



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 01 OF 2020

MICHAEL ODIWUOR OBONYO.....APPELLANT

VERSUS

CLARICE ODERA OGUNDE.....RESPONDENT

[Being an appeal arising from the decision of the Hon. R. K. Ondieki (SPM)

delivered in Kisumu CMCC No. 197 of 2015 on 10th December 2019]

JUDGMENT

The Appellant, **MICHAEL OWUOR OBONYO** was the Defendant in the suit before the trial court.

1. He brought this appeal after the trial court held him 100% liable for the accident in which his vehicle had collided with the motor cycle of the Respondent, **CLARICE ODERA OGUNDE**.
2. In his Memorandum of Appeal the Appellant challenged both the findings on the issue of liability and the quantum of damages that the trial court had awarded in favour of the Respondent.
3. The Respondent had been awarded General Damages in the sum of Kshs 500,000/=.
4. The Appellant submitted that the said award was inordinately high, considering that the Respondent had sustained only “*blunt injuries*.”
5. It was the Appellant’s submission that the trial court erred by assessing the damages without giving any reasons for its findings, and without backing it up with any relevant authorities.
6. In the opinion of the Appellant, the Respondent had suffered minor blunt soft tissue injuries, which could therefore have been adequately compensated by an award of Kshs 120,000/=.
7. The Appellant pointed out that the Respondent had fully recovered from the injuries, and had no residual incapacity.
8. In support of his appeal, the Appellant cited the decision in **FM (MINOR, SUING THROUGH MOTHER AND NEXT FRIEND MWN) Vs JDK & ANOTHER 2020eKLR**. In that case, the learned trial magistrate had awarded Kshs 60,000/= as general damages, as compensation for blunt soft tissue injuries to the head, neck, thorax, abdomen and limbs of the Plaintiff.
9. On appeal, Nyakundi J. set aside the award and substituted it with Kshs 100,000/=.
10. In answer to the appeal, the Respondent reminded the court about the well settled principles which an appellate court ought to observe when determining whether or not it was justified to disturb the quantum of damages awarded by the trial court.
11. In that respect, both parties are on the same page.
12. Accordingly, there is consensus that the appellate court will not disturb the trial court’s award of damages unless the said award was so inordinately high or so inordinately low, as to represent an entirely erroneous assessment of what the Plaintiff was entitled to.

13. In determining the appeal, I first take note of the fact that the Appellant expressly abandoned his challenge against the trial court's findings on the issue of liability. Therefore, this court is only called upon to make a determination on the issue of quantum of the damages.

14. In a nutshell, the Respondent submitted that the award by the trial court was appropriate in the circumstances of the case. Therefore, the Respondent urged this Court not to interfere with the judgment.

15. In determining the appeal I would have to answer the question about whether or not the trial court had applied a wrong principle, or if the said court had failed to take into account some relevant factor.

16. If the trial court had misdirected itself or if it had taken into account some irrelevant consideration, the decision made by it would be set aside.

17. When the trial court has demonstrably taken into account comparable awards, that is a relevant consideration.

18. When the trial court increases the award in comparison to the comparable awards, it is imperative that the court explains its reasons for the said increment. For instance, if the increment was attributable to inflation, the court would need to say so, and to also explain the rate of inflation which it had decided to apply in the circumstances.

19. A fair and reasonable award ought to provide proportionate compensation to the Plaintiff, in a manner that was consistent with other comparable awards.

20. I am alive to the principle that as an appellate court I should not interfere with the award made by the trial court simply because I could have given a different award: it is only if the trial court's decision was manifestly wrong that I would be entitled to set it aside.

21. In this case the trial court held as follows;

“Therefore, the claimant is compensated for his inability to lead a full life and *not merely for the injuries sustained.*”

22. I have carefully perused the plaint, the evidence tendered at the trial and the judgment of the learned trial magistrate.

23. In the plaint, the particulars of the injuries sustained by the Plaintiff were described as “*Blunt Injury*” to each of the following body parts;

a. Head;

b. Neck;

c. Chest;

d. Upper Limbs;

e. Lower Limbs;

f. Ribs; and

g. Back.

