



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 241 OF 2019

MWATA MOSES MUGISA.....APPELLANT

VERSUS

MWANAKOMBO MWABWAGIZO.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. P. Wambugu

(Principal Magistrate) in PMCC No. 296 of 2015 Kwale delivered on 20th November, 2019)

JUDGMENT

1. The Appellant **Mwata Moses Mugisa** was the 1st Defendant in Mombasa PMCC No. 296 of 2015. The Appellant was sued by the Respondent for an injury claim where the facts of the case were that on or about 20th April, 2015 the Respondent was lawfully travelling as a fare paying passenger aboard Motor Vehicle Registration No. KAC 615C along Kwale Komboni Road at Vuga Area when the Appellant and/or his authorized driver, servant, agent and/or employee negligently and/or carelessly drove Motor Vehicle Registration No. KAL 947L which caused it to collide with Motor Vehicle Registration No. KAC 615C, hence occasioning the Respondent serious injuries, pain and damage.

2. The Respondent's case was that the accident occurred due to the negligence of the Appellant, which he described as driving at a high speed, failing to exercise sufficient caution, failing to have sufficient regard to passengers travelling along on the same road, loss of control of the motor vehicle, driving on the wrong side of the road and failing to slow down, apply brakes, swerve, stop or in any other way so as to manage the motor vehicle in an effort to avoid the accident.

3. The Respondent stated that due to the negligence he suffered; *fracture of the sternum; head injuries associated with concussion, laceration on the right side and muscle spasms; severe injuries of the neck involving laceration on the right side and muscle spasms; huge Hematoma measuring 8 x 3 cm on the upper back; Hematoma on the left upper arm; Three cut wounds on the right forearm measuring 8cm, 3cm and 2 cm respectively with a piece of glass embedded in the soft tissues; 6cm cut wound on the calf of the right leg and several others on the right knee and thigh; bruises on the left forearm and hand, blunt injury to the abdomen on the left iliac fossa; bruises on the dorsum of the right hand; several lacerations on the left lower limb on the knee, thigh and calf regions and several lacerations on the mid-back.*

4. In the **Plaint** dated **7th December, 2015** filed in the Trial Court, the Respondent sought as against the Appellant *general damages; special damages of Kshs.2,000/= and costs of the suit plus interest.*

5. The Appellant filed a **Statement of Defence** on the **16th August, 2016** in which he denied that any accident occurred, and if the same occurred, it was due to the negligence of the driver of the motor vehicle registration no. KAC 615C in which the Respondent was a passenger. The Appellant sought that the Respondent's suit be dismissed against him with costs.

6. The Respondent called three (3) witnesses while the Appellant neither called any witness nor file any witness statements. The Plaintiff/ Respondent testified as PW1. PW1 stated that on **20th April, 2015**, he was involved in a road traffic accident. He stated that he was on board a personal saloon car and was seated at the co-driver's seat and when they reached around Vuga area, he heard an impact and he lost consciousness. He said that when he woke up, he found himself at Msambweni Hospital.

7. PW1 testified that he found he was injured with a cut wound on the neck, head cut, cut on hand, scapulae, fracture, cut on the back, cut on legs, cut on the nose and cut on the stomach. He stated that he was treated and admitted in hospital for two (2) weeks and his family incurred costs.

