



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 204 OF 2011

JENIFFER JEBICH KOMEN.....1ST APPELLANT

KIPROP CHANGWONY.....2ND APPELLANT

VERSUS

MOSES SIMIYU NYONGESA.....RESPONDENT

(Being an appeal from the judgment of Honourable S.M Soita PM, delivered on 25th October, 2010 in Molo SPMCC No. 423 of 2010)

JUDGMENT

1. This appeal arises from a suit filed in the lower court by the respondent against the appellants as a result of an **accident involving motor vehicle registration No. KAP 691Y** driven by 1st defendant and the respondent being a passenger on 27th August, 2010. The plaintiff sought damages for the injuries he sustained.

2. After full trial, the trial court found the defendants 100% liable and awarded the plaintiff general damages of Kshs. 150,000 and special damages of Kshs. 6,500.

3. The defendant/appellants being dissatisfied by the said award, filed this appeal seeking to set aside judgment and review of damages awarded and cost of the appeal and the lower court be granted to the appellant. Grounds of the appeal are as set out hereunder: -

i. **THAT** the trial magistrate erred in fact and in law by failing to give a concise statement of the case, points of determination, decision thereon and reasons for his judgement pronounced on the 25th October 2011.

ii. **THAT** the learned magistrate erred in law and in fact in failing to consider the appellant's submissions.

iii. **THAT** the learned trial magistrate erred in law and in fact in failing to find that the respondent failed to prove his case on a balance of probability.

iv. **THAT** the learned trial magistrate erred in law and in fact in failing to take into account relevant factors and failed to find the 2nd appellant vicariously liable.

v. **THAT** the learned trial magistrate erred in law and in fact in awarding Kshs. 150,000/= general damages which is excessive and unrealistic in the circumstances against the injuries allegedly sustained.

4. The Court directed that the appeal be canvassed by way of written submissions. Both parties filed submissions summarized as hereunder.

APPELLANT'S WRITTEN SUBMISSIONS

5. The appellants submitted that the trial court failed to give a concise statement of the case and reasons for the judgement hence violating **Order 20 Rule 4 of the Civil Procedure Rules**; that all the Court said is that it believed the plaintiff's testimony and therefore held the defendants 100% liable for the alleged accident. The appellants submitted that they cannot fathom how the learned magistrate arrived at his judgement.

6. The appellant submitted that the plaintiff/respondent failed to prove his case on a balance of probabilities and yet the law placed duty on him to do the same and cited the case of **Evans Nyakwana v Cleophas Bwana Ongaro (2015) eKLR**.

7. Further that the trial magistrate erred in law and in fact by disregarding the appellant's submissions and only considering the respondent's submissions and finding the appellants 100% liable despite the respondent having failed to prove his case on a balance of probabilities as required by law.

8. The appellants further cited the case of **Nicholas Kobia Kinampiu v Overseas Co. HCCA No. 5832 of 1990, Nairobi** where the plaintiff who sustained soft tissue injuries of the scalp, neck, left eye and right knee was awarded Kshs. 10,000 for general damages. However, the trial court misdirected itself by failing to award anything close to what they had proposed and only considered the respondent's submissions.

9. The appellants submitted that the honorable magistrate did not appreciate the facts of the case and hence the unreasoned judgment; that the trial magistrate proceeded on wrong principles and as such he arrived at a figure which was inordinately too high in the circumstances. They urged this Court to find the award excessive and proceed to allow their appeal.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that the judgment was properly drafted as it reflected all the 4 elements of a judgment as envisaged under **Order 21 Rule 4, of the Civil Procedure Rules**. The judgment contains evidence of whether there was an accident, how the accident occurred, who was liable for the accident and the consequences of the accident.

11. The respondent submitted that the award by the trial court was appropriate and just considering the particulars of the injuries sustained by the respondent, the factors of inflation, and the year the authorities quoted by both parties were decided.

12. The respondent submitted that he sustained bruises of the forehead, soft tissue injuries of the chest, soft tissue injuries of the back and bruises on the right leg and the injuries confirmed by P3 form filled at Evans Hospital and a medical report by **Dr. Omuyoma**. The respondent further submitted thus that considering the injuries he sustained, the award was not excessive but sufficient and equivalent to the injuries suffered as opposed to the amount that the appellants had proposed in the lower court and cited the case of **Sumaria & Another v Allied Industries Ltd [2007] eKLR** and submitted that the present case does not present a scenario where the Court can interfere with an award of damages; that there was no misdirection on the part of the learned magistrates on the way that he assessed the damages.

13. The respondent further relied on the case of **Devki Steel Mills Ltd v James Makau Kisuli [2012] eKLR** in which the plaintiff was awarded Kshs. 250,000 for pain and suffering and loss of amenities for soft tissue injuries and submitted that the learned magistrate was right in his findings as to the award of given.

