



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 17 OF 2019

ABEL KIPRUTO MAGUT.....1ST APPELLANT

SAMMY MBURU.....2ND APPELLANT

VERSUS

JACKSON ABUYA OBONYO.....RESPONDENT

[Being an appeal arising from the Judgment and Decree of the Hon. J. Ng'arng'ar (CM) delivered in Kisumu CMCC NO. 159 OF 2021 on 29th November 2018]

JUDGMENT

By a judgment delivered on 29th November 2018, the trial court held the Defendants 100% liable for the accident involving the Plaintiff and a trailer belonging to the 2nd Defendant, **SAMMY MBURU**.

1. At the material time, the vehicle was being driven by the 1st Defendant, **ABEL KIPRUTO MAGUT**.

2. The trial court ordered the Defendants to compensate the Plaintiff, **JACKSON ABUYA OBONYO**, as follows;

a. General Damages Kshs 1,500,000/=

b. Special Damages Kshs 1,467,531/=

c. Costs and Interest at Court rates.

3. Being dissatisfied with the judgment, the Defendants lodged an appeal to challenge both the decision on liability and the decision on the quantum of the compensation.

4. The 6 Grounds of Appeal, which were raised by the Appellants can be summarized as follows;

i. The trial court disregarded the *evidence tendered by the appellants*;

ii. The manner in which the trial court handled the issue of liability occasioned a serious miscarriage of justice to the appellants;

iii. The trial court awarded Special Damages which had not been incurred by the respondent;

iv. The Damages awarded were excessive;

v. The General Damages awarded were *manifestly high*;

vi. The written submissions and authorities of the appellants were not taken into account.

5. The Appellants requested this court to set aside the Judgment, and to substitute it with a Judgment apportioning liability, and also awarding damages that were commensurate to the injuries sustained by the Respondent.

6. Secondly, the Appellant asked this court to set aside the entire award which the trial court had made for Special Damages.

7. Finally, the Appellants asked this Court to award them the costs of the appeal.

8. Being the first appellate court, I am enjoined by law to re-assess all the evidence on record and to draw my own conclusions therefrom. However, I am obliged to always bear in mind the fact that I did not have the benefit of observing the witnesses when they were testifying.

9. PW1, PC WILSON KAISAN, was a police officer whose responsibilities were in relation to Traffic duties.

10. He testified that the 1st Defendant reported that the trailer he was driving on 26th September 2011, had been involved in an accident.

11. He reported that people were telling him to stop the trailer which he was driving, as the vehicle had knocked down a person.

12. PW2, JACKSON ABUYA OBONYO is the Plaintiff. He testified that on the material day, he was walking along the Kisumu – Busia Road, behind a petrol station.

13. His evidence was that whilst he was walking next to the said petrol station, a trailer knocked him down, from behind.

14. He sustained serious injuries, as his left ankle was fractured, while the right thigh was completely crushed.

15. Due to the said injuries, **PW2** was admitted at the Aga Khan Hospital for 2 months. However, even after being discharged, **PW2** continued receiving treatment at the same hospital.

16. PW2 exhibited the receipts relating to the payments made in respect to the medical treatment he received. He also exhibited the Medical Report prepared by Dr. James Obondi Otieno.

17. During cross-examination **PW2** confirmed that **NHIF** made payments on his behalf; and that he paid Kshs 28,800/= on 18th November 2011, and he also paid a further sum of Kshs 39,600/=.

18. PW2 said that other payments were made by his employer and also by Resolution Insurance.

19. PW3, DR. JAMES OBONDI OTIENO, is a Practicing Orthopaedic Surgeon.

20. He testified that the Plaintiff had suffered the following injuries;

1. Weber C Fracture of the left ankle;

2. Injury to the right thigh, with massive hematoma;

3. Injury to the left thigh.

21. The doctor said that the Plaintiff was treated by, inter alia, fixing a plate with screws and tension band wire to the left ankle; as well as surgical and skin grafting on the right thigh.

22. PW3 testified that the Plaintiff suffered severe pain and blood loss.

23. In the doctor's assessment, the injuries sustained by the Plaintiff amounted to grievous harm.

24. The doctor also said that the Plaintiff would need physiotherapy for a period of 2 years.

25. Although the doctor had indicated that the implants should be removed after one-and-a-half years, both he and the Plaintiff testified that the implants had remained in situ.

26. After **PW3** testified, the Plaintiff closed his case.

27. Thereafter, the Defendants called one witness, **ABEL KIPRUTO MAGUT (DW1)**. He testified that on the material day, he drove a trailer which was laden with fuel. The said fuel was off-loaded at the Lakeview Petrol Station.

28. After, he had off-loaded the fuel, **DW1** decided to reverse the vehicle, so that he could get enough space to exit from the petrol station.

29. DW1 testified that his turn-boy was behind the trailer, assisting him as he was reversing.

30. Suddenly, he heard people screaming. This is what he said;

“I was to reverse to the upper gate. I was guided by my turn-boy. I engaged the gear and it had reverse alarm. I then was to direct the tank to the right.

