



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 184 of 2011

**EBEREGE TEA FACTORY CO. LTD.....1ST
APPELLANT**

**EZEKIEL OBASO OKIKI.....2ND
APPELLANT**

AND

SABINA MORAA (suing through the next of Friend and

**Uncle ROBERT ONDIEKI
ONGAGA).....RESPONDENT**

**(Being an appeal from the judgment of Kisii CM M/s E. Maina given on 18th August 2011 in Kisii
CMCC NO.326 of 2007)**

JUDGMENT

1. The respondent herein, Sabina Moraa, suing through the next friend and uncle, Robert Ondieki Ongaga was the plaintiff in the lower court. She filed suit seeking to be paid both general and special damages on account of injuries she alleged to have sustained in a road traffic accident which occurred on or about 3rd march 2007 along the Nyangoge-Kisii Road, involving the respondent and the 1st appellant's motor vehicle registration number KAV 344 V which vehicle was being driven by the 2nd appellant. The respondent who was a pedestrian along the said road blamed the appellants for the accident in which she was injured. She averred that the said accident was caused by the utter negligence of the owner and/or driver of the aforesaid motor vehicle by, *inter alia*, failing to observe the Highway Code, failing to service and/or maintain the said motor vehicle, driving without due care and attention in the circumstances, driving the vehicle off the road and driving while under the influence of intoxicating substances.
2. As a result of the applicant's negligence, the respondent sustained a cut wound on the head, cerebral concussion, bruises on both hands, legs and on the chest. As a result of the said injuries the respondent sought to be awarded damages for pain, suffering and loss of amenities.
3. The appellants entered appearance and also filed defence. The appellants denied that the alleged accident occurred and that the respondent was injured and suffered or continues to suffer damages as claimed in the plaint or at all. They also denied all the particulars of negligence attributed to them. Alternatively, the appellants pleaded that if the respondent was injured at all, an allegation that was denied, then she was injured due to her own negligence as more particularly set out in paragraph 7 of the defence. The appellants pleaded further that if the respondent ever suffered any injuries, then such injuries

were self inflicted and that the respondent was the author of her own misfortune and consequently, the appellants could not be held accountable to the respondent in any manner howsoever. Further, the appellants pleaded that if the subject motor vehicle was involved in an accident on 3rd March 2007 (which was vehemently denied) then nobody was injured as a result thereof.

4. The appellants denied that they were served with any demand notice with respect to the accident. They also denied that the respondent had a cause of action against themselves, reasons wherefore they prayed that the respondent's suit be dismissed with costs. The respondent did not file a reply to the defence.

5. The suit was heard in the court below. Thereafter, both parties filed their respective submissions. After carefully considering the evidence that was placed before the court, together with the submissions and the authorities cited, the learned chief magistrate, E. Maina found that the respondent herein suffered permanent paralysis and urinary incontinence due to head injuries. She however attributed 30% liability to the respondent for the accident and gave judgment as follows:-

- a) General damages Kshs.1,750,000/=
- b) Special damages Kshs. 4200/=
- c) Interest (on specials from date of filing suit and on general damages from the date of this judgment)
- d) Costs of the suit.
- e) Right of appeal 30 days.

6. The appellants were aggrieved by the whole of the said judgment and have come before this court on first appeal to challenge the same. The Memorandum of Appeal dated 5th September 2011 and filed in court on 16th February 2012 raises the following 10 grounds:-

1. *The quantum of general damages in respect of pain, suffering and loss of amenities is inordinately high and amounts to a miscarriage of justice.*
2. *The learned trial magistrate erred in law and fact in taking into account irrelevant matters while assessing the general damages.*
3. *The learned trial magistrate considered extraneous matters conjectures and suppositions which were not on record in arriving at her decision to the detriment of the appellant.*
4. *The learned magistrate erred in law and fact in making the award in the said judgment as the same is manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent.*
5. *The learned trial magistrate erred in law and fact in entering judgment on quantum for the plaintiff without considering the applicable principles as established by precedent.*
6. *The learned trial magistrate erred in law and fact in awarding general damages under heads not pleaded.*
7. *The learned trial magistrate failed to take into account the nature of the injuries as disclosed in the medical reports before her while assessing damages.*
8. *The learned trial magistrate ignored and/or paid lip service to the appellants' submissions and*

authorities cited therein.

