



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO. 84 OF 2019

BETWEEN

MARY WANJAH GACHOMBAH.....APPELLANT

AND

JOSINTA ADHIAMBO OGANA.....RESPONDENT

(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's PMCC No. 122 of 2018 by Hon. J.P. Nandi –Principal Magistrate).

JUDGMENT

1. Mary Wanjah Gachombah, the appellant herein, was the defendant in Oyugis Principal Magistrate's CMCC No. 122 of 2018. This was a claim that arose from a road traffic accident where the respondent was injured. In the judgment that was delivered on 13th September, 2019 the respondent was awarded Kshs. 2,000,000/= general damages.

2. The appellant was aggrieved by the said judgment and filed this appeal. She was represented by the firm of P.R. Ojala & Company advocates. She raised five grounds of appeal as follows:

- a) That the learned trial erred in law and fact by holding the appellant 100% liable contrary to the weight of the evidence.
- b) That the learned trial erred in law and fact by awarding general damages which were manifestly excessive thereby occasioning miscarriage of justice.
- c) That the learned trial erred in law and fact in diverting from the facts in pleadings and evidence on record.
- d) That the learned trial magistrate acted in error when he failed to properly evaluate evidence on record thus arriving at an erroneous decision.
- e) That the learned trial magistrate erred in and fact in failing to appreciate the authorities supplied by the appellant thus arriving at a wrong decision.

3. The respondent was represented by the firm of Nyatundo & Company, Advocates. She opposed the appeal on the following grounds:

- a) That the appellant was found liable based on the evidence on record.
- b) That the award was fair and reasonable.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. In her pleading the appellant denied that there was an accident. This is what she pleaded at paragraphs 4 and 7:

4. The defendant denies that on 16th April, 2018 along Kisii-Oyugis road at Oyugis Township, motor vehicle registration No. KCF 846M was negligently driven, managed and/or controlled thereby knocked down the plaintiff who was a pedestrian on the said road and caused her much pain, suffering and loss and the plaintiff is put to strict proof thereof. Particulars of

negligence in paragraph 4 (a) - (j) are also denied and the plaintiff is put to strict proof thereof.

7. Further and without prejudice to the foregoing the defendant wish to state that if any accident occurred which is denied, the same was caused and contributed by the negligence of the plaintiff.

6. It is trite law that parties are bound by their pleadings. The court of Appeal in the case of **Global Vehicles Kenya Limited vs. Lenana Road Motors [2015] eKLR** emphasized the importance of pleadings in the dispute resolution. They also quoted **Thorp vs. Holdsworth, (1876) 3 Ch. D, 637 at 639**, the leading case on the subject. This is what the learned judges of Appeal said:

i. Thirdly, pleadings contribute immensely to speedy resolution of dispute and cost-efficient delivery of justice. Because pleadings ensure that the dispute is focused and precisely defined, they not only eliminate ambushes and surprises, but also wastage of time and unnecessary expenses involved in calling witnesses to prove or disprove matters that are not in dispute before the court. It can therefore be argued that pleadings also contribute immensely to the realization of the cardinal constitutional principle that justice shall not be delayed.

Jessel M. R. articulated this view very well in **Thorp vs. Holdsworth, (1876) 3 Ch. D, 637 at 639**, as follows:

The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.

In the instant case, the mode of pleading by the appellant was suicidal. It did not propose any defence except denial of the allegations by the respondent. The trial court was therefore left with the evidence adduced in court to decide on the issues raised.

7. The evidence that was adduced during trial was that an accident that occurred on 16th April, 2018 along Kisii-Oyugis road at Oyugis Township, involving motor vehicle registration No. KCF 846M and the respondent. The evidence indicated that the motor vehicle veered off the road and hit the respondent where she was arranging her bananas. This evidence was unchallenged with any other evidence. The appellant did not testify all call any witness. The learned trial magistrate was therefore left with no other version except that of the respondent. His finding that the appellant was 100% liable cannot be faulted.

