



NO. 202

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 227 OF 2007

MOHAMED JUMA SALAA.....1ST APPELLANT

ISMAEL MUSTAFA MOHAMED.....2ND APPELLANT

B.A.O (minor suing through his friend & Father)

I.O.O.....RESPONDENT

JUDGMENT

(Being an appeal preferred from the Judgment and decree of the Senior Principal Magistrate, Ezra O. owino in Migori SPMCC.No. 8 of 2006 dated and delivered on 16th November, 2007)

On 31st October, 2004, **B.A.O**, a minor then aged 5 years old and the respondent herein was involved in a road traffic Accident as he walked off the verge of Migori-Isebania road. The offending motor vehicle was allegedly motor vehicle registration number [Particulars withheld], Isuzu lorry owned by the 1st appellant and was at the material time being driven by the 2nd appellant as the 1st appellant's authorized driver, servant and or agent. Consequent upon the accident, the 2nd appellant was arrested and charged before the Migori Principal Magistrate's court in Traffic case Number 459 of 2004 with the Traffic Offence of careless driving contrary to section 49(1) of the traffic Act. He pleaded guilty to the charge and was subsequently fined Kshs. 5000/= in default one month's imprisonment. In so far as the respondent was concerned therefore the 2nd appellant was directly and solely liable for the accident while the 1st appellant was vicariously liable to for the same, hence the suit against them jointly and severally.

The injuries that the respondent sustained were cut wound on the right parietal skull, blunt trauma on the head right side, severe degloving injury of the right upper arm, elbow and proximal 1/3 lower arm, complete loss of the biceps and triceps of the right arm and extensive skin loss of the dorsum of the right hand. He had to be treated for those injuries and incurred Kshs. 22,770/= in that regard. Thereafter he paid Kshs. 3,000/= for the medical report and another Kshs. 3,000/= to secure the Doctor's court attendance in court on the day of the hearing of the suit. According to **Dr. Idagiza A. Akidiva**, the respondent required corrective surgery to refill the muscles and to release the co fractures at his approximate cost of Kshs. 700,000/=. Armed with all these information, the respondent sued the appellant's in the Senior Principal magistrate's court at Migori through his father and next friend, **I.O.O** seeking general damages, special damages of Kshs. 28,770/= future corrective surgery, costs of the suit and interest.

Of course and as expected, the appellants denied the respondent's claim and put him to strict proof on each of his allegations in the plaint. In the alternative, the 2nd appellant averred that the said accident was solely caused by the negligence of the respondent and gave particulars of negligence he attributed to the respondent.

Subsequent thereto liability was on 23rd October, 2008 by consent of the parties determined in the ratio of 25% and 75% respectively in favour of the respondent and as against the appellants. What then fell for determination by the trial court and the only issue to be determined in this appeal is the quantum of damages.

The learned magistrate having considered the injuries sustained by the respondent, the written submissions and various authorities cited, reached the verdict that a sum of Kshs. 950,000/= would suffice for general damages and Kshs. 28,770/= as special damages with costs and interest.

The 1st appellant was aggrieved by the judgment and decree aforesaid. He therefore lodged the instant appeal setting out 4 grounds of attack to wit:-

“1. The learned trial magistrate erred in both law and infact in awarding to the Respondent the sum of Kshs. 950,000/= as general damages which amount was manifestly and exorbitantly high and excessive in the circumstances and constituted an erroneous estimate of the alleged damages (sic) suffered.

2. The learned trial magistrate erred in both law and infact in relying on the case of Francis K. Kariuki vs Hudsun Wanambiri Kamulamba HCCC.NO. 37 of 1990 Nakuru where quantum was assessed for complete loss of hand, which authority is inapplicable in the circumstances.

3. The learned trial magistrate erred in both law and infact in failing to hold that the treatment chits, P3 form and medical report and the evidence of Dr. Idagiza led at trial on behalf of the respondent were all made up purely for purposes of seeking compensation and had no actual and truthful evidential value and in failing to disbelieve the same.

4. The learned trial magistrate erred in both law and infact in failing to dismiss the respondent’s suit as manifestly no cause of action (sic) against the appellant.....”

