shs 200,000/= was not inordinately high, nor was the figure of Ksh 80,000/= suggested by the Respondent's counsel. The figure of shs 50,000/= was a bolt from the heavens. I think it was inordinately low. It had not balance between the figures suggested by counsel for the parties. I would call it unreasonable. Taking into account the previous decisions on similar injuries, and the march of time, a figure of shs 180,000/= would have been an appropriate figure. I accordingly set aside the award of sh 50,000/= made by the trial court, and award damages of Ksh 180,000/=.

On the question of costs the learned trial magistrate denied the Appellant costs on the ground that there had been no notice of intention to sue. The basis of denial of costs for failure to give notice to sue is founded upon the principle that where the claim is for liquidated damages, it is considered that had the Defendant been notified of the debt due, he would have paid, and the necessity of suit would have been avoided. The principle also applies where though suit has been filed, the defendant pays the claim well before the hearing of the suit. The general principle of law however is that costs follow the event. (*Section 27 of the Civil Procedure Act, Cap. 21, Laws of Kenya*), unless there is reason for denial of costs.

That is the reason why Order 4 rule (6) provides inter alia that it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just, whether or not it should have been asked for or granted when the suit was filed, which rule equally applies to a defence or counterclaim.

It was therefore erroneous for the trial court to deny the appellant costs in a suit which was contested. Having found the Respondents liable there was no reason to deny the Appellant costs.

The Appeal having succeeded on both grounds of damages and costs, I award the Appellant costs in this, and the lower court.

In summary the Appellant shall have general damages in the sum of Ksh 180,000/= in addition to the special damages found in the lower court together with costs as been awarded, together with interest thereon and on costs.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 28th day of February, 2014

M. J. ANYARA EMUKULE

JUDGE