**Edson Converters Limited & another v Khamala (Civil Appeal 51A of 2018) [2023] KEHC 3327 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3327 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL 51A OF 2018**

**RN NYAKUNDI, J**

**APRIL 20, 2023**

**BETWEEN**

**EDSON CONVERTERS LIMITED ..... 1ST APPELLANT**

**SIMEON MWANGI NGARUIYA ..... 2ND APPELLANT**

**AND**

**ROBERT KAABA KHAMALA ..... RESPONDENT**

## JUDGMENT

1. The appeal herein arises from Eldoret CMCC 692 of 2016 instituted vide a plaint dated 22nd June 2016 where the plaintiff sought special and general damages arising from an accident that occurred don 2nd February 201. The cause of action was that the plaintiff sustained injuries as a passenger in Motor vehicle registration no. KAS 387E as a passenger due to the negligent driving of motor vehicle registration KBY 802Y by the respondent which caused said vehicle to be involved in an accident with Motor vehicle registration no. KAS 387E.

2. The parties consented on liability at 90/10 in favour of the plaintiff and upon considering the submissions of the parties and the authorities tendered therein, the trial magistrate awarded the plaintiff Kshs. 300,000/- as general damages and Kshs. 4,100/- as special damages.

3. Being aggrieved with the judgment of the trial court, the appellant instituted the present appeal vide a memorandum of appeal dated 3rd may 2018 premised on the following grounds;

    1. That the learned tri-al magistrate erred both in law and fact in pronouncing judgment in favour of the respondent on liability when there was no legal or otherwise basis of doing so in light of there being no sufficient evidence adduced before her.

2. That the learned trial magistrate erred both in fact and law by pronouncing judgment in favour of the respondent whereas the respondent had not proved appellants' liability on a balance of probabilities.

3. That the learned trial magistrate erred both in fact and law by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof she reached a wrong decision by holding the appellant liable for the accident.

4. That the learned trial magistrate erred both in fact and law by holding that that the respondents had proved negligence as against the appellants on a balance of probabilities and finding the appellant to blame for the accident in light of the evidence adduced.

5. That the learned trial magistrate erred both in fact and law by holding that that the respondent had proved negligence as against the appellants on a balance of probabilities.

6. That the learned trial Magistrate misdirected herself by failing to apply or applying wrong principles on the assessment of quantum on damages awardable to the respondent thus awarding damages which were manifestly excessive in the circumstances.

7. That the learned trial Magistrate erred in law and in fact by failing to consider the evidence of the Appellants.

8. That the learned trial Magistrate erred in law and in fact by taking into account irrelevant factors and failing to fake into account relevant factors thereby arriving at an erroneous judgment.

9. That the judgment of the learned magistrate is in the circumstances unfair and unjust.

**Appellant's Case**

4. There were no submissions on record for the appellant.

**Respondent's case**

5. The respondent filed submissions dated 12th May 2022. He submitted that the trial court's finding on quantum is not inordinately too low or so high so as to amount to a wholly erroneous estimate. He cited various comparable authorities in support of his submissions. He relied on the case of Eldoret HCCA No. 32 of 2017 - *Jyoti Structures Limited & Anor Vs Charles Ogada Ochola* where the Respondent sustained blunt injury to the neck, head, chest and right shoulder. The court upheld an award of Kshs 300,000 as general damages. He cited Nyeri HCCC No. 320 of 1998 - Catherine W. Kingori Vs Gibson T. Gichubi where the 1st Plaintiff sustained an injury on the left ankle, injuries on the legs and injuries on the chest. General damages were assessed at Kshs 300,000. He relied on Nairobi HCCA No. 791 of 1999 *Martin M. Mugi & 3 Others Vs Attorney General* where the Plaintiff sustained a deep extensive cut on the face, mild concussion and generalized soft tissue injuries. General damages were assessed at Kshs 350,000.

6. Learned counsel for the respondent urged that the sum of Kshs 300,000 as general damages is reasonable and considering inflation effluxion of time we find that the same suffices to compensate the Respondent for the injuries sustained. The special damages of Kshs 4,100 was specifically pleaded and proved by way of receipts. He urged the court to dismiss the appeal with costs.