8. It was PW1's testimony that he reported the accident at Diani Police Station and was issued with a P3 form and a police abstract. He stated that the driver was arrested but he did not know if he was charged.
9. He testified that was see by Dr. Ndegwa who prepared a report and was paid Kshs.2,000/=. He maintained that there was no vehicle ahead of them and were bumped from the rear and that he blames the driver of the lorry for the accident.
10. PW1 stated that he was in pain and sought from the court that he be awarded damages and costs.
11. PW2 was **Dr. Stephen K. Ndegwa** who stated that he did a clinical assessment and prepared a medical report dated the **11th June, 2015** wherein all his findings were captured. He stated that to prepare his report, he relied on treatment notes from Msambweni Hospital, P3 forms and X-ray films. He testified that the X-ray films showed the Respondent had suffered a fracture of the sternum and all other injuries were in relation to the fracture.
12. PW2 testified that he was paid Kshs.2,000 for the report and Kshs.10,000 to attend court.
13. PW3 was **No.84682 PC Dominic Asunwa**, who was stationed at Diani Police Station performing traffic duties. He stated that he had a file of an accident that occurred on **20th April, 2015** at about 5.30 pm along Kwale Komboni Road Vuga area.
14. He testified that the accident involved **KAL 947L Nissan UD Bus** and **KAC 615 U Subaru**. That one **Matano Abedi**, a male adult was driving **KAC 615V** from Kwale towards Komboni and he had a passenger Mwakombo Juma. That the driver of **KAL 947L Nissan UD Bus** was **Noah Julius Amanyanya**.
15. It was PW3's testimony that on reaching vuga area, the lorry driver lost control and rammed the Subaru from behind and ran over it. The wreckage of the Subaru was trapped under it. He stated that the accident was reported by the Public and **PC Mohammed Abdikadir** together with **Inspector Loibon** rushed to the scene of the accident.
16. He testified that the victims were rushed to Kwale sub- County Hospital and transferred to Msambweni Sub-county Hospital. He stated that the driver of the Subaru **Matano Abdei** succumbed to his injuries on his way to the hospital.
17. PW3 testified that both vehicles were towed and detained at Diani Police Station, where investigations commenced and one **Noah Julius Amanyanya** was charged with the offence of causing death by dangerous driving which case is pending.
18. It was PW3's testimony that the registration of the Subaru is as it appeared in the Police Abstract as **KAC 615U**. Both the P3 form and Police abstract emanated from his station.
19. The Defendant did not call any witnesses. The suit was thus, undefended.
20. On **30th April, 2018**, parties in the suit recorded a Consent on liability which was filed on **3rd May, 2018** and the same was adopted as an order of the trial court. Parties settled that liability was settled be apportioned at 75% as against the Appellant and 25% against the Respondent.
21. After hearing the parties, the trial court delivered its **Judgment on 20th November, 2019** and awarded the Respondent Kshs.500,000/= as general damages, special damages of Kshs.2,000/= and costs plus interests. The General Damages as awarded was subjected to the agreed liability apportionment by parties.
22. Being dissatisfied with the quantum on general damages, the Appellant filed an appeal before this Court and raised the following grounds: -

1. The learned trial magistrate erred in law and in fact in failing to hold that the plaintiff herein suffered soft tissue injuries by overlooking the primary evidence on injuries.

2. That the assessment and award of general damages for pain suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate.

3. That the learned trial magistrate in assessing damages for Pain and suffering and loss of amenities failed to apply the correct principals by leaving out of account, the, the age of the Plaintiff, the length of suffering of the Plaintiff and the fact that the Plaintiff had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.

4. That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principals and judicial precedent and the submissions by parties that she made an award for pain suffering and loss of amenities that was erroneous and inordinately high.

5. The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of *stare decisis* and take into account public interest. He thus made an award for pain, suffering and loss of amenities that was arbitrary, inordinately high and erroneous.

6. That there is a wanton of discretion on the face of the assessment of damages in lieu of current awards for the soft tissue injuries making the awards of Kshs. 500,000/= for fully healed soft tissue injuries is excessive and an affront to public policy.

23. The Appellant prayed that the Appeal be allowed and the assessment of damages for pain and suffering and loss of amenities be set aside and the award be reduced downwards, the court do re-assess the award for general damages for pain, suffering and loss of amenities and costs of this appeal and proceedings in the subordinate court be awarded to the Appellant.

24. Directions were then given on **8th February, 2021** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **27th November, 2020** while the Respondent filed theirs on the **20th January, 2021**.

25. Parties relied on their written submissions in their entirety.

ANALYSIS AND DETERMINATION

26. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that it neither saw the witness nor heard the evidence when the parties were testifying to see their demeanour. (See the case of **Peters-vs-Sunday Post Ltd [1958] EA 424**).

27. I have carefully considered the pleadings and submissions filed herein. The only issue for determination is *whether the award on general damages was based on a wrong principle of law, and thus was inordinately high*.

28. The Appellant's contention is that the trial court failed to consider trite principles in awarding general damages comparable to the injuries of the Respondent and therefore making the award of Kshs.500,000/= that was manifestly high.

29. According to the medical report of **Dr. Ndegwa**, the Respondent was unconscious, admitted in hospital for two (2) weeks for the following injuries; *fracture of the sternum; head injuries associated with concussion, laceration on the right side and muscle spasms; severe injuries of the neck involving laceration on the right side and muscle spasms; huge Hematoma measuring 8 * 3 cm on the upper back; Hematoma on the left upper arm; Three cut wounds on the right forearm measuring 8cm, 3cm and 2 cm respectively with a piece of glass embedded in the soft tissues; 6cm cut wound on the calf of the right leg and several others on the right knee and thigh; bruises on the left forearm and hand, blunt injury to the abdomen on the left iliac fossa; bruises on the dorsum of the right hand; several lacerations on the left lower limb on the knee, thigh and calf regions and several lacerations on the mid-back*.

