



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: Hon. D. K. Kemei - J

CIVIL APPEAL NO. 88 OF 2018

JOHNSON NGISHU KANYIRI.....1ST APPELLANT

PHILISILAH KIMANI.....2ND APPELLANT

-VERSUS-

FLORENCE WAUSI MUTISO.....RESPONDENT

(Appeal from the Judgment of Hon. G. O. Shikwe (Mr.) (SRM) at Kithimani Principal Magistrate's Court in Civil Suit No. 188 of 2015 delivered 27th June 2018

BETWEEN

FLORENCE WAUSI MUTISO.....PLAINTIFF

VERSUS

JOHNSON NGISHU KANYIRI.....1ST DEFENDANT

PHILISILAH KIMANI.....2ND DEFENDANT

JUDGEMENT

1. The Respondent had sued the Appellants for damages following an accident caused by the Appellants' motor vehicle registration number KBN 786A which was said to have been carelessly and negligently driven by the 1st Appellant who was then the driver, agent and servant of the 2nd appellant who was the registered owner. It was pleaded that the appellants' vehicle was reversed without warning and which rammed onto motor cycle registration number KMDC 044Y as a result of which the respondent who was a pillion passenger was injured. The respondent pleaded particulars of negligence vide paragraph 5 of the plaint dated 25/6/2015.

2. The Appellants filed a defence dated 1/10/2015 in which they denied occurrence of the accident or negligence on the part of the 1st appellant. They attributed negligence to the Respondent and the rider of the motor cycle registration number KMDC 044Y, and stated on a without prejudice basis, that if an accident ever occurred, it was inevitable. In its judgement dated 27th June 2018, the trial court found the 1st Appellant 60% liable for the accident and the 2nd Appellant vicariously liable for the negligence of his driver, and awarded the Respondent general damages of **Kshs 400,000**; special damages of **Kshs, 6,500/-**; Net award of **Kshs 243,900/-**; costs and interest.

3. The Appellants aggrieved with the judgment on quantum filed a memorandum of appeal dated 18th July, 2018 raising the following grounds of appeal:

a. THAT the learned trial magistrate erred both in law and fact in awarding general damages to the Respondent against the weight of the evidence adduced before the court and without consideration to the submissions of the Appellants/Defendants whilst making the award.

b. THAT the learned trial magistrate erred both in law and facts by failing to properly scrutinize and evaluate the evidence tendered by the Appellants and correctly relate the same to the case law cited in court and thereby failed to arrive at a fair and reasonable assessment on the issue of compensation to the Respondent.

c. THAT the learned trial magistrate erred both in law and fact in awarding Kshs. 400,000/- as general damages to the Respondent as the same is excessively high and also in failing to find that the nature of injuries sustained by the Respondent did not warrant such an award.

d. THAT the learned trial magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by the laws of natural justice.

e. THAT the learned trial magistrate erred both in law and fact in applying the wrong principles and failing to appreciate and be guided by the prevailing range of comparable awards in cases of similar nature awarded by various superior courts.

f. THAT the learned trial magistrate erred both in law and fact in making an award on quantum which is too high and was not supported by relevant authorities, guided by the doctrine of precedent, case law of similar facts and guided by the Laws of natural justice and/or commensurate with the injuries suffered by the plaintiff.

g. THAT the award on general damages was against the weight of the evidence before the court and was without any consideration to the submissions of the Defendants/Appellants whilst making the award.

4. Parties agreed to dispose of this appeal through written submissions. The Appellants filed their submissions dated 13th May, 2021 while that of the Respondent are dated 25th May, 2021.

5. The Appellants submitted that although the appellate court should not ordinarily interfere with an award of damages by a trial court, this court should interfere with the trial court's award in this appeal and relied on **Ephantus Mwangi & Geoffrey Nguyo v Duncan Mwangi Wambugu [1982-1988] 1 KLR** and argued that the award was inordinately high compared to the injuries the Respondent suffered. According to the Appellants, the doctor's medical report relied on by the Respondent indicates that she only suffered chest injuries and right upper limb injuries.

6. It was submitted that according to Dr. Wambugu's medical report the injuries of the Respondent consisted of soft tissues and were minor in nature. According to the Appellants, the doctor assessed that no total permanent incapacitation occurred. The Appellants blamed the trial court for ignoring the medical report by their doctor as well as their submissions and urges the court to take note of the fact that the 2nd Medical examination was done 25 months after the accident and wishes this court to fully adopt the findings of the medical report by Dr. Wambugu P.M.

