



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. 4 OF 2016

TAHIR SHEIKH SAID T/A TSS BUS SERVICES.....1ST APPELLANT

TAHIR SHEIKH SAID TRANSPORTERS LTD.....2ND APPELLANT

SALIM HASSAN NASSIR.....3RD APPELLANT

VERSUS

MOHAMED SHEE AHMED.....RESPONDENT

(Being an appeal from the Judgement by the Learned Principal Magistrate Hon. J. M. Macharia in Garsen PMCC No. 14 of 2011 delivered on 16th March 2016)

Coram: Justice Reuben Nyakundi

Wambua Kilonzo % Co. Advocates

Kimondo Gachoka & Co. Advocates

JUDGEMENT

Background

By a plaint filed on 23/6/2011 the respondent claimed in tort of negligence against the appellants; damages for personal injuries suffered by him in the course of travelling on 2/6/2010 along Witu-Lamu road, as a fare paying passenger in the appellants' motor vehicle registration number KAZ 681L. That at the time the subject motor vehicle was being driven by the 3rd appellant which lost control veered off the road as a consequence occasioning the injuries to the respondent.

After acknowledging service of the process, the appellants filed a formal defence. There after the trial proceeded in earnest by calling witnesses from both sides. The court heard evidence from the following witnesses:

PW1 – Mohamed Shee Ahmed, the respondent testified that he had been travelling in the motor vehicle registration KAZ 681L as a fare paying passenger when the driver, 3rd appellant drove it so negligently occasioning physical injuries. Further occasioning to the respondent he was to be treated at Mpeketoni Hospital as supported with treatment notes. Thereafter he was to be examined by **Dr. Ali Mwandera (PW2)** who corroborated his testimony as to the nature of injuries comprising the occipital bone fracture, lower incisor teeth, eye, the nose and left ear. To buttress his medical examination PW2 produced a medical report as evidence to that effect.

In addition, **PW3 Dr. Searooqur**, radiologist specialist confirmed that x-rays taken of (PW1) which served to proof fracture of occipital bone, with no other major injuries.

The trial court also heard from **Chief Inspector Juma** of Witu Police Station. in his evidence he produced a police abstract and demonstrated to the court that the P3 form was also issued to the respondent. The police abstract and P3 form issued were duly admitted in evidence.

At the conclusion of the hearing and by agreement of counsels, it was agreed that closing submissions with authorities be made to assist in the judgement writing.

The court in its pronouncement delivered judgement awarding the respondent Ksh.250,000/= for pain and suffering and loss of amenities. That was the bases of an appeal preferred before this court based on the following grounds:

- 1. The learned trial magistrate erred in law and in fact in finding that the respondent was entitled to general damages that were excessive as to amount to a wrong estimate.**
- 2. That the learned trial magistrate erred in law and in fact in failing to fully accord the appellants chance to avail their defence witnesses at defence hearing.**
- 3. That the learned trial magistrate erred both in law and fact in considering medical evidence from a witness whose identity is doubtful since he never attended to the respondent at the alleged hospital and thereby made a wrong finding as to the extent of injuries suffered by the respondent.**
- 4. The learned trial magistrate erred in fact and in law by closing defence case when the appellants had a formidable defence on fraud.**
- 5. The learned trial magistrate erred in fact and in law by awarding special damages that were not supposed to have been awarded since they were never incurred by the respondent at all.**
- 6. The learned trial magistrate erred both in law and in fact in failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages which was excessive in the circumstances.**

On these grounds the appellants' counsel submitted that the trial magistrate did not allow them an opportunity to adduce evidence during the declaratory suit hearing.

Learned counsel submitted that the respondent did not establish the claim on a balance of probabilities. Learned counsel submitted that on the strength of Dr. Mwandera and Dr. Farouq testimonies, the respondent did not seem to have suffered the injuries stated in his evidence on oath. To discredit the evidence at the trial learned counsel cited the case of **Timsales Ltd vs Wilson Libuywa [2008] eKLR**.

On the next limb on damages, learned counsel submitted that the award was manifestly excessive in view of the nature of injuries suffered and similar awards made by the court on the same set of injuries. Learned counsel contended that in assessing damages the approach is for the court to award damages to the respondent as far as possible which puts him in such position that he would have been had the accident not occurred to his physical body.

