



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 47 of 2010

ISMAEL KAGUONGOAPPELLANT

Versus

EDWARD MWANGI NDIRANGU.....RESPONDENT

*(Appeal arising from the judgment of Hon. L.Mbugua
Ag. Principal Magistrate Karatina in Civil suit No. 12 of 2009)*

JUDGMENT

1. This is an appeal against the judgment of L. Mbugua then Ag. Principal Magistrate Karatina dated 24th February 2010.
2. By a plaint dated 28th January 2009 the respondent sued the appellant for general and special damages arising out of an accident on 23rd December 2007 between the respondent and the appellant motor vehicle registration No. KAS 485K.
3. The appellant filed a defence wherein he denied the occurrence of the accident and further denied all the allegations of negligence contained in the plaint.
4. The matter proceeded for hearing wherein the respondent testified that he was with other people when he was hit by the appellants motor vehicle from behind and in support of his case P.W.2 FLORENCE WAMBUI testified that she saw the motor vehicle bypass her and went and hit the people including the respondent.
5. On behalf of the appellant the driver of the said motor vehicle James Kabuu Kabiru testified that there were many people on the road from a campaign meeting who refused to leave the road and when he stopped he found that he had collided with one person. His evidence was supported by D.W.2 Peter Githinji.
6. Upon this evidence the court entered judgment for the respondent on liability at 20%: 80% with general damages assessed at Ksh. 750,000/- before contribution
7. Being aggrieved by the said judgment the appellant filed his appeal and raised the following grounds in the memorandum of appeal namely:

1. That the learned magistrate erred both in law and facts in assessing and awarding Kshs.

750,000/=on a general damages as the same is excessively high.

2. *That the learned magistrate erred both in law and facts in failing to take into account the medical documents before her whilst making the award.*

3. *That the learned magistrate erred both in law and fact in failing to take into account the submissions of both counsels whilst making the award.*

4. *That the learned magistrate erred both in law and fact in making an award on quantum which was unsupported by authorities.*

5. *That the learned magistrate erred both in law and fact in apportioning liability between the parties.*

8. He prays that the said judgment be set aside, the award of general damages be reduced to a fair sum and liability be apportioned equally.

9. Directions were given in this matter that the appeal be disposed of by way of written submissions which have now been filed.

SUBMISSIONS

10. It was submitted on behalf of the appellant that a sum of Kshs. 750,000/- awarded to the respondent as general damages is excessive given the nature of injuries sustained by the respondent.

11. It was submitted that the trial court did not take into account the medical documents produced before the court while making the award and that the trial court did not take into account the submissions by both counsels while making her award.

12. It is submitted that counsel for respondent submitted Kshs. 1,200,000/- which was grossly excessive given the nature of the injuries and that the same relied upon the case of SAVCO STORES LTD vs DAVID MWANGI KIMOTHO CA NO. 12 OF 2005 whose injuries were more serious.

13. It was submitted that the appellant had submitted that the respondent be awarded Kshs. 400,000/= based on the case of PHILIP KIROREI v HASSAN NOOR ABILE HCCC NO. 725 OF 1995 wherein an award of Kshs. 300,000 was made and the case of ROBERT KAMURU MUCHICA vs ESTHER WANGAI MUNYIRI & ANO HCCC NO. 594 OF 1998 where an award of Kshs. 450,000/- was made.

14. On the authority of JABANE V OLENYA 1989 KLR 1 the appellant has submitted that the principles which a court must take into account in assessment of general damages are:

a) *Each case depends on its own facts.*

b) *For the sake of those who have to pay insurance premiums, medical fees or taxes the award should not be excessive.*

c) *Comparable injuries should attract comparable award.*

d) *Inflation should be taken into account*

e) *unless the award is based on an application of a wrong principle or misunderstanding of relevant evidence or is low to be an erroneous estimate*

15. It is therefore submitted that the authority submitted by the respondent were of more severe and not comparable injuries to the present case as opposed to the ones relied upon by the appellant. It is therefore submitted that the trial magistrate erred in both law and fact in not taking into account the submission of the parties

16. It is therefore submitted that an award of Kshs. 400,000/- would be appropriate since the award by the trial court was inordinately high.

17. The appellant through his submission abandoned the appeal on liability.

18. On behalf of the respondent it was submitted that the respondent relied upon the case of SAVCO STORES LTD HCCC NO. 12 OF 2005 where justice Sitati on 29th May 2008 assessed the general damage at Ksh. 800,000/- while the trial court awarded Kshs. 750,000/-

ISSUES

19. The only issue for this court to determine is what is the appropriate award in general damages here and whether this court ought to interfere with the award of the trial court.

20. The Respondent suffered the following injuries:

- i. Fracture of left tibia and fibula
- ii. Fracture of the left ulna
- iii. Deep laceration on the left side of forehead.

21. The appellant permanent and functional incapacity was assessed by Dr. Wangata at 10% and by Dr. Wambugu at 12%.

22. In arriving at the award herein the trial court had this to say:

“Dr. Wangata puts P.W.1 incapacitated at 10% whereas Dr. Wambugu puts the degree of incapacitation is placed at 12%. The valiance in incapacitation is of no consequence as it is minimal. What is apparent is that that plaintiff sustained serious whereby his right leg got broken in two places and his left leg also broke. On the side of the plaintiff an award of Ksh. 1,200,000/= has been sought whereas for the defence he proposed mode as from Ksh. 4000,000/-. I find an award of Ksh. 750,000 is fair and reasonable.”

23. The only issue in this appeal is that the trial court did not give reasons as to why an award of Ksh. 750,000/= was fair and reasonable and to that extent she fell into error and therefore the judgment is liable to be disturbed by this court.

24. I have looked at the authority of SAVCO STORES LTD and note that the Respondent therein suffered 20% permanent disability and I have further noted that the award thereon of 800,000/- included cost of future medical expenses and therefore on the principles set out by the court of appeal in KIGARAGARI VS AYA CIVIL APPEAL NO. 85 OF 1983 quoted in the SAVCO case the award herein is not based on comparable injuries.

25. In reassessing general damage herein I have looked at the following cases JOHN KIRIRU NJOROGE t/a NJEGO & ASSOCIATES ADVOCATES vs DAVID NJIRU (2008)eKLR wherein the plaintiff who sustained fracture right leg hip, knee and bruises and cuts all over the body was awarded Ksh. 450,000/-/ DAVID KIPLANGAT SANG vs RICHARD KIPKOECH LANGAT and another (2006)eKLR wherein the plaintiff was awarded Ksh. 550,000/-.

26. I am therefore of the considered opinion that an award of Ksh. 600,000/= would be an adequate award to the respondent herein having taken into account the inflation and loss in value of money.

27. I therefore allow the appeal herein in respect of general damages and substitute the award of general damages with Kshs. 600,000/- for pain and suffering less 20% making a total of Kshs.480,000/.

Dated and delivered at Nyeri this 23rd day of May 2013.

J. WAKIAGA
JUDGE

Court: Judgment is read in open court in the presence of Mr. Theuri for Mr. Mwaniki and in the absence of Miss Kimuyu for the appellant.

J. WAKIAGA
JUDGE