



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 77 of 2007

JANET OPIYO

KAREN NJUGUNA.....APPELLANTS

VERSUS

STEPHEN TUWEI.....RESPONDENT

JUDGMENT

INTRODUCTION.

The Appeal arises from the decision of Honourable W.N Njage acting SPM in Eldoret CMCC No. 1479 of 2003 delivered on the 12th June, 2007

FACTS

The Respondents herein was riding his bicycle on the 2nd February, 200 when the Appellants motor vehicle which was being negligently driven knocked him down occasioning serious bodily injuries to the Respondent

The issue of liability was settled “**BY CONSENT**” and apportioned at 70 % being borne by the Appellant and 30 % by Respondent.

The trial court was mandated to assess general damages and special damages.

On the 12th June, 2007 Judgment was duly entered against the Appellant and the Respondent was awarded general damages in the sum of Kshs 600,000/=.

The Respondent was also awarded special damages of Kshs 163,842/= and future medical expenses of Kshs 100,000/=

The total award was in the sum of Kshs 604, 689/40 after contributory negligence had been factored in.

The Appellants being aggrieved by one said judgment preferred this appeal and listed three (3) grounds of appeal in their Memorandum of Appeal. The grounds of appeal related mainly to the issue of the award for general damages made by the trial magistrate.

Counsel for both the Appellants and the Respondents chose to argue the Appeal through putting in Written Submissions.

APPELLANTS SUBMISSIONS.

The Appellants submitted that the award was excessive and amounted to an erroneous estimate of the damage suffered.

That the trial magistrate had misapprehended the injuries sustained by the Respondent and had taken into account irrelevant facts when assessing damages.

That the trial magistrate failed to take into account comparable authorities submitted by counsel for the Appellant's commensurate to the injuries sustained by the Respondent.

In conclusion, the Appellants prayed that their appeal be allowed as prayed for in the Memorandum of Appeal as it was meritorious.

RESPONDENT'S SUBMISSIONS

The Appeal was opposed and Counsel reiterated the injuries sustained by the Respondent.

Counsel submitted that the Respondent had tendered in documents in support of the injuries sustained.

There was a Discharge Summary from Moi Teaching and Referral Hospital, a medical report from Kapsabet District Hospital, a Medical Report prepared by DR. S.I Aluda and another report that confirmed the injuries prepared by DR. V.V Lodhina who was the doctor appointed by the Appellants, insurers.

Counsel submitted that all the above documents attested to the severe injuries that the Respondent sustained and the main injury being a double compound fracture of the right tibia and fibula.

Several authorities were cited by Respondents Counsel as to when an appellate court may interfere with an award.

The court was urged not to disturb the award as the trial magistrate had taken into consideration both the Appellants and Respondents submissions and the authorities citing support and had thereafter proceeded to assess quantum of damages.

Counsel contended that the award made by the trial magistrate was exceeding low and this court ought not to interfere with the award.

In conclusion the Respondent prayed that the Appeal be dismissed with costs.

ISSUES FOR DETERMINATION

Upon reading the Written Submissions of both Counsel for the Appellant and Respondent, this court finds that the only issue for determination relates to the quantum of damages.

ANALYSIS

It is the duty of this court being the first appellate court 1 to re-assess, re-evaluate and re-consider the evidence and come up with an independent conclusion.

The evidence of the Respondent was that he sustained the following injuries;

- i) a compound fracture of the right tibia.
- ii) Bruises on the left thumb

iii) Bruises on the left face

iv) Bruises on the left knee.

He gave evidence that had internal plates fixed after seven months there was no union on the broken leg.

The Respondent produced the Discharge summary from the Kapsabet District Hospital. He later sought treatment at the Moi Teaching and Referral Hospital and an attendance card was produced.

The Respondent was examined by DR. S.I Aluda and was referred for a further medical examination to Dr. Lodhia, by the Appellants Advocates.

The Appellant and Respondent agreed on the issue of apportionment of liability and agreed **“BY CONSENT”** to admit the medical reports prepared by Dr. S.I Aluda and Dr. V.V Lodhia.

The two doctors agree that the Respondent sustained:

i) Compound fractures of the right fibula.

ii) Soft tissue injuries to the scalp, chest, left knee and left hand.

DR. S.I Aludas report states that the injuries were severe and that fracture was continuing to heal and the Respondent had limited movements and physiotherapy was recommended.

DR. V.V Lodhina confirmed that there was mal union at the fracture sites.

After examining the Record of Appeal and re-evaluating the evidence, this court is satisfied that the evidence confirms the seriousness of the injuries sustained by the Respondent.

In their submissions in the lower court the Appellants proposed an award for general damages in the sum of Kshs 150,000/= and cited authorities dating back to the year, 1989 in support.

The Respondent proposed an award for Kshs 600,000/= and cited authorities to support the award.

This court can only interfere with the award if the trial magistrate applied wrong principles or took into account irrelevant factors and arrived at an award that was inordinately low or manifestly excessive. Refer to **ARROW CAR LTD –VS- BIMOMO AND 2 OTHERS CIVIL APPEAL 344 OF 2001.**

This court is satisfied and finds that the trial magistrate addressed and considered the medical evidence contained in the medical reports, the submissions and authorities of both Counsel for the Appellants and Respondents.

This court finds that the trial magistrates assessment was not based on wrong principles and no irrelevant factors were taken into consideration.

On the basis of the medical evidence, submissions and authorities cited, this court finds that the award is satisfactory and not manifestly excessive and finds no reason to interfere with the award.

CONCLUSION.

For the reasons stated above, the court finds that the appeal has no merit and the same is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Eldoret this 11th day of October 2012

**A.MSHILA
JUDGE**

Coram: Before Hon. A Mshila J
CC: Andrew
Counsel for the Appellant
Counsel for the Respondent

**A.MSHILA
JUDGE**