30. The trial court took into consideration a medical report by **Dr. Udayan Sheth** as was presented by the Appellant. The trial court indicated that the findings of Dr. Ndegwa and Dr. Udayan were similar except for the finding of a fracture of the sternum. The learned Magistrate referred back to the medical notes and found that the Respondent was diagnosed with a tentative fracture of the sternum at Msambweni Hospital but no X-ray film was produced as proof of this.

31. I have looked at the decision of the trial court and I find that it did consider the authorities that the parties relied on. According to the Learned Magistrate, the Respondent's proposal of an award of general damages of Kshs. 2, 500,000/= was on the higher side since no fracture had occurred in the case herein, while the Appellant's proposal for Kshs.100,000/= was too low as it did not consider the circumstances that the Respondent lost consciousness and was admitted in hospital for two weeks. In his discretion, the learned Magistrate in assessing the injuries of the Respondent, found an award of Kshs.500,000/= as favorable.

32. It is trite law that the assessment of damages is the discretion of a trial court. In assessing general damages, courts must have the presence of mind to ascertain the sum of general damages that other courts and especially what appellate courts would ordinarily award in respect of a particular injury. A party's compensation ought to be comparable to awards by other courts. In view of the aforesaid, a court must therefore be guided by precedents. This is what the Court of Appeal stated in the case of **Kigaragari –vs- Aya [1985] KLR, 273**, the Court of Appeal stated: -

“...Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford...”

33. Further, it is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly/ inordinately low and that a trial court had proceeded on the wrong principles or misapprehended the law.

34. The Court of Appeal in the case of **Kigaragari –vs- Aya (supra)** held that: -

“...In order for the appellate court to interfere with the High court award on general damages, it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred...”

35. After assessing the injuries as suffered by the Respondent, the trial Court found them to be soft tissue injuries without a fracture and relied on the case of **Francis Ochieng & Another –vs- Alice Kajimba [2015]eKLR**, where Justice Majanja in 2015 awarded Kshs. 350,000/= for multiple tissue injuries without fractures in addition to head injuries which aggravated the injuries. And in the case of **Isaac Katambani Iminya –vs- Firestone East Africa (1969) Limited [2015]eKLR**, where Justice Serگون increased an award to Kshs.250,000/= for general damages for multiple soft tissue injuries without fractures with an aggravated head injury.

36. As matters stand, the trial court gave the reason for awarding Kshs.500,000/= as general damages to be soft injuries aggravated by a head injury and spinal injuries.

37. A look at the injuries suffered by the Respondent as listed severally above, revealed no spinal injuries and I thus find that the award of Kshs.500,000/= was based on non-existent injuries which award calls for interreference by this Court.

38. I therefore find and hold that the trial court considered irrelevant factors when assessing damages and a result of which, made an award which, in my humble view is not comparable to other awards where the injuries are similar.

39. I now proceed to analyse the following decisions, while appreciating that no two injuries can be exactly the same, in **Grace Mwhiki Ngugi –vs- NNM (minor suing through next friend) Ano. [2019]eKLR**, Justice R.E Ougo substituted an award of Kshs.450,000/= with an award of Kshs.350,000/= for the injuries of *severe head injury and remained comatose for a week, deep cut wound on the posterior knee, blunt trauma to the back, deep extreme lacerations on the chest, multiple lacerations on both legs, extreme functional burns on the left thigh and an admission for three weeks in hospital.* In the case of **Duncan Mwenda & 2 others –vs- Silas Kinyua Kithela [2018] eKLR**, the Plaintiff sustained the following injuries; *severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger, soft tissue injuries on the chest wall and was admitted for 5 months and in an unconscious state for that period.* The trial court made an award of Kshs.600,000/- which was reduced to Kshs.350,000/- on appeal.

40. Comparing the above cases to the instant case, I find the injuries to be more comparable. I am therefore in agreement with the appellant that the award by the trial magistrate was inordinately high in light of the injuries sustained. I thus set aside the award of Kshs.500,000 on general damages made by the trial court. In lieu thereof, after considering the cases cited and inflationary trends, I award the respondent a sum of Kshs.400,000/- in general damages, costs and interest. This is fair and reasonable compensation in the circumstances of the case.

41. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

42. Each party to bear its own costs.

It is so ordered

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 8TH DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Hamisi for the Appellant

M/S Takah Counsel holding brief for Mutubia Counsel for Respondent

Court Assistant - Winnie