REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CIVIL APPEAL NO. 128 OF 2019

FRANCIS NJUNGE KARANU.....APPELLANT

VERSUS

ROSE NDINDA KITEMA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. Mac' Andere (R.M.)

delivered on 25th October 2019 in CMCC No. 107 of 2019 in Kisii)

JUDGMENT

1. This is an appeal against the assessment of quantum by the trial court in a personal injury claim filed by the respondent. She was a passenger travelling along Kisii- Keroka road in the appellant's motor vehicle registration No. KBB 309D on 20th July 2018 when the vehicle collided with motor vehicle registration No. KCK 998V. The respondent claimed that as a result of the accident, she sustained the following injuries:

a. Deep cut wounds on the face;

b. Blunt trauma to the right shoulder;

c. Blunt trauma to the left shoulder;

d. Blunt trauma to the lower back;

e. Blunt trauma to the abdomen;

f. Blunt trauma to the pelvis;

g. Per vaginal bleeding with incomplete abortion;

h. Bruises on the right leg; and

i. Bruises on the left leg

2. The respondent was the sole witness in the case before the lower court. She adopted her written statement and produced treatment notes, a P3 form, a medical report, police abstract, receipts, demand letter, a copy of her identification card and a copy of statutory notice. During cross-examination, she stated that she had not healed completely and claimed to have developed a sight problem.

3. The appellant closed its case without calling any witnesses.

4. On considering the evidence before it, the trial court found the appellant wholly liable for the accident. It assessed damages payable to the respondent thus:

a. General damages for pain and suffering and loss of amenities Kshs. 800,000/=;

b. Special damages of Kshs. 8,100/= with interest at court rates from the date of filing until payment in full; and

c. Costs of the suit.

5. The appellant has not contested the trial court's finding on liability. His issue is with the assessment of general damages. He contends that it was speculative and excessive in view of the fact that the respondent sustained soft tissue injuries. He argued, in his written submissions, that the respondent had proposed a sum of Kshs. 600,000/= yet the trial court proceeded to award a sum of Kshs. 800,000/= which amount had not been submitted for.

6. It was also argued that the trial court erred in finding that the respondent sustained per vaginal bleeding with incomplete abortion as there was no mention of it in the initial treatment notes produced by the respondent. Reliance was placed on the case of ***Timsales Ltd v Wilson Libuywa [2008]Eklr*** where Maraga J. (as he then was) held that a medical report by a doctor who examined the respondent much later was of little help if initial treatment cards did not show that the respondent suffered an injury on the day and place he claimed he did.

7. The appellant urged this court to reduce the award of Kshs. 800,000/= to an award of Kshs. 90,000/=. He referred to the following authorities in support of his proposal:

a. ***George Mugo & Another v A K M (Minor suing through next friend and mother of A M K [2018]eKLR*** where the court awarded Kshs. 90,000 for soft tissue injuries;

b. The case of ***George Kinyanjui t/a Climax Coaches & Anor. vs Hussein Mahad Kuyale [2016] eKLR*** where the Respondent was said to have sustained injuries on his chest, neck, knees and lost two teeth. However, on appeal, the court, relying on both parties' medical reports, found that the loss of two teeth was unrelated to the suit accident and reduced the award of Kshs. 650,000.00 to Kshs.109, 890.00.

c. In ***Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR***, the court reduced general damages for soft tissue injuries from Kshs. 300,000/ = to Kshs. 100,000/=.

8. In his submissions before the trial court, the appellant had suggested an award of Kshs. 100,000/= based on the case of ***Ndungu Dennis (supra)***.

9. Conversely, the respondent submitted that the award made by the trial court was neither inordinately high nor low. She argued that she had produced a P3 form and a Medical report which classified her injuries as grievous harm. The medical report had also indicated that she had suffered psychological trauma due to the loss of pregnancy and would require post traumatic counseling.

10. The respondent asserted that the authorities she had relied on in her submissions before the trial court were more relevant to her case as compared to those cited by the appellant. She had referred to the case of ***Monica Korori Ndunda v Malindi Taxis Ltd [1997] eKLR*** where the plaintiff who had sustained a head injury with depressed skull, blunt injury to the left ear, soft tissue injury of the lumbar spine and injury of the left sacro-iliac joint was awarded a sum of Kshs. 450,000/=. She had also cited the case of ***Julius M'ringera M'mwongera v George Mutetha & Anor [2005] eKLR*** but did not furnish a copy of the authority for the court's consideration.

11. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of ***Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR*** thus:

> *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 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.*

12. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of ***Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR*** where the Court of Appeal held:

> *"Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."*

13. The appellant has contested the extent of the respondent's injuries. He argues that the respondent only suffered soft tissue injuries and that there was inadequate proof of per vaginal bleeding.

14. The injuries listed by the respondent in her plaint were a replica of the injuries outlined in the medical report prepared by Dr. Morebu Peter Momanyi on 31st August 2018. The injuries particularized in the plaint also tallied with those listed in the P3 form which had also been filled by Dr. Morebu Peter Momanyi. In the P3 form dated on 24th July 2018, the doctor indicated that the respondent had sustained multiple soft tissue injuries and per vaginal bleeding. He approximated age of the injuries as 4 days old.

15. Unlike in the case of ***Timsales Ltd (supra)***, the medical doctor in this case examined the respondent just a few days after the accident. The appellant did not protest the production of the medical documents presented by the respondent nor did he furnish a second medical report to counter the findings contained in the documents produced by the respondent. Although the initial treatment notes from Kisii Teaching and Referral Hospital did not state that the respondent had suffered per vaginal bleeding, I find that there was adequate proof that she had sustained the injury. I therefore find that the trial court did not err in its finding on the extent and nature of the injuries suffered by the respondent as she adduced adequate proof of the injuries specified in her plaint.

16. However, in its assessment of quantum, the trial court erred by failing to analyze the authorities cited by the parties in their submissions or give a reason for the award. This is sufficient reason to disturb the quantum of damages given by the court.

17. On analyzing the authorities referred to by the appellant, I found them to be inapplicable to the present case, as they relate to soft tissue injuries. The case of ***Monica Korori Ndunda (supra)*** which was relied upon by the appellant is more relevant as the plaintiff in that case sustained a serious head injury in addition to soft tissue injuries. The authority does not however reflect recent awards as it was decided in 1997.

18. In the case of ***Leah Wambui Ngugi v George Mbugua Karanja & 2 others Civil Appeal No. 532 of 2013 [2016] eKLR*** the appellant had suffered blunt injury on the lower back, swollen bruised on both knees and blunt injury on the abdomen and loss of pregnancy The court awarded the appellant a sum of Kshs. 350,000/= in general damages in September 2016.

19. Doing the best I can and taking into account the nature of the respondent's injuries, the principles and authorities set out above as well as the rate of inflation, I find that an award of Kshs. 450,000/= will suffice as general damages.

20. In sum, this appeal succeeds. The trial court's award is set aside and substituted with the following award:

a. General damages for pain and suffering – Kshs. 500,000/= with interest at court rate from the date of this judgement

b. Special damages – Kshs. 8,100/= with interest at court rates from the date of filing the suit until payment in full.

21. Each party shall bear his own costs of the appeal as the appeal has only been partly successful.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF APRIL 2021.

A. K. NDUNG'U

JUDGE