24. However, in the Medical Report of Dr. Manasseh O. Onyimbi (PW3), the Plaintiff is said to have sustained the following injuries;

“(A) Head Injury which involved the following:-

(i) Damage to the occipital region.

(ii) Facial cut wounds above the left eye.

(iii) Multiple cut wounds on the nasal bridge.

(iv) Bilateral cut wounds on the forehead.

(v) Cut tongue and damage of both upper and lower mandibles, with loosened teeth.

(B) Dislocation of cervical spine of the neck.

(C) Chest injury with fracture of two ribs bilaterally.

(D) Dislocation of the left shoulder joints.

(E) Dislocation of the lumbar-sacral spine.

(F) Cut wound on the left knee region, and the right leg.

(G) Dislocated phalanges of the right toes.”

25. It is evident that the doctor’s testimony was about a person who had sustained many more and more serious injuries than the Plaintiff said she had suffered.

26. Whilst she said that all her injuries were blunt in nature, the doctor testified about multiple cut wounds, dislocations and a fracture of 2 ribs.

27. Considering that the Medical Report is dated 17th April 2015, whilst the Plaintiff was filed in court on 28th April 2015, it follows that the suit was filed after the Plaintiff had received the Medical Report from her doctor. Therefore, if the Medical Report contained an accurate record of the Plaintiff’s injuries, the same ought to have been incorporated into the Plaintiff.

28. In any event, evidence which was at variance with the particulars of the Plaintiff, cannot advance the Plaintiff’s case. Therefore, to the extent that the Medical Report was at variance with the particulars of the Plaintiff, the same was not supportive of the Plaintiff’s claim.

29. I note that the doctor said;

“On the injuries, she is a lay person.

I still forgive her if she forgets.”

30. Surely, when a person sustains injuries, he or she does not need to be a medical doctor to know about the said injuries!

31. At the very least, matters such as cut wounds should be obvious to the person who has sustained such injuries. It does not require a medical doctor to draw the attention of the said person, to his own injuries.

32. But even if the Plaintiff was such a “*lay person*” that she could have forgotten about the injuries she had sustained, I find that the Medical Report would have provided her with the reminder she required.

33. Notwithstanding the said “*reminder*”, the Plaintiff made a choice to exclude from the Plaintiff, the particulars of the injuries in the Medical Report.

34. It is a cardinal rule of law that parties are bound by their pleadings. Therefore, a party cannot put forward one case in his statement of claim, and later seek judgment on the basis of evidence which was at variance with the statement of claim.

34. In this case I have found no evidence that the Plaintiff would be unable to lead a full life, as alluded to by the learned trial magistrate. Accordingly, I find that the award of Kshs 500,000/= was influenced by an irrelevant consideration. It is therefore set aside.

36. In the case of **FM (MINOR SUING THROUGH MOTHER AND NEXT FRIEND MWM) V JDK & ANOTHER, HCCC NO. 39 OF 2020**, the learned Judge awarded the Appellant Kshs 100,000/= for soft tissue injuries.

37. I have also taken into account the following decisions;

a. JUSTINE NYAMWEYA OCHOKI & ANOTHER V JUMAA KARISA KIPINGWA [2020] eKLR, in which the plaintiff suffered blunt injuries to the chest, left wrist and lower lip.

The trial court awarded Kshs 300,000/=, but on appeal the same was reduced to Kshs 150,000/=.

b. NDUNGU DENNIS Vs ANN WANGARI NDIRANGU & ANOTHER [2018] eKLR, in which the plaintiff sustained soft tissue injuries to the lower right leg and to the back.

On appeal, the award was reduced from Kshs 300,000/= to Kshs 150,000/=.

38. Having given due consideration to those comparable cases, I now award to the Respondent Kshs 200,000/=.

39. The said sum will attract interest at Court Rates from 10th December 2019 when the trial court delivered its judgment.

40. Whilst the costs of the suit remained awarded in favour of the Plaintiff, the costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY 2021.

FRED A. OCHIENG

JUDGE