



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 92 OF 2012

PATRICK KINOTI MIGUNAAPPELLANT

VERSUS

PETER MBURUNGA G. MUTHAMIA..... RESPONDENT

J U G M E N T

The respondent PATRICK KINOTI MUGUNA through a plaint dated 20th May, 2011 sued the appellant claiming general damages for pain, suffering and loss of amenities, special damages of Kshs.14,935/= and costs of the suit.

The appellant filed defence to the respondents' claim and the respondent upon being served with the defence filed a reply to the defence. The respondent when the matter came up for hearing gave evidence and called the doctor to produce medico-legal report. The appellant did not give evidence nor did he call any witness in support of the defence.

The trial Magistrate after considering the evidence and written submissions submitted by the parties entered judgment in favour of the respondent on liability at 70% with contributory negligence at 30% as per consent filed by the parties dated 28th March, 2012. The court awarded the respondent general damages of Kshs.300,000 subject to 30% contribution by the respondent with pleaded and proven specials of Kshs.14,135/-.

The appellant being aggrieved by the trial Magistrate's judgment preferred this appeal setting out two grounds of appeal namely:-

- 1. The learned Magistrate erred in fact and in law in awarding general damages of Kshs.300,000/- to the plaintiff which is excessive considering the injuries sustained by the plaintiff.***
- 2. The learned Magistrate erred in law and in fact in failing to consider the defendant's submissions on record.***

That prior to the hearing of this appeal the Advocates for both parties agreed that the appeal be determined by way of written submissions. The appellant's counsel filed their written submissions on 2nd May, 2013 together with supportive authorities whereas the respondent's counsel filed their submissions on 6th June, 2013. This court has carefully considered the written submissions together with the attached authorities by both parties. It has read all the pleadings filed by both parties in support of their respective opposing positions as well as the proceedings and the trial court's judgment.

The appellant's first ground of appeal is that the learned trial Magistrate erred in fact and law in awarding general damages of Kshs.300,000/- to the respondent which is excessive considering the injuries sustained by the respondent.

The appellant submitted that the respondent in paragraph 4 of his plaint particularized the injuries as bruises on the right parietal region, 2 loose lower incisors, dislocation of the right shoulder, cut on the left leg, bruise on the dorsum of right hand and blunt chest injury.

That the respondent in his evidence testified that he sustained the following injuries:-

Shoulder dislocation, left and right leg injuries, injury to the forehead, two loose teeth(one tooth extracted later), injury on the left chest area and right knee areas. That the discharge summary from Consolata Hospital Nkubu(P.Exhibit-2) confirmed injuries allegedly sustained and treated between 19th and 25th January, 2011 were Anterior shoulder dislocation(left), cut and bruises on left lower lump and several bruises over the face.

The P3 Form(P.Exh.3) and Medical Report by Dr. Macharia dated 26th April, 2011 revealed as follows:- P3 Form filled on 24th March, 2011 indicates that the respondent sustained swelling right parietal region of head with bruising on the face, dislocation of left shoulder, loose lower 2 incisors, cut on left leg and bruises on right leg. The medical report revealed injuries as follows:-

- ***Bruise on the right parietal region, 2 loose lower incisors, dislocation of right shoulder, cut on the left leg and bruise on the right leg, bruise on the dorsum of right hand.***

The injuries sustained by the respondent as documented in the P3 form are the same as the injuries particularized in the respondent's plaint. They are the same injuries noted in the summary discharge note and in the medical report. The respondent who was PW1 produced discharge summary as exhibit P2, Medical report as exhibit P3. PW2 produced medical report in respect of the injuries sustained by the respondent. The medical report reveals that the respondent was admitted at Consolata Hospital 'Nkubu for 1 week. That at the time of examination on 26/4/2011 for the purpose of medical report he complained of inability to raise his left upper limb due to shoulder stiffness and, that he had 2 loose teeth. The doctor gave an opinion that the respondent has posttraumatic arthritis of the left shoulder that is expected to persist.