In pursuit of this ground learned counsel referred the court to the following authorities; **Kanga vs Manyoka [1961] EA 705, 709, Lukenya Ranching & Farming Cooperative Society Ltd vs Kavoloto [1979], Paul Kipsang vs Titus Osule Osore [2013] eKLR, Adbi Werdi Abdullahi vs James Royo Mungatia [2019] eKLR**. In essence learned counsel submitted that the award of Ksh.250,000/= was not within the jurisdiction for similar type of injuries and therefore an error committed hence ought to be corrected by the court.

In the respondent's closing submissions on the crux of the matter learned counsel objected to the line and approach taken by the appellants' counsel. According to learned counsel contention, the respondent suffered both skeletal and soft tissue injuries backed up with medical examination reports and the P3 form. That at the time of trial learned counsel submitted that the similar authorities reflected to projected a higher award on similar injuries. In persuading the court not to disturb the award, learned counsel cited the cases of Isaac **Waweru Mundia vs Kiilu Kakie Ndeti HCCC No. 312 of 2009, Nyambati Nyaswambu Erick vs Toyota Kenya Ltd**.

With regard to admissibility of expert evidence learned counsel cited the case of **Christopher Ndaru Kagina vs Esther Mbandi Kagina [2016] eKLR, Ratilal Govedhabhai Patel vs Lalji Makanyi [1957] EA 314, Prafulla Enterprises Ltd vs Norlake Investments Ltd Kisumu HCCA 117 of 2006**. This background epitomized to the position taken by the respondent's counsel that the appeal is not fit for setting aside as prayed by the appellant counsel.

Determination

This being a first appeal and the law requires that I be guided by the principles in **Selles v Associated Boat Co. Ltd [1968] EA 123 and Kirugi & Anor vs Kabuga & 3 Others [1987] KLR 347**. Therefore the crux of the appeal is whether the award of Ksh.250,000/= was an error or misdirection on the part of the learned trial magistrate, which calls for the jurisdiction of this court to be invoked.

It is plain and clear that general damages are usually determined taking into considerations the principles set out in **A. H. West & Son vs Shephard [1963] 2 AER 625**:

“In particular, the court is expected to consider the nature and extent of injuries, pain and suffering and loss of amenities, nature and gravity of the resentencing, physical disability and loss of amenities.”

I now turn to the appeal. The main ground is that the learned trial magistrate should not have awarded the respondent such manifestly excessive damages of Ksh.250,000/=. On consideration torches issue would be to reflect on the similar awards principle. In Sele case of **Zachary Kiraitu vs Samuel G. Njeru HCCC No. 5890 of 1993** the claimant suffered fracture of the left claudes, loss of upper left mid-ears, painful left ear, injuries for the left eye and occipital region. The court awarded Ksh.200,000/=. In **Kenya Power & Lightning Co. Ltd vs Zakayo Saitoti Ndengola & Anor [2008] eKLR**, the plaintiff suffered fracture of left femur, blunt injuries to the lower jaw. The court awarded Ksh.300,000/= in general damages.

Can it be said that all these injuries suffered by the respondent are not suitable for an award of Ksh.250,000/= for pain, suffering and loss of amenities is so high as to justify this court's interference with the learned trial magistrate award? I bear in mind that no two cases of motor vehicle injuries are exactly the same for one to form a suitable precedent of the other. So sometimes in assessment of damages past decisions remain to be a guide but of little assistance in determining the exact quantum of damages. This is more so on non-pecuniary damages for pain, suffering and loss of amenities.

In the instant case the injuries sustained by the respondent were undoubtedly confirmed from the testimony of (PW1) and corroborated with the medical reports by Dr. Mwandera. The credibility of that evidence largely remains unchallenged.

I think the true test can best be expressed in these words of the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express Service vs A. M. Lulua and Olive Lulua [1987] KLR 30** that:

“The principles to be observed by this appellate court in deciding whether, it is justified in disturbing the quantum of damages awarded by a trial judge are 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 wholly erroneous estimate of the damage.” (See also **Butt vs Khan [1977] 1KAR**).

Like, the respondent upon analysis of the evidence and the cited authorities, the cases referred to elsewhere in this judgement are by analogy relevant to the circumstances in the case at bar. There might be perceptible distinctions in regard to the age of the awards made, in those respective cases but by and large they provide a proper pathway for exercise of discretion in the matter.

In my view balancing the scales and the complete fusion of the divergent submissions I find no sufficient reasons to depart from the judgment of the trial court. In counsels submissions there are no abnormalities to the impugned judgement of the trial court when taken in context of the injuries suffered and the ensuring assessment that justified an award of Ksh.250,000/=.

For the reasons given I would dismiss the whole of the main appeal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (wambuakilonzoadvocates@gmail.com)