**Analysis & Determination**

7. The duty of an appellate court was stated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

8. On consideration of the memorandum of appeal, the record of appeal and submissions by the Respondent it can be deduced that the issues at stake in this Appeal revolve around liability and assessment of quantum by the trial court. Although the Memorandum outlined grounds 1,2,3, 4, & 5 to be pointers challenging liability the record speaks otherwise. Why do I say so? Liability had been reached by the consent and apportioned at a ratio of 90:10 in favour of the Plaintiff.

9. Therefore on liability as pleaded by the Appellant the Memorandum of Appeal can briefly be answered by the following case law: In the case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag.VP stated that:" The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed. Similarly, in the case of case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that; "Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."

10. Having the aforesaid principles in mind, the Appellant Appeal on liability fails miserably so for no sufficient evidence has been availed to set aside the consent judgement. That leaves me only with the question as to the award of damages.

**Whether the award for quantum was inordinately high**

11. In addressing the issue the starting point will be the guidelines in *Cornilliac vs St Louis* (1965)7 WR 491 the leading authority, wooding CJ set out the matters to be looked at in assessing general damages:

    a. The nature and extent of the injuries sustained

    b. The nature and gravity for the resulting physical disability

    c. The pain and suffering experience

    d. The loss of amenities if any, and

    e. The extent to which pecuniary prospects are affected.

12. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

> An appellate court will not disturb an award for damages unless it is 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".

13. It is trite law that when awarding damages courts should be guided by comparable awards for similar injuries. From the medical report, it is apparent that the respondent sustained the following injuries;

    a. Blunt injury to the chest.

    b. Blunt injury to the abdomen.

    c. Blunt injury to both lower limbs.

    d. Bruises and blunt injury to both legs.

14. The same were classified as soft tissue injuries.

15. In *Anthony Nyamwaya v Jackline Moraa Nyandemo* [2022] eKLR, the respondent sustained the following injuries;

    a. Rugged cut wounds on the temporal region of the head.

    b. Tenderness on the neck.

    c. Tenderness on the anterior chest.

    d. Tenderness on the lower back.

    e. Tenderness on the shoulders.

    f. Swelling and tenderness on the right hand.

    g. Bruises on right index finger.

    h. Swelling, tenderness and bruises on both legs.

16. The appellate court upheld the award of Kshs. 250,000/- as general damages.

17. In the case of *Poa Link Services Co. Ltd & Another v Sindano Boaz Bonzemo*, HCCA NO. 17 OF 2019, Riechi J upheld the general damages of Kshs. 350,000/- for the plaintiff, who had sustained the following injuries: -

    a. Blunt injury to the chest.

    b. Bruises to lower abdomen.

    c. Bruises of the right hip joint.

    d. Bruises of the thigh; and

    e. Bruises on the knee.

18. The broad principles has indeed been established for a long time and was propounded by Lord Blackburn in Livingstones –vs- Rawyards Coal Company in the following terms: " I do not think there

is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages in settling the sum of money to be given for reparation of damages you should as nearly as possible gat at that sum of money which will put the party who has injured, or who has suffered, in the same position as he would have been in if he has not sustained the wrong for which he is now getting his compensation or reparation. In conclusion in the case of *British Transport Commission – vs- Gourley* (1956) A.C185 at page 197 also observed as follows: " The broad general principle which should govern the assessment of damages in cases such as this is that the Tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in fi he had not sustained the injuries".

19. Hence for the assessment of damages, the nature, duration and intensity of the pain, the seriousness of the injury, the extent of the physical and psychological diminution in health, the lose of enjoyment of life are of paramount importance in any given case. The courts therefore should in principle strive for full compensation however difficult it may seem bearing in mind the above critical elements. What is clear however much courts try it is difficult to assess pain and suffering and lose of amenities in monetary terms for there is an infusion of law and economics at play. The so called past precedents are just but a guide in exercising discretion for pain and suffering damages award. I let this Appeal rest there for now.

20. In my considered view, the award of general damages was commensurate with the injuries suffered and in line with comparable awards for similar injuries. in the premises, the appeal is dismissed with costs to the respondent.

**DELIVERED VIA E-MAIL DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF APRIL 2023**

**.....**

**R. NYAKUNDI**

**JUDGE**