The appellant in support of their submissions that the award of Kshs.300,000/- as general damages was excessive relied on the case of **Wambaira & 17 others V Kiogora & 2 Others Civil Appeal No. 10 of 2004 eKlr** in which Court of Appeal awarded five (5) plaintiffs Kshs.100,00/ for fractures. The appellant further relied on the case of **FAST CHOICE CO. LTD & ANOTHER V HELLEN MUNGARE NGORE.(2011) Eklr** in which case Hon. Lady Justice R.P.V Wendo allowed the respondents appeal and awarded Kshs.180,000/- for plaintiff who had suffered fractures of shaft of the humerus, bruises right small finger and soft tissue injuries to the chest and anterior wall. The appellant also relied on the case of **PAMELA OMBIYO OKINDA V KENYA BUS SERVICE LTD NAIROBI HCCC 1309 of 2002** in which case the plaintiff who had suffered blunt need injury, deep cut on the forehead and both legs, soft tissue injury on the neck ,subluxiion of pubic symphysis, blunt trauma to the hip and right eyes, was awarded Kshs.50,000/-.

The respondent in opposition to the appellants' ground of appeal No. 1 submitted that the court did not misapprehend the evidence on the nature of the injuries sustained by the respondent and indeed the court reproduced the respondent's injuries.

The respondent submitted the respondent also has post traumatic arthritis of the left shoulder and the same will persist. The respondent submitted the sum of Kshs.300,000/- awarded to the respondent is reasonable and just and are in tandem with the injuries. I have carefully considered the authorities relied upon by the appellant and most of the authorities are over cases decided many years ago. The injuries sustained by the respondent in this appeal are quite different from injuries sustained by claimants in those cases. None of the authorities relied upon by the appellant involved similar injuries as the ones sustained

by the respondent, such as loose teeth or dislocation of the shoulder resulting in post-traumatic arthritis. The medical report showed that at the time of examination the respondent had an inability to raise his left upper limb due to shoulder stiffness resulting in a reduced range of movement on the left shoulder. The medical report of the respondent was not challenged by the appellant who did not produce a medical report to the contrary or call evidence to controvert the respondent's evidence. The court therefore considers and accepts the injuries sustained by the respondent as the ones indicated in the medical report.

It is now settled law that an appellate court will not interfere with an award of damages by the lower court unless it is satisfied that the lower court acted on wrong principles of law or made an award of damages which is inordinately high or low as to represent a wholly erroneous estimate of damages (see Morris Mugambi & Silas Imanene (Joshid) V Isaiah Gitiru CA No.138 of 2002), Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini V A.M Lubia & Olive Lubia C.A 21 of 1984).

I have carefully considered the injuries sustained by the respondent. The respondent sustained multiple bodily injuries resulting in permanent disability. Indeed the injuries sustained by the respondent are severe injuries. The trial court seriously considered the respondent's injuries. In assessing the damages the trial court did not take into account an irrelevant fact, or left out of account a relevant factor nor did it misapprehend the evidence. Secondly the amount awarded is not so inordinately high as to represent a wholly erroneous estimate of the damages. The court also considered the authorities relied upon by both Counsel.

In view of the foregoing I find no merits in ground No.1 of the appeal and the same is dismissed.

The second ground of appeal is that the learned Magistrate erred in law and fact in failing to consider the defendant's submissions on record on proof of injury by the respondents. The court's record shows that the trial court in its judgment considered the evidence adduced before it and also considered the submissions by both parties. I therefore find no merits in the appellant's assertions that his submissions on record on the proof of injury by the respondents were not considered. The appellant did not call any evidence to controvert the respondent's injuries nor did they produce any medical report challenging the respondent's injuries.

In view of the foregoing I find no merits in ground No.2 of the appeal and the same is dismissed.

I therefore find no merits in the appeal and the same is dismissed with costs of appeal to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

Mr. Kiogora for the respondent

Kairu & Mccourt for the appellant.

J. A. MAKAU

JUDGE