



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 104 OF 2009

MARY NJERI MUNGAL.....APPELLANT

VERSUS

JOSEPH ODINGO OGOLA.....RESPONDENT

(Being an appeal from the judgment of Honourable E. Tanui Resident Magistrate, Nakuru, delivered on 14th May, 2009 in the original Nakuru CMCC No. 1248 of 2005)

JUDGMENT

1. This suit arises from claim filed in the lower court by the appellant for **injuries sustained from an accident while she was travelling as a pillion** passenger in a bicycle along Moi Road within Nakuru County when the bicycle was knocked down by motor vehicle registration number KAV 507B on 22nd May, 2005.

2. After full trial, the trial court found the defendant 100% liable and awarded the plaintiff general damages of Kshs. 30,000 and special damages of Kshs. 2000.

3. The plaintiff/appellant being dissatisfied by the said award, filed this appeal and prayed for quantum to be set aside, that this Honourable court do re-assess damages payable to the appellant with view to enhancing the same and costs of the appeal be borne by the respondent.

4. The appellant cited the following grounds of appeal;

i. That the Learned magistrate erred in law and in fact in awarding damages so low and not proportional to the injuries sustained.

ii. That the learned magistrate erred in law and in fact in failing to evaluate and consider the appellant's evidence on record.

iii. That the learned magistrate erred in law and in fact in failing to evaluate and consider the appellant's submissions.

iv. That the learned magistrate erred in law and in fact in failing to set out points for determination and determine them as per the law.

5. The appeal was canvassed by way of written submissions. The appellant filed their written submissions but the respondent despite being served and a return of service filed in court failed to file submissions.

APPELLANT'S WRITTEN SUBMISSIONS

6. In seeking enhancement of the award, the appellant relied on the case of **Joseph D. Otiende v Hayer Bishan Singh & Sons HCC No. 972 of 1992 Nairobi** and **Quentine Wambua v Ndunda Wambua Kituu [2012] eKLR** where the plaintiff were awarded Kshs. 130,000 and 160,000 respectively. The plaintiff had submitted for an award of Kshs. 180,000 considering the issue of inflation, the severity of the injuries sustained, the age of the authorities relied upon, and the vicissitudes of life. The appellant thus submitted that the trial magistrate should have awarded general damages that were within the range of the authorities relied on.

7. The appellant further cited the case of **Tridev Construction vs Charles Wekesa Kasembeli Civil Appeal No. 121 of 2002** where the court relied on the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini vs A.M Lubia and Olive Lubia (1982-88) L KAR 727** and submitted that the present case presents to this Honourable Court a scenario where the Court ought to disturb the award issued by the lower court and argued that there was misdirection on the part of the learned trial magistrate in assessment of the damages as the general damages awarded to the appellant were very low in light of the injuries sustained and should therefore be enhanced.

8. The appellant further submitted that the trial court erred by holding that the plaintiff did not file submissions yet they were filed as shown on page 17 of the record of appeal. She submitted that the trial magistrate failed to put into consideration the appellant's submissions in making his judgement and urged this Court to consider the appellant's submissions on record together with the case laws relied upon and enhance the appellant's award.

9. The appellant submitted that **Doctor Kiamba** testified and produced a medical report which described the injuries sustained by the appellant as soft tissue injuries to the chest, back, right leg, right ankle joint and foot.

ANALYSIS AND DETERMINATION

10. 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 follows: -

"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."

11. In view of the above, I have perused the entire record of appeal and considered the submissions by counsel for the appellant and find that the issue for determination is **Whether the award on quantum of damages was inordinately low in light of the injuries sustained.**

12. In respect to quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court. Being a discretionary matter, it is now well settled that an 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 -v- Aziri Kamau Musika Lubia & Another (NBI C.A No. 21 of 1984)** where the C.A 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."

13. There is no doubt that Courts while assessing damages, must ensure that damages should commensurate with injuries.

14. Similarly, the Court in **Amos Wenyere & Another v Ashford Murithi Muregi & 2 Others [2017] eKLR** the Court stated as follows: -

"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"

15. I note from the evidence adduced in Court by **Dr. Wellington Kiamba** that the appellant sustained soft tissue injuries to the chest, back, right leg, right ankle joint and foot. On reexamination, the doctor stated that the soft tissue injuries were severe.

16. I note that the authorities cited by counsel for the defendant in the lower court were decided in 1991 and 1990 which is about 15 years before the dispute herein was filed. Change in inflation rate and the severity of the injuries should be considered. In my view the kshs 25,000 proposed by defendant's advocate was low bearing in mind the lapse of time.

17. I note that the plaintiff proposed award of kshs 180,000 for general damages in the lower court and cited the case of **Otiende Vs Hayer Bishan Singh & Sons HCC NO.972 of 1992, Nairobi**. The injuries were to the back and left hand with severe backache and severe pains on the left small and ring finger which had affected his grip; the doctor's conclusion was that surgery cannot alleviate the problem. Plaintiff prayed for kshs 180,000 as general damages but was awarded kshs 131,000 as general damages.

18. Whereas injuries in the above cited case are comparable to the injuries herein, the plaintiff/appellant herein as per the doctor's report would fully recover as the disabilities, he found at the time of examination were temporary from his opinion.

19. I however note that the decision was made 13 years before this matter and it's important to consider the lapse in time and element of inflation. I am therefore in agreement with the appellant that the award by the trial magistrate was inordinately low and not commensurate with the injuries sustained by the appellant.

20. Taking into consideration the injuries sustained by the appellant and the element of inflation, I would be inclined to award general damages of kshs 120,000.

21. **FINAL ORDERS**

- a. Appeal is allowed.
- b. Award under general damages is set aside and kshs 120,000 awarded to the appellant.
- c. Award under special damages not interfered with
- d. Each party to bear own costs of appeal.

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

.....

RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

M/s. Makori holding brief for Gekonga Counsel for Appellant

Matiri Mburu Counsel for Respondent