9. *The estimate of general damages is erroneous, oppressive and punitive.*

10. *The learned magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages.*

7. The appellants therefore pray that the appeal be allowed and for orders that:-

a) *The judgment/decree on quantum of general damages for pain suffering and loss of amenities be set aside, varied and or be substituted with a suitable award.*

b) *The costs of this appeal be paid by the respondent to the appellant.*

8. This appeal proceeded by way of written submissions by consent of the parties. The submissions together with supporting authorities were duly filed and are on the record. I have carefully read through those submissions. I have also carefully read the pleadings filed by the parties to this appeal. I have considered and weighed the judgment of the trial court.

9. This appeal is before me as a first appeal. In the circumstances, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, remembering that though this appeal is like rehearing the case, this court has to make allowance for the fact that it has no opportunity of seeing and hearing the witnesses who testified before the trial court. In the case of **Peters –vs- Sunday Post Limited [1958] EA 424**, Sir Kenneth O'Connor P. delivering the judgment of the Court expressed the considered views of the court on the duty of a first appellate court as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence

is given:

Lord Thankerton said at P.487:

“I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: (I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion; (II) The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; (III) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.”

Lord Macmillan said at p.491:

“So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

10. In the present appeal, the appellant’s complaint is against quantum of general damages for pain, suffering and loss of amenities. Should this court interfere with the same. The evidence that is relevant to this issue is the medical evidence that was tendered by consent and without the necessity of calling the makers. From that evidence and as noted by the trial court, the respondent suffered the following injuries:-

- *Cut wound on the head.*
- *Cerebral contusion.*
- *Bruises on the scalp.*
- *Bruises and lacerations on both hands.*
- *Bruises on both legs.*

11. According to the report prepared by Dr. Ajuoga, the head injury suffered by the respondent was serious and that it had led to neurological deficit with distorted speech which was likely to be permanent. The second medical report which was prepared by Dr. A. Otieno on 21st December 2007 at the instance of the appellants was to the effect that the head injury suffered by the respondent had left the respondent permanently paralyzed and with urinary incontinence. It was also Dr. Otieno’s opinion that there was no hope of the respondent ever recovering her normal mobility. The doctor estimated the respondent’s degree of permanent disability at about 95% and the injuries suffered by her as maim.

12. During submission before the lower court, counsel for the respondent proposed an award of Kshs.3500000/= supported by **Nairobi HCCC No.5452 of 1990 – Sarah Ndege –vs- Nairobi Delux Services Ltd.** For his part, counsel for the appellants submitted that in the circumstances of the case, an award of Kshs.1200000/= would be a reasonable figure for pain, suffering and loss of amenities, especially when the respondent did not put evidence before the court proving loss of future earning capacity. Counsel also argued that no future medical care was pleaded or proved.

13. The power of an appellate court to interfere with the award of damages made by a trial court is limited and an appellate court can only interfere if it is clear that the award is based on some wrong principle or it is so low or excessive that it must have been based on some incorrect reasoning. As stated by the court in the **Peters case** (above) an appellate court must act with circumspection and be slow to reverse the trial judge on the issue of quantum. An interference with the trial judge's award must be informed by the following parameters namely that the trial judge:-

- *acted upon a wrong principle of law; or*
- *has misapprehended the facts; or*
- *has for the above other reasons made a wholly erroneous estimate of the damage.*

14. For the above principles, I have been guided by **R. Kuloba's book: Measure of Damages for Bodily Injuries: Law Africa 2006 at p. 25.** I have also benefited from the Court of Appeal judgment in the case of **Butt –vs- Khan, Nairobi Civil Appeal NO. 40 of 1977,** where the court stated that for an appellate court to interfere with quantum of damages, the award must be:-

“--- so inordinately high or low as to represent an entirely erroneous

estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

15. In the instant case, I have carefully considered the medical evidence and the authorities cited by both parties to this appeal. I have also carefully read and considered the judgment of the trial court. I find no reason to want to interfere with the award made by the trial court as the same is neither too high nor too low as to give a completely erroneous impression of the gravity of the injuries suffered by the respondent. As rightly pointed out by the trial court, the injuries suffered by the respondent compared favourably with the injuries sustained by the plaintiffs in the 4 cases relied upon by counsel for the appellants. I also do not find any evidence to show that the learned trial magistrate misapprehended the evidence in some material respect or that she proceeded on wrong principles in making the award.

16. The above being the position, I find no merit in this appeal. The same is accordingly dismissed with costs to the respondent.

17. It is so ordered.

Dated and delivered at Kisii this 25th day of October, 2012.

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of:

Mr. Karanja (present) for Appellants
Mr. Mogire (present) for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.