



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 55 OF 2010
ORION HAULIERS
LIMITED.....PLAINTIFFS
VERSUS
MICHAEL SEMPER
ESIKHATI.....DEFENDANT

Coram:

Mwera, J.

Gor for Appellant

Njoroge for Respondent

JUDGMENT

The record of appeal herein was lodged in court on 13th July, 2012. The appeal followed the judgment in the lower court which was delivered on 19th March, 2010. The claim was for damages following a road accident which took place on 16th January, 2003. It was claimed that the appellant/defendant's motor vehicle knocked down and injured the respondent/plaintiff. A sum of sh. 800,000/= was granted as general damages. This was reduced by 40% contributory negligence leaving a net of sh. 480,000/=. The two grounds of appeal stated that the award of sh. 800,000/= was excessive and erroneous. And that the learned trial magistrate did not adequately appreciate the medical report of Doctor Udayan Sheth or his evidence plus what was stated in the submissions.

Directed to submit the appellant company did annex the 2 medical reports by Doctor Sheth dated 2nd April, 2008 and by Doctor S.K. Ndegwa of 19th June, 2009 with the courts leave.

Referring to Doctor Sheth's evidence the court was told that the prognosis showed that the respondent would fully recover from the fracture sustained and the stiffness in the left hip joint if an operation of a total hip arthroplasty was done and he wore a high - heeled shoe. Then he could carry on his job. Accordingly, the lower court's award of sh. 800,000/= should be set aside and substituted with one of sh. 450,000/= on the basis of 100% liability but less 40 % contributory negligence. No reference was made to Doctor Ndegwa's report.

On the respondent's part several authorities were referred to particularly to emphasize the principle that assessment of general damages was in the discretion of the trial court and the appellate court is not justified in substituting the award with its own figure unless the trial court applied wrong principles or misapprehended the evidence. Or the sum given was manifestly high or low. This court was urged to appreciate that the learned trial magistrate heard the two doctors on their reports, appreciated those reports and came to a proper conclusion.

Focusing on the aspect of general damages as the parties here did, the evidence of the respondent was that he was walking on a side path along the Nairobi – Mombasa Road facing motor vehicles heading to Mombasa. Then the appellant's motor vehicle heading to Mombasa got onto the pavement and hit the respondent unconscious. As at the time of testifying he was still feeling ill from the accident impact – some 2 years after the incident. He could not work.

Doctor S.K. Ndegwa (PW2) testified in 2009. He had seen the respondent on 19th June, 2009 – some 6 years since the accident took place on 16th January, 2003. He alluded to injuries including a fracture of the left femur, a wound, bruises and lacerations, and that the respondent was walking on crutches. He could not work as a security guard. His left leg was shortened and there was no movement in the left knee joint and hip. The respondent had healed with severe disabilities especially the left lower limb which was functionally useless with 70% permanent disability. The good doctor could as well recommend its amputation.

Doctor Udayan Sheth (DW1) examined the respondent on 1st April, 2008 a year earlier than Doctor Ndegwa. This witness prepared a supplementary report dated 29th September, 2009 ie some 6 years following the accident. His view was that 70% disability could be applied to people whose leg, as the case was here, had been amputated. The respondent only sustained a fracture of the hip joint which got stiffened. He put the respondent's permanent disability at 20% adding that the left leg was not completely useless and if he went for surgery, had an artificial hip, the leg shortening could be corrected. He could also wear a high-heeled shoes and all could be well. But he was on crutches when DW 1 saw him and in that state he could not carry out his duties but all this could be taken care of if he got an artificial joint.

In his judgment the learned trial magistrate appreciated both the medical reports, even where they differed on disability. Seemingly, they agreed on the injuries and the respondent's present state of health. The learned trial magistrate also considered the authorities both sides presented and the sums proposed for general damages. While the respondent asked for sh. 1 million the appellant proposed something between sh. 400 – 450,000/= . Then the learned trial magistrate gave the sum of sh. 800,000/= to be reduced by 40% contributory negligence.

The appellant urged this court to find that that award was excessive and erroneous and that the learned trial magistrate did not adequately consider the medical report of Doctor Sheth. This court does not agree. The learned trial magistrate heard evidence from the 2 doctors as presented by either side and went over their respective reports. He also appreciated authorities cited by each side especially on the levels of awards there. He saw all that in the context of the respondent's present state of health. Submissions of parties were not overlooked either. And it has not been demonstrated that the learned trial magistrate took into account wrong principles in arriving at the questioned award or that he misapprehended the evidence or the figure awarded was so high as to constitute an erroneous estimate ending in failure of justice. Or that the learned trial magistrate did not consider relevant matters that ought to have been considered. Generally demonstrating any or a combination of the above or such other aspect that may result in an injustice, will prompt this court to interfere in the learned trial magistrate's discretion to consider and award general damages.

Such has not been demonstrated here and this appeal is thus dismissed with costs.

Dated 26th June, 2012.

J W. MWERA
JUDGE