



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 89 of 2007

PETER GICHARU NGIGE.....APPELLANT

VERSUS

CHARLES DAUDI ONDERI.....RESPONDENT

JUDGMENT

This appeal arises from a judgment and decree of the Honourable Chief Magistrate in Eldoret C.M.C.C. No. 983 of 2002 read and delivered on the 27th day of June, 2007.

The Counsels for the Appellant and the Respondent, both, chose to put in written submissions.

FACTS

The Respondent sustained injuries through a road traffic accident whilst riding his bicycle. He was knocked down by the lorry vehicle owned by the Appellant. The Respondent sustained the injuries as set out in the plaint as set out hereunder;

- (a) Loss of consciousness for 6 days.
- (b) Fracture of the right temporal bone
- (c) Fracture of the left jawbone and injury to the right jawbone
- (d) Dislocation of the right shoulder
- (e) Pain and bleeding left ear

The Respondent was awarded the sum of Kshs.800,000/= by the trial magistrate for general damages and liability was apportioned '**BY CONSENT**' at 70% to be shouldered by the Appellant and 30% by the Respondent. It was the Respondents contention that the injuries were properly pleaded and proved and that the injuries were of a severe nature and that the award was not satisfactory and qualifies for enhancement by this appellate court. The Respondent prayed that the award given by the lower court be enhanced and further prayed that the appeal be dismissed with costs to the Respondent.

The Appellant being aggrieved with the award preferred this appeal. The Appellant submitted that the

Respondent was bound by his pleadings. That the particulars of injuries the Respondent testified to was at variance with those set out in his pleadings and that the Respondent had failed to prove his injuries. It was the Appellant's submission that the trial magistrate applied wrong principles and arrived at a wrong decision when making the award. Therefore the Respondent did not merit the general damages awarded as he had not proved his claim and the amount awarded was inordinately excessive.

The Appellant's prayer was that the appeal be allowed and that the trial courts judgment be set aside and the Appellant be awarded costs.

ISSUES FOR DETERMINATION.

I have perused the Record of Appeal and read the submissions of both the Counsel for the Appellant and the Respondent and find there are two issues for determination by this appellate court which are

- (i) injuries pleaded by the Respondent in the plaint
- (ii) Quantum.

THE LAW

The law is set down in the case of **ROBERT NZIOKA KITAVI vs COASTAL BOTTLERS LTD (1985) 1 KAR 891** where it was held that an appellate court should not disturb an award unless the trial court takes into consideration irrelevant factors or leaves out relevant ones or applies wrong principles of law in making an award.

In the case of **BUTT vs KHAN (1977) 1KARI** it was held that;

‘.....An appellate court will not disturb an award unless it is inordinately high or low so as to represent an erroneous estimate.....’

ANALYSIS

As an appellate court my duty is to re-evaluate and analyse the evidence on Record. I have perused the Plaint, in particular the particulars of injuries sustained and have read the medical reports contained in the Record of Appeal which were prepared by Doctor Gaya, Doctor Oganda, Doctor Embenzi and Doctor Sisenda and I have also read the testimonies of the Respondent and Dr. Paul Kipkorir Rono given at the trial.

The Respondent testified that he sustained injuries to the head, the left ear, a broken right jaw and a shoulder dislocation and stated that he was admitted for eleven days at Moi Teaching and Referral Hospital and had not fully healed at the date of the trial.

Doctor Paul Kipkorir Rono testified as the Respondent's witness at the trial and confirmed the injuries as listed hereunder;

- (f) Head – fracture of the base of the skull on the left side
- (g) perforated left ear drum
- (h) an intra-cerebral haematoma which is a residual blood clot
- (i) fracture to mandible of the right side
- (j) In semi comatose state for 7 days.

Doctor Oganda was the doctor who examined the Respondent initially and his medical report confirmed

the fracture of the right temporal bone, haematoma, seven days of unconsciousness, loss of hearing in the left ear and the injury to the right shoulder.

Doctor Z. Gaya's examined the Respondent and his medical report confirmed partial loss of hearing of the left ear, injuries to the skull, brain, right ear, nose, right mandible, the right shoulder and left hip.

Doctor Embenzi also confirmed the fracture to the base of the skull and fracture of the right mandible in his medical report.

Doctor Sisenda an ENT specialist confirmed the perforated left ear drum injury in his medical report.

I find that there is a general consensus as to the injuries sustained by the Respondent in all the medical reports.

CONCLUSION

This appeal arises from a civil claim and all that the Respondent needed to do was to prove his case on a balance of probabilities and he did not have to prove his claim beyond reasonable doubt. It was sufficient for the Respondent to adduce evidence on the most critical injuries which were the fracture to the skull and fracture of the mandible. I find that the Appellant is splitting hairs when they insist that the Respondent must adhere '**stricto sensu**' to his pleadings. The anomalies of the injuries being on the left or right are curable and do not render the Respondents claim unproved. I find that the Respondent availed himself for a medical examination by a Doctor of the Appellants choice a Doctor Z. Gaya and find that the said Doctor examined the Respondent at the Appellant's request and indeed verified the injuries. I reiterate that I am guided by the pleadings, the medical reports and evidence adduced and I am satisfied that the Respondent indeed sustained those severe injuries.

I am satisfied that the trial magistrate made the award based on the injuries pleaded and sustained by the Respondent and that the trial magistrate did not apply wrong principles in arriving at the award and find no reason to interfere with award.

The award I note is satisfactory when compared to other awards for similar injuries referred to in the authorities set out hereunder;

(i) JUNE ELSA ONOO –VS- LOCHAS BROTHERS & CO. NAIROBI HCC NO. 5733 OF 1991

Githinji J as he then was gave an award of Kshs 1,000,000 for a fracture to the skull, fracture of the maxillary bone resulting in total blindness.

(ii) FRANKLE RAY –VS- PAUL KAHARA & 3 OTHERS MOMBASA HCCC NO. 579 OF 1989. Wambuyangala J awarded general damages of Kshs 540,000/= for a fracture of the mandible and severe facial disfigurement.

(iii) PETER GICHIRU MWANGI –VS- JAMES KABAMI MWANGI HCC NO. 343 OF 2000 Kasanga Mulwa J awarded general damages of Kshs 600,000/= for a compound mandibular fracture, head injury and severe face injuries.

(iv) HUSSEIN HASSAN MOHAMMED –VS- STANLEY THUO GACHERU & 4 OTHERS HCC NO. 229 OF 2008 NAKURU. Ouko J awarded Kshs 650,000/= General damages for fractures to the mandible, severe head injury, loss of consciousness for 2 days, fracture of right ulna and fracture of left supra-orbital ridges.

The Respondent did not file a cross-appeal therefore this appellate court cannot entertain an enhancement of the award.

I find the appeal has no merits and it is hereby dismissed with costs to the Respondents.

Dated and delivered at Eldoret this 13th day of February 2012.

A.MSHILA
JUDGE