7. The Appellant relied on Court decision in **Helle Sejer Hansen & 2 Others v. Julius Kakungi Mukavi (2020) eKLR** where the court held that: **"I have considered the two medical reports. They are three months apart. Although the report by Dr. Okere states that the respondent suffered 10 percent permanent incapacity, Dr. Wambugu who saw the respondent last, did not find any permanent incapacity. The doctor concluded that the respondent had made sufficient recovery and the fracture had united. There was no challenge to this conclusion by the respondent."**

8. Therefore, the Appellants submitted that the award be set aside and should this court find that an award should be made, the said award of general damages of **Kshs. 400,000/-** be reduced to **Kshs. 100,000/-**.

9. The Appellant relied on the case of **Nyambati Nyaswabu Erik v. Toyota Kenya Limited & 2 Others (2019) eKLR** where the court set aside the award of general damages by subordinate court and substituted it with an award of **Kshs. 90,000/-**.

10. The Appellant also relied on the case of **PF (Suing as next friend & Father of SK (minor) Victor O Kamadi & anor (2018) eKLR** and the case of **Ndungu Dennis v Ann Wangari Ndirangu & Anor (2018) eKLR** where the court awarded **Kshs. 100,000/-** respectively.

11. The Appellants contended that the lack of reference by the trial magistrate to the medical report by Dr. Wambugu led to the award of the excessive general damages yet in the case of Dr. Wambugu there was no dislocation and the appropriate award to adequately compensate the Respondent would be **Kshs. 100,000/-** subject to the liability already apportioned.

12. The Appellants urge this honourable court to allow this appeal and set aside the decision of the trial magistrate on quantum with costs to the Appellants.

13. The Respondent opposed this appeal and supported the trial court's decision. It was submitted that the **Kshs. 406, 500/-** in general damages and special damages awarded was reasonable due to the seriousness of the Respondent's injuries and is also commensurate with court awards for similar injuries at that time.

14. The Respondent relied on the following cases: **Joseph Ndinguri Mwatheke vs Justsus Ngusi & Another HCCC No. 1450 of 1991 Nairobi** and **Mulandi David Kole vs. George Odhiambo Obiewe & Another HCCA No. 105 of 2016 Machakos**

15. The Respondent urges the court not to interfere with the lower court awards and to dismiss the Appellants appeal with costs as the same lacks merit and uphold the judgement of the lower court.

16. I have considered the appeal, submissions and the lower court record. This being a first appeal, it is the duty of this court, as the first appellate court to reconsider, re-evaluate and reanalyze the evidence afresh and come to its own conclusion as to whether to uphold the decision of the trial court. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. Further, in *PIL Kenya Limited v Oppong* [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that”.

17. **PW1, Dr. Simon Kioko Muli**, a clinical practitioner at Matuu level four hospital and with license no. A3342/18, testified that on 21st May, 2015 for purposes of medical report saw the Respondent a victim of road traffic accident on 9/12/14. He relied on the treatment notes and P3 form from Matuu Level 4 hospital and noted that she sustained injuries that revealed among others a right elbow posterior dislocation. On cross examination, he testified that he classified the injuries as severe soft tissue injuries regardless of the dislocation.

18. **PW2, Salat Diba**, number 79682 Police constable attached to Matuu traffic base, testified that on 9th December 2014 he received a report of a road accident where a rider of motor cycle registration number KMDC 044Y reported the accident. According to the rider, he was caring the Respondent and another passenger when Isuzu lorry registration number KBN 789A heading in the same direction stopped and reversed on the narrow murram road, hit and injured both the Respondent and the other pillion passenger. On cross examination he stated that the 1st appellant was charged with a traffic offence No. 552/2015 but did not know the outcome of the case. He also stated that he did not visit the scene and he adopted his evidence that he had given in criminal case number 186/2015.

19. **PW3, Florence Wausi Mutiso**, the Respondent herein, adopted her witness statement filed on 3rd June 2015 which is to the effect that after the accident she received treatment at Nthungululu dispensary and later Matuu level 4 hospital. She produced treatment notes as well as receipts. She stated that she still had residual pains. On cross examination, she testified that she and the other pillion passenger did not have helmets on. She stated that the appellants' lorry reversed suddenly and hit them and they fell on the right side of the road.

20. **DW1, Johnson Ngishu Kanyiri**, the 1st Appellant herein, adopted his statement filed on 2nd March 2016. He testified that he has driven for the past 7 years and was acquitted of the traffic case for lack of sufficient evidence. He stated that it was the motor cyclist who hit his lorry from behind and he denied reversing the lorry as alleged. He stated that the police did not visit the scene and he had to draw his own sketch plan regarding the accident which he produced as an exhibit.

21. After considering the evidence, the trial court held the 1st Appellant 60% liable for the accident and the 2nd Appellant vicariously liable for the negligence of her driver, and awarded the Respondent both general and special damages prompting this appeal. The appellant faulted the trial court for holding that their driver was wholly to blame for the accident and failed to attribute some contributory negligence to the respondent. According to the Appellants, the award of damages was inordinately high as to represent an erroneous estimate of damages.

22. The respondent on her part supported the trial court's finding on quantum. She argued that based on the injuries she sustained and assessed, the award of general damages was fair and reasonable.

23. The issue for determination in this appeal is whether the respondent's case on liability and quantum had been proved to the requisite threshold of proof.

24. On the issue of liability, it is noted that the trial court apportioned liability upon the appellants at 60% while the remainder to be shouldered by the respondent. The trial court accepted the version of events by the respondent and the police officer that the 1st appellant who had reversed the lorry and thus caused the accident. The learned trial magistrate established that the motor cycle rider escaped without injuries as he might have embarked on evasive measures to avoid the collision and that the respondent and her fellow pillion passenger were unfortunate. I have perused the record as well as the evidence of the respondent, the police officer and the 1st appellant. There were no independent witnesses and that the 1st appellant's version could not be corroborated as the motorcycle rider was not enjoined into the suit for contribution and/or indemnity by the appellants. The respondent who was a pillion passenger gave her version that the appellants' lorry that they were following from behind suddenly reversed and hit them which was backed by the police officer. Indeed, the 1st appellant confirmed that he was charged with a traffic offence in regard to the aforesaid accident but maintains that he was acquitted for lack of evidence. He also maintained that the motor cycle rider who was following him from behind rammed onto his lorry. Even if the 1st appellant was acquitted of the traffic charge, his culpability in the civil suit could still be proved since the proof in a civil case is on a balance of probabilities and hence the acquittal is of minimal effect. The evidence showed that the appellants' lorry had reversed without warning and caused the accident. I am inclined to believe the version by the respondent and her witnesses. The 1st appellant did not observe the highway code of traffic as he did not ensure that he first had a proper look out of other road users before reversing his lorry. The 1st appellant stated that he made his own sketch maps of the scene which he introduced into the proceedings. It was appropriate for him to have ensured that they were validated by the police officers at the scene. Further, the 1st appellant blames the motorcyclist for ramming onto his lorry but he did not see it fit to enjoin him into the suit for indemnity and/or contribution. Again, despite both the motor cycle and lorry being detained by the police, the rider's motorcycle was released and the 1st appellant charged with a traffic offence. This then lends credence to the respondent's assertion that the 1st appellant was negligent. On the respondent's contributory negligence, it is noted that she confirmed that she had no helmet at the time and as per evidence of the 1st appellant she had fallen down and injured herself while the rider escaped unhurt. The respondent must be held to have contributed to the accident in that she boarded a motorcycle while without a helmet which might have assisted her from sustaining the injuries. It also transpired that the rider did not get hurt probably due to the presence of a helmet. It is also highly likely that the respondent on sensing danger opted to jump off the motor cycle in a bid to save herself only to be received by the unforgiving ground. Looking at the circumstances, I find the apportionment of liability by the trial magistrate of 60% to 40% in favour of the respondent to be fair and which must be upheld.

25. As regards the second issue, the appellants have contended that the trial court did not consider their doctor's medical report, submissions and quoted precedents. However, that seems not true according to the trial court's judgment. The court stated at page 4 of the judgment:

“.....it is clear to me that the Plaintiff sustained injuries from the accident as highlighted by the medical reports produced.....Having perused all the authorities cited.....”

26. It is clear from the above extract that the trial court considered the Appellants submissions and was alive to the fact of the appellant's doctor's medical report.

27. The question to be answered is whether the award of damages was inordinately high. It has long been held that an appellate court should not interfere with exercise of discretion by a trial court unless it acted on a wrong principle, took into account irrelevant factors or failed to take into account relevant factors. This was aptly put by **De Lestang**, Ag VP in **Mbogo v Shah** [1968] at page 94:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

28. In **Gitobu Imanyara & 2 others v Attorney General** [2016] eKLR, the Court of Appeal stated:

“It is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

29. The principle had earlier been stated in **Butt v Khan** [1981] KLR 349, where the Court (**Law. J.A**), held that:

“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 at a figure which was either inordinately high or low.”

30. In this appeal, the trial court considered the injuries the respondent suffered and bore in mind the period of incapacitation as regards the dislocation as well as the decisions the respondent had relied on.

31. Assessment of damages involves the exercise of discretion, and as already pointed out, the principles on which this court, sitting on appeal may interfere with exercise of that discretion are clear. It must be satisfied either, that the trial court in assessing the damages, took into account an irrelevant factor, or failed to take into account a relevant one, or the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

32. In her plaint, the respondent pleaded that she sustained; severe pain and tenderness on the neck; severe pain and tenderness on the back; deep cut wound on the left thigh; severe pain and tenderness on the left thigh; cut wound on the left ankle joint region; severe pain and tenderness on the left ankle joint region; cut wound on the left foot; severe pain and tenderness on the left foot.

33. The medical report by **Dr. Muli Simeon Kioko**, dated 21st May, 2015 confirmed the injuries the respondent sustained. The respondent's present complaints were; on and off chest pains and was on analgesic drugs and self-heat therapy at home.

34. The appellants filed a report by Dr. Wambugu P. M dated 10th January, 2017 that noted that the respondent's injuries were soft tissue only and were minor in nature, that she had since made a full recovery and no further complaints were envisaged and no total permanent incapacitation occurred.

35. The trial court referred to the medical reports by the two doctors, and the fact that there was divergence on the opinion & prognosis. The court did not however say anything about that discrepancy. The two reports were about two (2) years apart and that the appellants doctor observed that injuries had healed well and that the respondent had made a full recovery and that no total permanent incapacitation had occurred.

36. The two medical reports appear to differ on the assessment of prognosis. Whereas the respondent's doctor who had seen the respondent about 5 months after the accident and put temporary incapacitation, the appellants doctor saw the respondent about two (2) years later and put no total permanent incapacitation. It would have been important for the trial court to state whether to accept the assessment of temporary incapacitation by the respondent's doctor, or no permanent incapacitation by the appellants' doctor. In my view, it would be a challenge to reconcile this discrepancy and hence it is appropriate to take note of the injuries sustained and the period that lapsed while she healed.

37. Further, whereas the respondent's doctor opined that the respondent's present condition as an on and off chest pains and that she was on analgesic drugs and self-heat therapy at home, would that significantly change the position regarding the award?

38. While the assessment of damages is discretionary, the exercise of that discretion is guided by certain principles. Among those principles

is that comparable injuries should as far as possible be compensated by comparable awards albeit bearing in mind that no two cases are exactly alike.

In the case of **Stanley Maore v Geoffrey Mwenda [2004] eKLR** the Court of Appeal stated: -

“.....Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

The other principle is that the court must consider inflation and passage of time. This was held in the case of **Ugenya Bus Service v Gachoki [1982] eKLR** and also in the case of **Jabane v Olenja [1986] KLR 661** where the court stated: -

“In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation.”

39. I am satisfied that in arriving at the awards the learned trial magistrate took into account all the above principles. I have also considered the appellants case in light of the above principles. The injuries sustained by the plaintiffs in the cases cited by counsels for both parties were similar to those of the respondent.

40. I wish to point out that the learned trial magistrate did the same and went a mile further by taking into account the effects of inflation on the economy and the period of incapacitation as the dislocation healed when awarding damages. (see page 4 of the trial magistrate’s judgement)

“..... taking into account and especially bearing in mind the period of incapacitation as the dislocation healed, I shall award general damages of Kshs. 400,000/-.....”

41. The specials were specifically pleaded and strictly proved by production of receipts and were hence properly awarded. I find therefore that the trial magistrate did not err and that the awards were fair and just in light of the injuries suffered by the respondent as well as past awards and passage of time.

42. In light of the foregoing observations, it is my finding that the appellants’ appeal lacks merit. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF JULY, 2021.

D. K. KEMEI

JUDGE