



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NUMBER 43 OF 2009

JOSEPH NJOROGE KARIUKI.....APPELLANT

VERSUS

CHRISTINE MAINA.....RESPONDENT

(Being an appeal from the judgment of Honourable Mr. Munguti Senior Resident Magistrate, in SPMCC No.546 of 2008 delivered on 26th March, 2009 at Machakos)

JUDGMENT

This is an appeal by the defendant, herein the appellant from the judgment and decree of **Hon. Munguti SRM** in the Senior Principal Magistrate's Court at Machakos in SPMCC No.546 of 2008 delivered on 26th March, 2009 whereby the learned Magistrate entered judgment in favour of the plaintiff for KShs.225,180/- general damages and KShs.200/- by way of special damages with costs and interest.

On or about 1st February, 2008 the plaintiff, herein the respondent was lawfully travelling in motor vehicle registration number KAU 196P owned and or driven by the defendant along Machakos-Kitui road and on reaching Katangi area, the defendant and or his driver, negligently drove, controlled and or managed the said motor vehicle that he permitted the same to get out of control, veer off the road and overturn. The plaintiff was injured as a result. According to the plaint, the plaintiff sustained concussion of the brain, tenderness of the left parietal region, crush injury to the left lateral neck and tenderness of both mid shaft femur.

The plaintiff then mounted a suit against the defendant claiming general and special damages on account of the defendant's negligence aforesaid. In paragraph 5 of the plaint, it was pleaded that the accident occurred solely as a result of the negligence of the defendant and or his driver. Particulars of such negligence were duly given. By his defence, the defendant denied the occurrence of the accident, negligence and the particulars thereof attributed on him or his driver, nor was he the registered owner of the motor vehicle and that on the material day, the plaintiff was a passenger therein sustained any injuries or at all. In the alternative, he pleaded that if indeed the accident occurred, it was due to forces and or actions of third parties outside his control. Accordingly, the accident if at all was inevitable.

At the trial, the plaintiff gave evidence in support of her claim and two medical reports were tendered in evidence with regard to the plaintiff's injuries by consent. The 1st report was dated 29th May, 2008 and was prepared by **Dr. Ndambuki** on the instructions of the plaintiff. The 2nd report was by **Dr. Wambugu** and was dated 31st October, 2008. It was prepared at the instance of the defendant.

Soon after the plaintiff had testified and closed her case, judgment on liability was entered by consent of the parties on 26th February, 2009 in which liability was apportioned in the ratio of 90%:10% in favour of the plaintiff as against the defendant. As a result, the defendant led no evidence.

In a judgment delivered on 26th February, 2009 which essentially was on assessment of damages, the learned magistrate awarded the plaintiff the sum of KShs.225,180/= and 200/= respectively as general and special damages. That award triggered this appeal to this court. Basically, there are 2 grounds of appeal to wit:

(a) That the Honourable Learned Magistrate erred in law and fact in awarding damages to the Respondent amounting to KShs.225,180.00/-.

(b) That the quantum of damages is excessive and an erroneous estimate of the damages that may be awarded to the Respondent due regard to the circumstances of the case before the subordinate court and the weight of precedents in the similar circumstances.

The appeal it would appear, is limited to the awarded of general damages. In a nutshell, what the defendant wants this court to determine is whether the learned magistrate indeed erred in law and fact in awarding the plaintiff general damages amounting to KShs.225,180/- and whether the assessed damages were excessive and erroneous.

When the appeal came up for directions before me on 8th November, 2011, **Mr. Nyangu** and **Mr. Kariuki**, learned counsel for the defendant and plaintiff respectively agreed to canvass the appeal by way of written submissions. Subsequent thereto they filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

I have revisited and evaluated the material placed before me that being my duty as a first appellate court. The principles on which an appellate court will interfere with an award of damages are now settled. This court must be satisfied that the trial court either took into account an irrelevant factor or left out of account a relevant one in assessing damages payable; or that short of this, the amount awarded is so inordinately low or so high that it must be a wholly erroneous estimate of the damages. Again, the consideration that should bear heavily upon the trial court in making awards in these types of cases or in any other similar ones is that the awards must be seen not only to be within the limits set by the decided cases but also to be within what Kenyans can afford. See **Kimotho and others Vs. Vesters 1988 KLR 48** and **Jayendra Kumar Hana Vs. Abdulrasul Hussein C.A. No.220 (UR)**.

The injuries sustained by the plaintiff are what are commonly referred to in medico-legal parlance as soft tissue injuries. Though the two medical reports tendered in evidence may have differed on some aspects of the soft tissues sustained by the plaintiff, the bottom line is that the plaintiff suffered soft tissue injuries. The two doctors agree that much. They also agree that the plaintiff would recover fully from the injuries with no complications expected or anticipated.

In my opinion and considering the nature of the injuries sustained by the plaintiff, the award of general damages in the sum of KShs.225,180/- after 10% contribution was inordinately high that it amounted to a wholly erroneous estimate. From what I have seen from the precedents cited before the trial court and from my own knowledge, the award of damages for this kind of soft tissue injuries at the time tended to vary from as low as KShs.20,000/- to about KShs.180,000/- depending on the seriousness of the soft tissue injuries.

The plaintiffs in the authorities cited by the defendant in the trial court suffered more or less similar injuries to the ones suffered by the plaintiff in this appeal. The caveat however being that those authorities had been decided in early eighties and nineties, almost 25 or so years earlier. Taking the incidence of inflation into account since then, I do not think that the proposal by the defendant that an award of KShs.60,000/- would have sufficed was reasonable in the circumstances.

On her part, the respondent submitted that an award of KShs.400,000/- would be sufficient compensation for her pain, suffering and loss of amenities. I think that this proposal was inordinately high considering the injuries sustained by the plaintiff. The authorities cited in support thereof were not consistent or similar with her injuries. Indeed the injuries therein were much more serious. Yet these were the authorities preferred by the trial court. Because of this, the trial court ended up awarding general damages which were inordinately too high in the circumstances.

In my view reasonable recompense for the plaintiff should have been KShs.150,000/- less 10% leaving a balance of KShs.135,000/-. That is the plaintiff's entitlement.

In view of the foregoing, I would allow the appeal, set aside the award of KShs.225,180/- as general damages. Instead I direct that the plaintiff be paid KShs.135,000/- as general damages for pain, suffering and loss of amenities with interest from the date of judgment and decree of the trial court. The award of special damages of KShs.200/- has not been challenged. It remains. To that extent, the appeal succeeds. However, I make no order as to costs.

Judgment dated, signed and delivered at Machakos, this 15th day of February, 2012.

ASIKE-MAKHANDIA

JUDGE