When the appeal came up for directions before me on 3rd May, 2010, parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities

I have considered the material that was placed before the trial court by way of medical reports and the unchallenged evidence of PW1 and PW II. I am not oblivious to the fact that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases. **Lord Morris of both –Y-Gest** had occasion to comment on the above concept in the case of **H. West and Son Ltd v. shepherd (1964) AC.326** and stated thus: ***“...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”***

Of course this court has jurisdiction to interfere with assessment of general damages by the trial court. However it is a jurisdiction which must be exercised with caution and not capriciously. The General approach is that an appellate court can only interfere with an award of damages by the trial court when it is shown that a relevant factor was not taken into account or an irrelevant factor was taken into consideration, or that the trial court did not appreciate the importance of some material evidence or that the award was so inordinately low or high that same such like mistake must be assured. See generally **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727, Mugambi & another -vs- Gitiru (2004) eKLR and finally Salim S. Zein t/a Eastern bus Service & another .v. Rose Muniee Mututi-Civil appeal no. 147 of 1994 (UR)**. In the later case the court of appeal observed:-

“.....the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

In this appeal I discern no such misgivings. The appellant has questioned the basis for the global award of Kshs. 950,000/= as general damages for pain, suffering and loss of amenities. He seem to fault the learned magistrate on the basis that he did not rely on the contents of any medical report. The learned magistrate was very clear in his judgment that in arriving at the figure aforesaid, he had paid regard to the medical report prepared by **Dr. Idagiza** after examining the respondent on 5th December, 2005 and 17th September, 2007 respectively. Indeed he went out of his way to reproduce in detail the nature and extent of the injuries sustained by the respondent in the accident. The complaint by the appellant that the learned magistrate did not seem to have relied on the contents of any medical report is therefore without basis or substance at all.

The appellant too seems to fault the learned magistrate for relying on the authority of **Francis K. Kariuki v. Hudson W. Wamulamba, HCCC.NO. 37 of 1990 (UR)**. He faults him for having held that the injuries sustained in that case were more or less similar to the ones, suffered by the respondent in the case that was before him. To the appellant this was an error and misdirection. I do not see how that holding can possibly be deemed to be an error and or misdirection. The learned magistrate did not say that the injuries in that authority were similar to those sustained by the respondent. All that he said was that ***“.....the injuries sustained were more or less similar....”*** The learned magistrate cannot be said to have erred in making that comparison. He was entitled to do so, more so, considering that the injuries resulting from road traffic accidents can never be similar.

The appellant also takes the view that because of over reliance on the aforesaid authority the ultimate award of Kshs. 950,000/= was excessive in the circumstances and constituted an erroneous estimate. The basis for that proposition is that the injuries to the respondent's right arm were soft tissue injuries although admittedly, severe. Much as there were no fractures these I must say, were not ordinary soft tissue injuries. According to PW1, the respondent sustained cut wound of skull, trauma of side of the head, severe dorsum injury upper arm, loss of biceps and triceps muscles and loss of arm and skin. Loss of skin was put at 90% and deformity at 20% to the body. He assessed the injury at 20%. The testimony of PW2 was that following the accident, the respondent was admitted to Machage Hospital initially. He was later referred to Kenyatta national Hospital where he was admitted for almost one month. He was thereafter flown to Philadelphia Children Hospital in USA where he was given further treatment.

There is no doubt at all that the respondent sustained serious and extensive soft tissue injuries involving skin loss estimated at 90% and 20% deformity of the whole body. The doctor further gave evidence that despite the fact that the respondent went to USA for further treatment, he still had earlier injuries and loss of skin. It is instructive that the evidence of PW1 was not at all challenged by the evidence of any other doctor. In a nutshell the respondent suffered permanent disability of the right arm by completely losing triceps and biceps, sustaining severe de gloving injury of the right elbow and proximal 1/3 lower arm as well as extensive skin loss of the dorsum of the right hand.

Much as the appellant faults the learned magistrate for his over reliance on the case of **Francis K. Kariuki** (supra) it is instructive that the appellant never filed written submissions and cited any authorities before the trial court in opposition to that brought forth by the respondent. In other words, the appellant never attempted to challenge the said authority before the trial court by referring him to it any other relevant authority. In the premises, the appellant cannot be heard to lambast the trial court on that basis. The learned magistrate had only one relevant authority cited before him. He cannot therefore be blamed for relying on it heavily. The appellant had an opportunity to challenge the same which he did not take up.

As correctly submitted by the appellant, the injuries sustained resulted in a permanent deformity of the right hand to a child aged 5 years as at the time of the accident. Besides the permanent deformity, the

injures resulted in unsightly ugly scars on the right arm which will psychologically affect him for the rest of his life. In those circumstances I do not think that an award of Kshs. 950,000/- was so excessive as to be erroneous. The learned magistrate did not take into account an irrelevant factor or left out of account a relevant one. The appellant has sought to argue that the award must have been influenced by the Doctor's opinion that the respondent would require Kshs.700,000/= for corrective surgery to refill the muscles and the fact that the respondent was taken to the USA for further treatment. However I do not discern such influence. Those submissions are therefore purely speculative and presumptive. In any event the claim for Kshs. 700,000/= had been abandoned and the learned magistrate was aware of the fact.

In the end, the appellant has failed in the appeal which is accordingly dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 16th July, 2010.

ASIKE-MAKHANDIA

JUDGE