



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 125 OF 2008

JOSEPHINE ANGWENYIAPPELLANT
-VERSUS-
SAMUEL OCHILLORESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of R.M Wewa in Chief Magistrate's court at Kisii in CMCC No. 509 of 2007 Dated 9th July, 2008)

This is an appeal from the judgment of the subordinate court (**S.R Wewa R.M**) delivered on 9th July, 2008. The appeal is basically on assessment of damages as can be gathered from the grounds of appeal advanced in the memorandum of appeal dated 6th August 2008 and filed in court on the same date. They are as follows:-

- “1. That the learned trial magistrate erred in law and in fact in awarding Kshs. 30,000/= damages after making a finding that the applicant had proved his case under (sic) a balance of probability.***
- 2. That the learned trial magistrate erred in law and in fact awarding (sic) Kshs. 30,000/= when the injuries sustained by the applicant were serious.***
- 3. That the learned trial magistrate decided the case against the weight of evidence on record.***
- 4. That the learned trial magistrate erred in law and fact in failing to assess the extent of the injuries as sustained by the appellant.***
- 5. That the learned trial magistrate erred in law and fact in failing to take into consideration the evidence of the appellant and the medical report as appertains the (sic) injuries sustained.”***

On 3rd October, 2008, the appellant was from Kisii going home aboard a Nissan Matatu registration Number KAY 085Y. She did not reach her destination though as the said matatu was involved in a road traffic accident at Kegati stage along Kisii-Keroka road. The accident according to the appellant, occurred when the respondent, his driver, servant and or agent allegedly so negligently drove, managed and or controlled motor vehicle registration number KAL 521L that he caused or permitted the same to collide into the matatu in which the appellant was travelling in from behind. As a consequence the appellant was seriously injured, suffered pain and damage. She was thereafter taken to Kisii District Hospital where she was treated for 2 days as an outpatient. Later she filed the suit whose judgment is the subject of this appeal.

As expected the respondent denied the appellant's claim. He denied that the appellant was a lawful passenger in the matatu and or that the said accident if at all, occurred solely due to the negligence or recklessness of his agent, worker, servant and or driver. The respondent further denied the particulars of negligence attributed to him, his driver, servant, worker, agent and or employee. Finally he denied the particulars of injuries sustained by the appellant and at that she was entitled to damages.

When the suit came up for hearing in the subordinate court, the appellant testified giving details of how the accident occurred and the injuries she sustained. The defence also gave their version as to how the accident had occurred. Having listened to the evidence from both sides and the submissions and the law applicable, the learned magistrate reached his decision on both liability and quantum. On the question of liability, the learned magistrate was of the view that the respondent was solely to blame for the accident. She delivered herself thus ***“...The defendant drives (sic) concedes to the fact that he hit the motor vehicle KAY 085Y. The rule of keeping a distance was not observed. The motor vehicle did not have a defect which would have caused it (sic) not to apply the brakes and avoid the hitting (sic). I do find that from my considered view the defendant is to blame for the accident. The negligence has been proved. I do find that the plaintiff's case is proved on a balance of probability. I do enter judgment in***

favour of the plaintiff as against the defendant at 100% liability". She then proceeded to award the appellant Kshs. 30,000/= as general damages having held the view that the injuries were relatively soft tissue in nature and ***"There is no permanent disability other than visible scars"***.

When the appeal came up for directions on 15th June, 2010, it was agreed among other directions that the same be heard by way of written submissions. Subsequently both the appellant and respondent filed and exchanged written submissions which I have carefully read and considered alongside authorities cited.

Essentially, the case for the appellant is that the award of general damages was too low as to attract interference by this court considering the nature and extend of the injuries sustained. In rebuttal, the respondent is of the view that the learned magistrate having found that the appellant only sustained soft tissue injuries which had healed leaving no permanent disability, the award as assessed was in line with authorities cited and as such was more than adequate compensation for the appellant.