As I reversed I heard screams. I applied hand break and alighted to know what was happening. I found an old man down.”

31. During cross-examination, **DW1** said that the Plaintiff was injured pursuant to the accident involving the trailer he was driving.

32. According to **DW1**, it was the Plaintiff who was to blame for the accident. In a nutshell, **DW1** said this about the Plaintiff;

“I blame the old man. He contributed.

The vehicle had a reverse alarm. The reverse speed is very low.”

33. After **DW1** testified, the Defendants closed their case.

34. I have now re-evaluated all the evidence on record.

35. I note that the Defendants did not challenge the Plaintiff about his testimony, concerning the place where the accident took place. The Plaintiff said that the accident occurred when he;

“..... was walking on the right side of the road towards Kicomi, along Kisumu- Busia road, next to National Petrol Station.”

36. Secondly, the Plaintiff testified that the vehicle knocked him down, from behind. That piece of evidence was also not challenged through cross-examination.

37. To my mind, that implies that the Plaintiff could not have seen the vehicle as it approached him.

38. On the other hand, the Defendants emphasized that the vehicle had a reverse alarm, when it was being reversed. If that is the position, the Plaintiff ought to have been able to hear the vehicle as it approached.

39. But the court cannot speculate about why the Plaintiff failed to hear the sounds from the trailer, as it approached the place where he was walking. I say so because during cross-examination of the Plaintiff, it was not suggested to him that the reverse alarm was emitting sound when the trailer was being reversed.

40. I found no factual basis for the Appellants assertion that;

“..... the Respondent largely contributed to his own misfortune.”

41. If anything, because **DW1** was relying upon the guidance of his turn-boy, who was behind the trailer at the material time, I find that it is the failure of the alleged guidance that led to the accident.

42. The driver had no idea what was behind the trailer, in the direction that he was reversing to. He did not know what had transpired, until he stopped the vehicle, after he had heard people screaming about the accident.

42. Although the driver had taken the precaution of having his turn-boy guide him, the Defendants failed to demonstrate that any meaningful guidance was provided to the driver.

44. Furthermore, by making a conscious decision to have a turn-boy stand behind the trailer, so as to be able to offer guidance, the driver was acknowledging that in the absence of such guidance, he would be faced with challenges when maneuvering the trailer in reverse.

45. Whilst it was a good idea for the driver to seek the guidance of his turn-boy, the failure by the said turn-boy to provide appropriate guidance cannot be attributable to the Plaintiff.

46. In my considered opinion the learned trial magistrate was right to have held the Defendants 100% liable.

Quantum of Damages

47. The law is well settled on the issue concerning the award of damages. In that respect, an appellate court will not disturb the award made by the trial court unless the said award was so inordinately high or low that it can only be deemed to constitute an erroneous estimate.

48. In this case the Appellants submitted that the trial court disregarded their submissions, leading to the award of an inordinately high amount.

49. A perusal of the Judgment reveals that the learned trial magistrate did not make any reference to the Appellants' submissions on the issue as to the quantum of damages.

50. The Appellants had, in their submissions at the trial court, submitted that Kshs 400,000/= was sufficient compensation on account of General Damages.

51. In support of that submission, the Defendants cited the case of **H. YOUGH CONSTRUCTION COMPANY LIMITED Vs RICHARD KYULE NDOLO [2014] eKLR** in which the High Court reduced the award from Kshs 350,000/=, to Kshs 250,000/=.

52. It was the Defendants' contention that the Plaintiff in that case had sustained injuries which were comparable to those of the Plaintiff in this case.

53. I have carefully read the Judgment of the Hon. Lady Justice B. Thuranira Jaden and note that the Plaintiff in that case sustained injuries which were described thus;

“..... a degloving injury on the left calf region. Both (medical reports) also refer to the ankle joint pains.

The report by Dr. Ndambuki states that the Respondent sustained blunt injury to the left ankle joint.

The report by Dr. Wambugu reflects that

‘ankle joint movements are Within normal range.’

The report by Dr. Wambugu further reflects that the Respondent had complained of pains in the left ankle joint.”

54. Whilst the trial court had described the injuries as “*grievous harm*”, Jaden J. noted that;

“The two medical reports, however, reflect serious soft tissue injuries which necessitated admission for about three months.”

55. In my considered opinion, the Plaintiff in this case suffered more serious injuries, which included a fracture of the left ankle joint.

56. Dr. James Obondi Otieno described the injuries as amounting to grievous harm. He also noted that the Plaintiff was likely to develop Post Traumatic Osteoarthritis of the left ankle as a permanent disability which will amount to 55%.

57. At the trial, the Plaintiff submitted that an award of Kshs 2,000,000/= would constitute adequate compensation. To support that contention, the Plaintiff cited **JECINTA WANJIKU Vs SAMSON MWANGI, HCCC NO. 166 OF 2004**, (at Nakuru).