8. The appellant has contested the quantum of damages. There are principles which ought to guide an appellate court before interfering with an award by the trial court. These principles were spelled out by the Court of Appeal (Law JA) in the case of **Butt vs. Khan [1981] KLR 349** at page 356, as follows:

...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.

I will therefore be guided by this authority in this case.

9. The respondent sustained the following injuries:

- a) Bruises on the scalp;
- b) Chest contusion;
- c) Fracture of the right humerus;
- d) Deep cut wound on the left arm;
- e) Cut wound on the right lower limb;
- f) Fracture of the right tibia; and
- g) Fracture of the right fibula.

For these injuries she was awarded Kshs. 2,000,000/= general damages which the appellant claims was inordinately excessive.

10. At the trial, the appellant proposed an award of Kshs.300,000/= and cited some two authorities in support of the proposal. In the case of **Zachariah Mwangi Njeru vs. Joseph Wachira Kanoga [2014] eKLR** the respondent sustained fracture of tibia/fibula. He was awarded Kshs.800,000/= general damages in June 2014. In the case of **Beatrice Wairimu Wandurua vs. C. Dorman Limited [2009] eKLR** the appellant sustained injuries that were summarized as follows:

She suffered extensive compound fractures of her left tibia. She also had a compound fracture dislocation of the left ankle joint. A large portion of the bone was lost in the process. There is no doubt that a lot of pain and blood was experienced. The loss of a large portion of the shin bone has complicated the treatment to a very great extent. There is a very big gap between

the fractured segment of the left tibia. There is no way that natural process can bridge this gap. Above mentioned is going to require surgery at a later date to close the gap. The only method I can think of is transposing the fibula by staged procedure. The fibula can be cut proximally and distal and transposed to the end of the fractures of the tibia. This way the fibula will act as a spare part. This is a complicated surgery which will require patience and a lot of resources for it to succeed. It is practiced elsewhere and in good hands it can be successful considering she is of a young age. I would put this financial outlay for future surgical treatment at approximately Shs.850,000/= (eight hundred fifty). She is going to require a long period of surgical treatment to make the surgery successful. Presently she has disability which in this case I would assess at approximately 40% (forty).

For these injuries she was awarded Kshs. 550,000/= for suffering and loss of amenities in July 2009.

11. It is worth noting that the **Beatrice Wairimu Wandurua** was decided 10 years prior to the impugned decision herein whereas the injuries in **Zachariah Mwangi Njeru** were less severe to the ones suffered by the respondent herein.

The respondent on the other hand was seeking Kshs. 6,000,000/= general damages and relied on the following decisions:

a) **Michael Njagi Karimi vs. Gideon Ndungu Nguribu & another [2013] eKLR** where the plaintiff suffered the following injuries:

(i) Bruises, swelling and tenderness of the right arm and forearm and a displaced fracture of the right humerus.

(ii) Deformity and swelling of the right forearm and fractures of the right radius and ulna with displacement.

(iii) Injury to the right lower limb involving the right leg which was tender, swollen and deformed. X-ray examination showed a fracture of the right tibia and fibular.

(iv) Swelling and deformity of the left thigh with apparent shortening; x-ray revealed a segmental fracture of the left femur with marked displacement.

He was awarded Kshs.2,000,000/= for loss of amenities in 2013.

b) **Henry Moriasi Osiemo vs. Quid J. Mohamed & Merali Mfadhul [2001] eKLR** the plaintiff sustained the following injuries:

Head injury – concussion, multiple lacerations on head, fracture humerus (left arm), fracture femur (right thigh), fracture ribs 4th & 5th right side, fracture trochanter right hip and fractures pelvis (pubis and right sacro -iliac joint). He was awarded Kshs.1.5 million in general damages in 2001.

12. After considering the authorities relied by both parties, I find that the award was not excessive. The appeal is therefore dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE