



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.11 OF 2018

BETWEEN

JOSHUA OUMA OUKO.....APPELLANT

AND

RAYMOND OLENDO.....RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate’s CMCC No. 66 of 2017

by Hon. R.N.B. Maloba –Senior Resident Magistrate).

JUDGMENT

1. Joshua Ouma Ouko, the appellant herein, was the plaintiff in Homa Bay Chief Magistrate’s CMCC No. 66 of 2017. This was a claim that arose from a road traffic accident on 1st December, 2016. The accident involved motor vehicle KBW 043N ZC 3538 and motor vehicle KBV 683Z. The appellant sustained injuries for which he was awarded of Kshs.1, 000, 000/= general damages, special damages of Kshs.619, 730/=.

2. The appellant was dissatisfied with both general and special damages and filed this appeal. He was represented by the firm of Ochillo & Company Advocates. He raised four grounds of appeal as follows:

- a) That the learned trial magistrate erred in awarding an amount in general circumstances that was inordinately low.
- b) That the learned trial magistrate erred in failing to award future medical expenses when the same was clearly advised by the doctor.
- c) That the learned trial magistrate erred in failing to appreciate the injuries suffered by the appellant.
- d) That the learned trial magistrate failed to consider the documentary evidence and the submissions presented by the appellant in awarding general damages.

3. The respondent was represented by the firm of Simiyu, Opondo, Kiranga & Company Advocates. They did not respond to the appeal and did not file any submissions.

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. For a court to award special damages, the same must be specifically pleaded and strictly proved. The appellant had pleaded special damages as follows:

- a) Police abstract.....Kshs.200.00
- b) Medical Report.....Kshs6,500.00

- c) Doctor's court attendance fees.....Kshs4,000.00
- d) Medical expenses.....Kshs 621729.55
- e) Future medical expenses.....Kshs 300,000.00

6. The appellant proved Kshs.1, 250, 368/= special damages. In the medical report Dr. Morebu Peter Momanyi was of the opinion that the appellant would require Kshs.300, 000/= for future medical expenses. This figure was not challenged and it ought to have been awarded. I therefore set aside an award of Kshs. Kshs.619, 730/= special damages and substitute it with an award of Kshs.1, 550,368.00.

7. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...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.

8. The appellant contends that the award of Kshs. 1,000,000/= general damages was inordinately low. The appellant sustained the following injuries:

- a) Fracture of the right femur (comminuted);
- b) Fracture of the right ulna;
- c) Right maxillary sinusitis;
- d) Fracture of the left radius; and
- e) Contusion on the neck.

9. At the time of compiling of the report, the appellant was using clutches and was unable to walk without support. The doctor was of the opinion that recovery would take long and he was to require physiotherapy and occupational therapy. These together with the removal of metal implants will cost Kshs.300, 000/=.

10. The respondent had proposed an award of Kshs. 800,000/= general damages of Kshs.5, 000,000/=. Both parties relied on and cited several decisions. The injuries suffered by the plaintiff in the case of **Alex Wachira Njagua vs. Gathuthi Tea Factory & another [2010] eKLR** were close to what the appellant sustained. The plaintiff sustained the following injuries:

- a) Blunt injury of the head with a contusion;
- b) Fracture of the left tibia;
- c) Fracture of the right fibula;
- d) Cut wound of the forehead;
- e) Bruised elbow; and
- f) Bruised knee.

For these injuries the plaintiff was awarded 3,000,000/= general damages for pain and suffering on 23rd February 2010.

11. I am persuaded that the award by the learned trial magistrate was inordinately low. I will therefore interfere and set aside the award of Kshs 1,000,000/= and substitute it with an award of Kshs.3,000,000/=. This will be subject to the contribution negligence as agreed between the parties. The appeal therefore succeed with costs.

DELIVERED and SIGNED at HOMA BAY this 13th day of July, 2021

KIARIE WAWERU KIARIE

JUDGE