



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

CIVIL APPEAL NO. 703 OF 2002

S. S. MEHTA & SONS LTD APPELLANT

VERSUS

JOAKIM MUNGATHIA M'LAARIA RESPONDENT

JUDGMENT

This is an appeal from the Judgment of the lower court which awarded the Respondent a sum of Kshs.290,000/= as general damages, and Kshs.3,100/= as special damages for personal injuries suffered in a motor vehicle accident. Aggrieved with that decision, the Appellant has appealed to this Court citing the following four grounds of appeal:

1. That the learned trial Magistrate erred in law and in fact in failing to consider adequately or at all the evidence placed before her. 2. That the learned trial Magistrate erred in law and in fact in awarding a sum that was manifestly excessive in the circumstances. 3. That the learned trial Magistrate erred in law and in fact in failing to follow rules of precedent in awarding general damages. 4. That the learned trial Magistrate erred in law and fact in coming to the conclusion that she did without any or any good reason or sufficient cause. Although the prayer for the orders sought asks that the Judgment on liability be set aside, Counsel for the Appellant made it clear, and it is evident from the grounds of appeal, that the only issue before this Court is the quantum of damages. In his Complaint, filed on 18th November, 2002, the Respondent has described his injuries as follows:

(a) Deep Cut wound on right Parietal aspect of the head. (b) Contusion on the skull. (c) Deep cut wound on the left antecubital fossa. (d) Loss of function on the left hand. (e) Loss of function on the left-elbow joint. (f) Bruises left knee. (g) Bruises right knee.

As a result of these injuries, the Respondent was hospitalized for nine days. There were two medical reports produced before the lower court – one by the Respondent's doctor, Dr Mwaniki, and the other commissioned by the Appellant's doctor, Dr Wambugu. Dr Mwaniki concluded that the Respondent suffered "grievous harm" as a result of the accident, that he suffered physical and psychological trauma with temporary incapacitation; and that his left elbow joint was likely to develop early damage (osteoarthritis). Dr Wambugu, on the other hand, concluded that the Respondent suffered "soft tissue injuries" from which adequate recovery had occurred; that recovery of injury to the forearm was anticipated; the scars were permanent; and the degree of permanent disability was 3%.

Based on these injuries, the learned Magistrate came to the following conclusion: "Having carefully taken into consideration the nature of the injuries sustained by the Plaintiff which were found to be severe soft tissue injuries and also taking into account the effect they have and are likely to have (on) the Plaintiff and bearing in mind too the degree of permanent disability found at 3%. Also having considered the authorities cited by both Counsels on quantum of damages ... I am satisfied that an award of

Kshs.290,000/= as general damages for pain and suffering is reasonable ...”

Against this background, Mr Mbugua, Counsel for the Appellant, argued that the award of Kshs.290,000/= for general damages was manifestly excessive. He cited the case of *Messay Jaggery Ltd vs Maurice Ochieng Maengo* (C A 46 of 2001 – Kisumu) where an award of Kshs.200,000/= was made for injuries that were much more severe and which resulted in the amputation of the Respondent’s left hand and arm at a level above the elbow joint, and which the Court of Appeal called “grave permanent injuries which will affect his status forever.”

He also cited the cases of *Margaret T. Nyaga vs Victoria Kioko* (Nairobi C A 395 of 2001); *Godfrey Muturi vs Charles Ndegwa* (Nairobi C A 1638 of 2001); *Stanley Maore vs Goeffrey Mwenda* (C A 147 of 2002 – Nyeri); and *Arrow Car Ltd vs Elijah S Bimomo* (C A 344 of 2001 – Kisumu). He submitted that the injuries in the case before this Court were superficial, and indeed the injuries to pelvis were not even pleaded, although relied upon by the lower court in making what he believed was an excessive award. Finally, with regard to special damages, he submitted that only Kshs.2,100/= had been pleaded and hence the award of Kshs.3,100/= was wrong.

Mr Ndegwa, for the Respondent, argued that the award was fair in the light of injuries sustained. Citing the case of *Jane Wangui Obwogi vs Lawrence Aburi* (C A 46 of 1997 – Nairobi), he submitted that the trial court had not acted on a wrong principle of law, nor was the amount so high as to present an entirely erroneous estimate of the award made. Having looked at the record of proceedings, and the medical reports produced before this Court, I am satisfied that the injuries suffered by the Respondent have been properly described by Dr Wambugu as “soft tissue injuries” with a permanent disability of 3%. Dr Mwaniki has not indicated his opinion on permanent disability.

The Respondent, of course, had a rather exaggerated view of his injuries, but this Court must be guided by the medical reports, and the award of damages must reflect these injuries, and the award should, as far as possible, be in line with comparable awards in similar cases. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs A. M. Lubia and Olive Lubia* (1982 – 88) 1 KAR 727 at page 730 Kneller J. A. said:

“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 judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one 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 damage. See *Ilango vs Manyoka* (1961) E. A. 705, 709, 713, *Lukenya Ranching and Farming Co-operatives Society Ltd vs Kalovoto* (1970) E. A. 414, 418, 419. This Court follows the same principles.”

These principles are sound, and applicable to this case. As Dr Wambugu’s report states, this was a case of soft tissue injuries. The Respondent suffered no fracture nor a dislocation of any limb. In *Arrow Car Limited vs Elijah Shamalla Bimomo & Others – Civil Appeal No 344 of 2001* (Unreported) the Court of Appeal said: “What about the injuries sustained by the Respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1st and 3rd Respondents herein suffered what the doctors described as soft tissue injuries the awards of Kshs.350,000/= for such injuries as made by the superior court are in our view, inordinately high as to warrant our interference ...

We must now consider what we think ought to have been awarded in respect of each respondent. Taking into account other decided cases on soft tissue injuries we think that the 1st respondent’s injuries should have attracted an award of Kshs.150,000/= as general damages for pain and suffering and loss of amenities. We therefore, award him that sum”.

As Counsel rightly submitted, in the *Messay Jaggery* case (supra) the Court awarded Kshs.200,000/= for injuries that were far more severe than here. In *Margaret Nyaga* (supra) this Court awarded Kshs.300,000/= for injuries that were also far severe. In *Stanley Maore* (supra) the Court of Appeal

reduced the award of Kshs.300,000/= to Kshs.100,000/= for soft tissue injuries, and similarly in Arrow Car Ltd (supra) the Court of Appeal awarded Kshs.150,000/= for soft tissue injuries. The Arrow Car case is the most recent in the line of similar cases, and both the Arrow Case and Stanley Maore case (supra) provide guidelines for damage awards in similar cases.

I am, therefore, of the considered opinion that the Respondent here was entitled to Kshs.150,000/= in general damages for the injuries sustained by him. With regard to special damages, the Respondent had pleaded (and proved) Kshs.2,100/=, and only that sum may be awarded. Accordingly, and for reasons stated, this appeal is allowed, the Judgment of the lower court is set aside and in its place I enter Judgment in favour of the Respondent for Kshs.150,000/= as general damages, and Kshs.2,100/= as special damages plus costs (in the lower court) and interest at court rates. I award one-half of the costs of this appeal to the Appellant.

Dated and delivered at Nairobi this 11th day of May, 2005.

ALNASHIR VISRAM

JUDGE