REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 117 of 2008

SAMUEL NDIRANGU NG'ANG'A .... APPELLANT

VERSUS

LUCY WAMBUI WACHIRA …... RESPONDENT

(Being an appeal from the Judgment of Maisiba (PM) in Eldoret Chief Magistrate's Court Civil Case No. 309 of 2006 delivered on 8th October, 2008)

JUDGMENT

This is an appeal by the Defendant in the Lower court against the Judgment and decree of that court in which the Respondent (who was the Plaintiff) was awarded damages following a road accident along Oloo Street near Nandi Arcade – Eldoret town on 2nd January, 2006. The Respondent was walking outside the yellow kerb on that road when the Appellant, the owner and driver of motor vehicle registration number KAS 592 H reversed the said motor vehicle and hit the Respondent who sustained fracture of the right radial ulna and dislocation of right hip joint.

Parties agreed to apportion liability at the ratio of 80% to 20% in favour of the Plaintiff. Hence trial court only assessed the damages payable.

The Respondent was awarded general damages to the tune of Ksh. 380,000/= and proved special damages of Ksh. 2,000/=. The same were subjected to 20% contributory negligence against the Respondent and the court arrived at a balance of Ksh. 305,600/=, plus costs and interests.

The issue of liability having been settled, this appeal is on quantum only. The memorandum of appeal dated 1st November, 2008 attests to this fact and grounds raised thereof are on quantum only. They are two, vis:-

1. That the learned trial Magistrate erred in law and fact in awarding damages that was excessive in the circumstances of the case before him.

2. That the learned trial Magistrate erred in fact and law in using wrong principles in assessment of damages such that the sum awarded was an erroneous estimate of the injuries actually suffered by the Respondent.

It is now well established principle in law that an appellate court will not interfere or disturb a trial court's award of damages unless it is demonstrated that the court 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” - KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO KARUNI -V- A. M. LUBIA &**

ANOTHER (1982-88) 1 KAR 777.

The same principle is upheld in **BHUTT -VS- KHAN (1982-88) 1 KAR, 1**.

I have considered the submissions of the respective counsel on record. I have equally perused the record of the lower court and the authorities the Respondent's Counsel relied on. Two medical reports were produced. One by the Respondent signed by Doctor S. K. Sirma dated 7th March 2006 and the other by the defence signed by Doctor V. V. Lodhia dated 20th December, 2007. In the first, injuries are specified as, fracture right radial – ulna and dislocation right lip joint. In the second, it states "**injury to the right arm"** only.

I have noted too, there is a P3 form (Pext.3) signed at the Moi Teaching and Referral Hospital which indicates that the Respondent had a painful hip at the time of examination on 22/10/06. Dr. V. V. Lodhia also noted that, at the time he examined the Respondent (20/12/2007), she complained of a painful right hip joint. Dr. S. K. Sirma on the other hand only noted the treatment given for the hip injury as "**close reduction right hip joint**". No X-ray was referred to to indicate the dislocation of the hip joint. An X-ray of right leg did however show fracture of the right radial ulna.

It is also apparent no admission to hospital was recommended. The Respondent was treated as an outpatient. As at 7/3/2006, she walked with the help of a walking stick. But by 20/12/2007 when the second examination was made, she had healed well, albeit with slight pain on right wrist and hip joint. Doctor V. V. Lodhia assessed the degree of permanent incapacity of the right radius at 2%.

Counsel for the Appellant cited two cases. One, **HCCC. NO. 919 OF 1991 – MUSHAMBI OUDE GONA -VS- ASSOCIATED VEHICLES ASSEMBLERS LTD & ANOTHER**; the plaintiff had sustained fracture of the radius and ulna of the right arm, cut wound on scalp with mild concussion, abrasion on right hand and soft tissue injuries on both knees and chest. In this instance, the Plaintiff was hospitalized for one week when fractures were managed by excision of the head of the radius and by open reduction of the ulna. General damages of Ksh. 380,000/= were awarded for pain, suffering and loss of amenities.

In the other **MOMBASA HCCC. NO. 910 OF 1991 – JANE MUNGUTI -VS- SIMON PETER MWANGI & ANOTHER**, the Plaintiff had sustained a fracture of the middle third of the shafts of the right radius and ulna, dislocation of the left acronio-claricular joint, contusion of the chest wall, cut lacerated wound 4 cm long on the right side of the forehead, cut wound on the left shoulder and a 12cm curved wound on the upper part of the arm. She was in hospital for 2 ½ months when among other treatments, given, the fracture was mobilized in plaster.

The Appellant's Counsel cited no case law but submitted that the authorities tendered by the Respondent's Counsel were not relevant, and further noted that the fracture was not commuted and the Respondent was never admitted to hospital. The counsel suggested an award of Ksh. 130,000/=.

In arriving at her decision, the learned Magistrate stated:

> **"I have considered the authorities cited to guide me in the submission. Doing the best I can I opine that an award of Ksh. 380,000/= will adequately compensate the Plaintiff for the injuries sustained."**

I am persuaded that the learned Magistrate failed to take into account the magnitude of the injuries suffered by the Respondent compared to those referred to in the cited case law. Moreover the effects of the accident in both instances are totally different. In the case at hand, no hospitalization was made. In the cited cases, the victims were admitted to hospital.

Indeed on the face it, the injuries of the Plaintiffs in the cited cases were far more serious than those suffered by the Respondent. This is a factor the trial Court failed to take into account. In this regard, I would consider awarding a much lower figure. After all, it is clear the Respondent did not suffer any

significant permanent disability. Moreso the fracture has since healed completely.

Given the inflationary trend I proceed to make the following award:-

(a) General damages for pain, suffering and loss of amenities

Ksh. 250,000/=

(b)	Special damages	Ksh. 2,000/=
	Sub-Total	Ksh. 252,000/=
	Less 20% contributory negligence	Ksh. 5,040/=
	TOTAL PAYABLE	**Ksh. 246,960/=**

As for the costs, the Appellant shall pay costs of the lower court suit, plus interests at court rates. Such costs shall be reduced by 20% as per the contribution agreed upon. This appeal has succeeded to the extent that the damages have been reduced and I therefore order that each party bears its own costs.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 15th day of March, 2013.

G. W. NGENYE – MACHARIA
JUDGE

Mrs. Khayo for Appellant

Mr. Ombati for Respondent