



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 23 OF 2010

KIRINYAGA DISRICT CO-OPERATIVE UNION..... 1ST APPELLANT

DUNCAN KINYUA 2ND APPELLANT

VERSUS

EUSTACE MACHERU WILSON RESPONDENT

An Appeal from the Judgment of HON. Mrs Wachira - CM

sitting at EMBU in CMCC NO.66A of 2014 delivered on 9th March 2010)

J U D G M E N T

The appellants appeal is against the judgment of the Chief Magistrate of Embu in CMCC NO.66 of 2004 which was a claim for special and general damages for injuries arising from a road accident which occurred on the 21st March 2003 along Embu – Runyenjes road. The respondent in his plaint alleged that the appellant’s driver for vehicle registration KAJ 711L lorry Isuzu drove in a negligent manner causing a Collision between the appellant’s vehicle and that in which the respondent was travelling registration No. KAQ 517K Toyota Hiace. Due to the impact the respondent sustained injuries.

Parties entered consent judgment on liability at 85%:15% for the plaintiff against the defendant.

The court assessed damages and awarded kshs.1,400,000/= as general damages for loss of amenities less 15% contribution leaving the amount of kshs.1,190,000/= plus special damages of kshs.15,154/=. The total amount payable to the respondent by the appellant was kshs.1,205,154/=.

The appellant in his memorandum of appeal contends that the Magistrate erred in law by awarding manifestly excessive general damages; ignored the principles of assessing damages and ignored the appellant’s authorities while giving more weight to those of the respondent. It is the prayer of the appellant that the judgment be set aside and that this court awards appropriate general damages.

The appeal was opposed by the respondent who argued citing authorities that an appeal court should not interfere with an award of damages unless it is inordinately high or low to represent an erroneous estimate. It was also argued that an award of damages should not be disturbed unless the Judge or Magistrate proceeded on the wrong principles or relied on the irrelevant factors. He argued that the award was correct and need not be disturbed.

The appellant cited the case of ***SIMON TAVETA –VS- MERCY MUTITU NJERU (2014) eklr*** where it was held that when assessing general damages, comparable injuries should attract comparable awards.

The appellant also cited cases with comparable injuries arguing that the plaintiffs in those cases were awarded much less than the respondent in this appeal. The appellant urged this court to find that the award was inordinately high and reduce the general damages as it deems fit.

The issue for determination in this appeal is whether the Magistrate misdirected herself in law and in fact in not taking cognizance of the established principles in awarding general damages and whether the award was inordinately high.

In examining the principles of awarding damages, I rely on the case of **ARROW CAR LIMITED –V- BIMOMO & 2 OTHERS (2004)2 KLR 101** where the Court of Appeal cited an earlier case of **KEMRO AFRICA LTD & ANOTHER –V- LUBIA & ANOTHER** in holding that;

1. *In deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied that the judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*
2. *In assessment of damages the general method of approach should be that comparable injuries should, as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.*

In his evidence during the trial, the respondent tendered the medical report by Dr. J.E. Thiongo which confirmed that the plaintiff was admitted in Embu District Hospital for three (3) days and suffered the following injuries;

1. Compound fracture of the right elbow joint;
2. Transverse fracture of the upper 1/3 right femur;
3. Dislocation of the right hip joint

The fracture on the right elbow joint resulted in disability to use the right hand arm and abnormal extension of the elbow joint. He was incapacitated for a period of two (2) years. His work as a driver was affected and he mal-union of the fracture contributed to pain and permanent scars of K-nail removal. The trial Magistrate awarded general damages of shs.1,400,000/=.

The appellant in their submissions argued that the respondent is entitled to not more than kshs.400,000/= general damages. The authority relied on was of **ANTHONY MWAGI –VS- MARIN MUIRURI eklr [2008]** where the plaintiff suffered fracture of the left thigh and fracture of both arms, plus soft tissue injuries. The injuries in the **ANTHONY MWANGI case** were less complicated fractures and did not result in any permanent disability. The fractures in this appeal were a compound fracture of the elbow joint which resulted in disability of the right hand, a condition the plaintiff suffered for a period of two (2) years where K-nail was fixed on the elbow joint to help unite the fractured bones and was to be removed at a later date. The second fracture was a transverse one of the right upper 1/3 of the femur. This would still cause more pain and permanent scars on the respondent. In addition to the fractures, the respondent suffered a dislocation of the hip joint.

In yet another case relied on by the appellants, that of **ISMAEL KAGUONGO –V- BARU KABIRU [2013] eklr** where the plaintiff sustained one simple fracture and soft tissue injuries. There was no temporary or permanent disability. In the case of **WARENG NDOVU ENTERPRISES LTD –VS- KELVIN KISANJI [2012] eklr** the plaintiff sustained one fracture of the right humerus and soft tissue injuries and was awarded kshs.350,000/= in the year 2012.

Looking at the authorities relied on by the appellant, the injuries suffered by the plaintiffs in those cases are not comparable to the injuries suffered by the respondent herein. The respondent's injuries were of a more grave nature and caused disability though temporary for a period of two years. During this period the respondent could not do his work as a driver.

I rely on the case of **DENSHIRE MUTETI WAMBUA –VS- KENYA POWER AND LIGHTING CO. LTD [2013] eklr** where the plaintiff suffered a fracture of the right and left tenure, fracture of the left scaploid bones, dislocation of the left elbow joint associated with the fracture of the radial head and dislocation of the left lunate bone plus soft tissue injuries. The plaintiffs award of kshs.1,500,000/= by the High Court was enhanced to kshs.1,500,000/= by the Court of appeal on grounds that the ward was inordinately low. I find the injuries in this appeal comparable to those in the **DENSHIRE MUTETI CASE**.

The appellant did not raise any issue with the special damages or costs awarded by the trial Magistrate.

For the foregoing reasons I find that the trial court followed the principles laid down in awarding general damages to the respondent. The award cannot be said to be inordinately high considering the grave nature of injuries suffered.

I find no merit in this appeal and dismiss it with costs to the respondents. It is hereby so ordered.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 10TH DAY OF DECEMBER 2014.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Kathungu for Respondent

Mr. Mungai for Munene Wambugu for the Appellant

F. MUCHEMI

J U D G E