14. The respondent further submitted that he proved his case on a balance of probabilities by fully prosecuting his case to conclusion and adducing evidence in Court in support of his case; and the magistrate took the respondent's and the appellant's evidence into account before awarding damages to the respondent as it is evident from his judgement; that it is not true that the learned magistrate wholly disregarded the appellant's submissions.

15. The respondent submitted that the appellants failed to call any witnesses hence the respondent's evidence was uncontroverted and therefore unchallenged as was held in the case of **Trust Bank Limited Vs Paramount Universal Bank Ltd & 2 Others, Nairobi Milimani HCCA No. 1243 of 2001**. The respondent submitted that he proved his case on a balance of probabilities and that the trial court reached its decision based on merits and evidence.

16. The respondent submitted that the issue of vicarious liability was not raised in the appellants' defence and/or pleadings and the trial court made the correct determination on the issue of vicarious liability as it cannot amount to an issue in this Court as it was not in the trial court. He cited the case of **Dakianga Distributors (K) Ltd Vs Kenya Seed Company Ltd [2015] eKLR** where the Court of Appeal in making its decision relied on the holding by the **Supreme Court of Malawi** in **Malawi Railways Ltd v Nyasulu [1998] MWSC 3** and submitted that parties are bound by their pleadings and the law does not allow one to appeal on an issue that was not dealt with in the trial court.

17. The respondent urged this court to uphold the lower court's judgement and dismiss this appeal with costs to the respondent.

ANALYSIS AND DETERMINATION

18. This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where **Sir Clement De Lestang (V.P)** stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

19. In view of the above, I have perused the lower court proceedings, pleadings and submissions filed and find the following as issues for determination: -

i. Whether the trial magistrate erred in finding on liability.

ii. Whether the award on quantum of damages was inordinately high in light of the injuries sustained.

i. Whether the trial magistrate erred in finding on liability

20. The respondent submitted that the appellant failed to adduce evidence in the lower court to controvert her evidence and the evidence adduced occurrence of the accident was not therefore challenged. On perusal of the defence dated 24th February 2011 filed by the defendants/appellants, I note that in paragraph 3 they denied occurrence of the accident involving motor vehicle registration number KAP 691Y along Eldoret/Nakuru road at Mukinyai area and every allegation of negligence and in paragraph 6 enumerated the particulars of negligence on part of the plaintiff/respondent. They however failed to adduce evidence to prove negligence on part of plaintiff in Court nor show that the accident involving their vehicle didn't occur.

21. Plaintiff on the other hand availed police abstract to prove that the accident occurred and testified that the driver was overtaking and did not manage the vehicle; that he lost control of the vehicle resulting in the accident. The respondent as per the evidence adduced was a passenger in the vehicle herein and he could not have contributed to the accident. I therefore fore find that the trial magistrate did not err in the finding on liability.

ii. Whether the award on quantum of damages was inordinately high in light of the injuries sustained.

22. On quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court and that being the position, appellate court would rarely interfere and can only do so following the principles laid out in the case of **Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -Vs- Aziri Kamau Musika Lubia & Another (NBI C.A No. 21 of 1984)**

In that court, the Court of Appeal made the following guiding observations: -

"The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a 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 have been a wholly erroneous estimate of the damages."

23. Further in **Amos Wenyere & another v Ashford Murithi Muregi & 2 others [2017] eKLR** the court stated: -

"It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position he/she was prior to the accident".

24. **Dr. Omuyoma's** report indicate the following injuries

- a. Bruises on the forehead
- b. Soft tissue injury of the back
- c. Soft tissue injury of the chest
- d. Bruises on the right leg

25. At the time of examination, the respondent/plaintiff was experiencing pain on the chest; bruises on the forehead and right leg had healed. The appellants in their written submissions argued that the award on general damages of Kshs. 150,000/= was manifestly excessive for the soft tissue injuries sustained and submitted that there was no justification to award the same. Appellants proposed a sum of Kshs. 10,000/= as fair and reasonable and cited the case of **Nicholas Kobia Kinampiu v Overseas Co. HCCA No. 5832 of 1990.**

26. I however note that the above authority was decided about 20 years earlier and the issue of inflation have to be taken into consideration while arriving at award for it to be relevant at the time of determination. This matter was filed in the lower court in the year 2010 while the authority cited was decided in 1990. An award of kshs 10,000 would therefore be unreasonably low even if the injuries are comparable.

27. However, since the respondent sustained soft tissue injuries which had healed at the time of examination, the award slightly on the higher side sum of Kshs. 150,000/- was inordinately high. I therefore set it aside and substitute it with an award of Kshs. 110,000

28. FINAL ORDERS

1. Appeal on liability is dismissed

2. Appeal on quantum is hereby allowed.

3. Award under general damages is set aside.

4. General damages assessed at kshs 110,000.

5. Special damages to remain as assessed by trial magistrate.

6. Each party to bear own cost of appeal.

Judgment dated, signed and delivered via zoom at Nakuru This 13th day of May, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Ms. Makori holding brief for Gekonga Counsel for Appellant

Ms. Chelagat Counsel for Respondent