59. In that case the Plaintiff had sustained the following injuries;

“(a) Head injury with cerebral concussion and a wound on the left forehead and scalp.

(b) Fracture acetabular rim right hip.

(c) Fracture of the right knee.

(d) Post traumatic osteoarthrosis right knee.”

59. In that case, Musinga J. (as he then was) awarded General Damages in the sum of Kshs 1,000,000/=.

60. In my considered opinion, the injuries in that case were more serious. However, I must admit that I found it difficult to appreciate why the doctor in that case assessed the disability at 40%, whilst in this case the disability was assessed at 55%.

61. Therefore, as I am not a professional in the medical field, I have to go by the professional assessment of the doctors, and thus accept that the permanent disability of the Plaintiff in this case denotes more serious injuries than those of the Plaintiff in **JECINTA WANJIKU Vs SAMSON MWANGI HCCC NO. 166 OF 2004**.

62. Viewed from that perspective, I find that the award of Kshs 1,500,000/=, by the trial court was not inordinately high.

Special Damages

63. The trial court made an award as follows; **Kshs**

a. Medical Expenses944,531.00

b. Medical Report	2,000.00
c. P3 Form	500.00
d. Search Fees.....	500.00
e. Removal of Implant	
(Future Expense).....	250,000.00
f. Physiotherapy for	
2 Years (Future).....	270,000.00
T O T A L	<u>1,467,531.00</u>

64. The Appellants submitted that the Respondent was only entitled to Kshs 68,400/= as the receipts he provided to the trial court proved that the Respondent only paid the sum of Kshs 68,400/=.

65. It was the Appellants' case that because the Respondent's Insurer, (**RESOLUTION HEALTH**) had paid the rest of the Medical Expenses, the Respondent did not incur or suffer, as a consequence.

66. On his part, the Respondent has told this Court that he produced "*medical receipts*" to support the claim for medical expenses.

67. I have perused the Record of the proceedings before this Court. I also perused the original record of the proceedings. I found only 2 receipts for Kshs 39,600/= and Kshs 28,800/=, respectively.

68. The other documents in support of Medical Expenses were "*Interim Inpatient Invoices*". Invoices do not constitute proof of payment.

69. When the Plaintiff asserted that payment had been made, he ought to have exhibited proof of such payment. However, the Plaintiff did not make available receipts or any other acknowledgement of receipt of payments.

70. The Respondent conceded, and rightly so, that;

"..... it is trite law that special damages should not only be pleaded but specifically proved."

71. I find that, save for the total sum of Kshs 68,400/=, the Respondent failed to specifically prove the claim for Medical Expenses.

Physiotherapy

72. The doctor had testified that the Plaintiff would need physiotherapy for 2 years, at the rate of Kshs 2,000/= per session, and that he would require 3 sessions every week.

73. The doctor's Report, which contains the foregoing is dated 4th January 2012.

74. When the Plaintiff testified on 6th July 2017 he said;

"I have been going for physiotherapy."

75. That means that by July 2017, physiotherapy was no longer something which was to be done at a future date. The Plaintiff testified that he had already been going for physiotherapy sessions.

76. In the circumstances, I find that the Plaintiff should have provided proof of actual payments which he had made. However, the Plaintiff did not produce any receipts in respect to the physiotherapy sessions which he had attended. In effect, the Plaintiff failed to specifically prove the claim for damages awarded for physiotherapy.

Removal of Implant

77. Although the doctor testified that the implant ought to be removed with 1.5 years, there is no explanation from the Plaintiff about the reason why that had not happened.

78. Dr. Obondi testified that the implant can only be removed if the patient visited the doctors for that purpose. The doctor also said that the patient would also need to be in a position to afford the required treatment.

79. Whilst the doctor's reasoning appears to be sound, I found no evidence from the Plaintiff about the actual reason why the implant had not been removed.

80. If the Plaintiff had testified that he could only visit the doctor, for the removal of the implant, after he had received money, I would have considered it necessary to uphold the award in that respect. But because there was no explanation why the implant had not been removed about 5 years after the accident, I find that it is possible that the proposed removal was not a necessity.

81. In the result, I find that the following Special Damages awarded to the Respondent ought not to have been awarded;

a. Kshs 944,531/=: *The said award is set aside and is substituted with an award of Kshs 68,400/=.*

b. Kshs 270,000/= for physiotherapy; and

c. Kshs 250,000/= for the removal of the *implant*.

82. To that extent, the appeal succeeds. However, in every other respect, the appeal is dismissed.

83. On the question of costs, I order each party to pay his own costs of the appeal, as the said appeal only succeeded partially.

84. For the avoidance of any doubt the trial court's award of costs for the suit, is hereby upheld.

DATED, SIGNED and DELIVERED at KISUMU This 2nd day of February 2021

FRED A. OCHIENG

JUDGE