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages were settled way back in the sixties and seventies in the cases of **Ilango –vs- Manyoka (1961) E.A 705** and **Lukenya Ranching & Farming Co-operative society Limited –vs- Karoloto (1970) E.A 414**. Those principles were recently re-echoed in the cases of **Kemfro Africa Limited t/a Mem Express Service, Gathogo Kanini –vs- A. M Lubia and Olive (1982-1988) 1 KAR 727** and **Ziphorah Wambui Wambaira & 17 Others –vs- Gachuru Kiogora, David Mwaniki Kuria –vs- Kiongora Saw Mills (2004) eKLR** to the effect that. ***"Those principles are that an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in assessing the damages, took into account an irrelevant factor, or left out of account a relevant factor or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages...."***. The case for the appellant is that the award made by the trial court as aforesaid is inordinately low that it must be wholly erroneous. The established method of assessing damages is that comparable injuries should, as far as possible, be compensated by comparable awards. As stated by **Lord Morris of Borth –y- Gest** in the case of **West (H) & Sons Ltd –vs- Shepherd (1964) A.C 326** at page 345 ***".....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 of comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional"***.

In this appeal I am being urged to consider the injuries sustained vis a vis the award made by the trial court and make a finding that the award was too low as to attract my intervention by way of enhancement of the same. However the respondent holds a contrary view to the effect that what was awarded to the appellant by trial court was sufficient compensation. According to the medical report by **Dr. P.M Ajuoga** tendered in evidence the appellant sustained:-

- Deep cut wound on the back.
- Bruises to both legs
- Chest contusion
- Bruises to both hands
- Cerebral concussion and
- Pain to the back.

It was the doctor's prognosis that the appellant sustained soft tissue injuries which had healed leaving her with visible scars with no permanent disability. In my view though the appellant suffered soft tissue injuries, they were not simple soft tissue injuries as they were accompanied with cerebral concussion. The appellant was also left with visible scars and being a woman, this is also a consideration. In her submissions in the trial court, the appellant had prayed for an award of Kshs. 250,000/= on the basis of the case of **Job Chanzu –v- Joseph Okello & Another, HCCC No. 4494 of 1989 (UR)**. It was a case decided by **Githinji J** (as he then was) way back on 12th November, 1993. In the said case the plaintiff though suffered more or less similar injuries as the appellant herein, he was nonetheless awarded Kshs. 150,000/= as general damages. However, my take on that case is that the plaintiff therein by far suffered very serious soft tissue injuries as compared to the appellant. It was not therefore a proper comparison.

As for the respondent, he was of the view that a sum of Kshs. 15,000/= was more than sufficient to compensate the appellant. He relied on the case of **Meshack Ingugi –vs- Synthetic Fibres (K) Limited,**

HCCC No. 46 of 1991 (UR). This case was decided by **Butter-sloss** on 30th October, 1989. The plaintiff in the case had sustained soft tissues injuries to the chest, right leg and head. He had fully recovered without any residual disability except for a scar on the right leg. My take on this case is that though comparable to the injuries sustained by the appellant herein, nonetheless the injuries were too minor.

It is also instructive that the awards above were made almost 20 years ago. They are not thus recent court decisions. They could only have been of assistance to the court, if the trial court had taken into account the incidence of inflation since they were made. It is no secret that inflation has taken a heavy toll on the Kenyan shilling since the awards aforesaid were made.

In my view, had the trial court considered recent decisions relating to soft tissue injuries and taken into account the inflationary trends in this country, I have no doubt at all that she would have awarded more than Kshs. 30,000/= to the appellant. I am therefore satisfied that, the general damages awarded to the appellant were so inordinately low as to amount to wholly erroneous estimate. I think that an award of Kshs. 70,000/= would have suited the occasion. In reaching this verdict I am fortified by the awards made by the court of appeal to various appellants in the case of **Ziphorah Wambui Waimbaira** (Supra). Some of the appellants therein had sustained soft tissue injuries comparable to those sustained by the appellant herein. They were each awarded Kshs. 50,000/=. That was on 17th December, 2004. The instant case court was heard and determined on 9th July, 2008. There was therefore a difference of about 4 years. An additional Kshs. 20,000/= over and above, Kshs. 50,000/= to take care of incidence of inflation is I think welcome.

In view of the foregoing, I allow the appeal and set aside the award of Kshs. 30,000/= made by the trial court and substitute thereof with an award of Kshs. 70,000/= as general damages plus costs and interest. Thus the appeal is allowed to that extent. The appellant shall have the costs of this appeal as well.

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

ASIKE-MAKHANDIA
JUDGE