



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 61 OF 2020

MBURUGU FREDRICK KOOME.....APPELLANT

VERSUS

KENNETH NTORIBI.....RESPONDENT

(An appeal from the Judgment and Decree of Hon. P. Wechuli (S.R.M) in Tigania PMCC No. 58 of 2018 delivered on 04/02/2020)

JUDGMENT

1. Before the trial court was a claim commenced by a Plaintiff dated 05/06/2018 in which the respondent sued the appellant seeking general damages, special damages and costs of the suit. The gist of the claim was pleaded to have been that on or about 3/10/2017, the respondent was lawfully travelling aboard Motor Vehicle Registration No. KCK 068 K, when the appellant and/or his driver, employee, agent, servant so negligently drove, managed and/or controlled the said motor vehicle that it veered off the road thereby occasioning him severe bodily injuries. It was pleaded that he was subsequently admitted at both Consolata and St. Theresa's Mission Hospitals, and was continuing with treatment as an outpatient by the time the suit was filed. Following the said accident, he was alleged to have been unable to perform his duties fully.
2. The parties recorded a consent on liability at the ratio of 80:20 in favour of the respondent against the appellant and the matter proceeded for assessment of the damages payable. On the assessment of damages, the respondent, testified as PW1 and gave evidence that on the material day, he was travelling as a passenger aboard motor vehicle registration No. KCK 068 K, when upon reaching Kaithe, it veered off the road and rolled over thereby occasioning him severe injuries. He was thereafter hospitalized at both Consolata and St. Theresa's Mission Hospitals for treatment and was still undergoing treatment as an outpatient as at the date of adducing evidence. He produced the numerous exhibits as per his list of documents dated 05/06/2018 whose import was to demonstrate the injuries suffered.
3. Even though Mr. Kariuki, advocate for the appellant, was present, he chose not to subject the testimony of the respondent to any cross examination. In such circumstance the evidence stands uncontroverted and remains that the respondent had suffered injuries to the cervical spine which necessitated treatment over a long period of time including admission for seven days and underwent a procedure the doctor described as **posterior cervical decompression with lateral mass screw**.
4. That evidence was subjected to appraisal by the trial court who then found for the respondent by assessing and awarding general damages in the sum of Kshs 1,000,0000.
5. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 07/08/2021 setting out four (4) grounds of appeal. A proper reading of the grounds reveals the appellant's complaint to be two pronged; that the trial awarded general damages of Kshs 1,000,000 which were obviously exaggerated, erroneous and excessive and that the trial court failed to consider the submissions and legal authorities tendered by him.

Submissions

6. Upon the directions by the court, the parties filed their submissions in respect to the appeal on 16/04/2021 and 09/06/2021 respectively. The appellant faults the trial court for awarding excessively high damages which were not proportionate to the injuries suffered. According to him, an award of Kshs 500,000 would have sufficed considering the respondent had fully recovered. In support of such submissions, he cited the decisions in **Millicent Atieno Ochuonyo v Katola Richard (2015) eKLR** for the proposition that comparable injuries ought to attract comparable awards and **Roseline Violet Akinyi v Celestine Oyoo Wagwau (2017) eKLR** where the high court on appeal reduced an award from Kshs 800,000 to Kshs 500,000. In making such submissions however, the applicant acknowledged the law that assessment of damages is at the discretion of the trial court with a rider that the discretion can be interfered with on appeal only when the same has been exercised improperly. To the appellant the award of the general damages was a demonstration of improper exercise of discretion.
7. For the respondent, submissions were offered to the effect that the appeal be dismissed, as the appellant had failed to demonstrate how the trial court fell in error in its decision. The cases of **Kenblest Kenya Limited v Musyoka Kitema (2020) eKLR**, **Charles Oriwo Odeyo**

v **Appollo Justus Andabwa & anor (2017) eKLR and Gitobu Imanyara & 2 others v Attorney General (2016) eKLR** were relied on in support of his submissions that assessment of damages is at the discretion of the trial court and that it takes a very strong case of application of wrong principle or irrelevant matter thus reaching an obviously too high or too low award. There were also cases cited to show that for comparable injuries other courts had awarded the sum of Kshs 1,400,000 which the court of appeal had upheld

Determination

8. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR**.

9. It is clear that the determination of the appeal spins around the question whether the general damages of Kshs 1,000,000 awarded by the trial court was excessive and thus amenable to being interfered with by this court on appeal.

10. It is undeniable that the respondent was injured while lawfully traveling aboard Motor Vehicle Registration No. KCK 068 K. The respondent's testimony was not subjected to any cross examination whatsoever, despite having being adduced in the presence of counsel for the appellant. It is also undisputed that the appellant did not tender evidence of his own to displace that by the respondent. According to the documents from St. Theresa Mission Hospital, the respondent was admitted in the said hospital for 7 days. Upon examination at the said hospital, he had tenderness over C4, C5, C6 with left upper limb weakness power grade 3 in all muscle groups. The CT Scan of cervical spine revealed severe C5 and C6 anterolisthesis with spinal canal stenosis, cord compression and fracture of C6 posterior elements. He subsequently underwent posterior cervical decompression with lateral mass screw. In my opinion, the damages awarded by the trial court were commensurate with the severity of the injuries suffered by the respondent.

11. It is trite that assessment of damages is discretionary and appellate court must find a strong demonstration of error in exercise of discretion to justify interference. It is also beyond doubt, for the sake of uniformity, that comparable injuries should attract comparable damages yet it is also a fact that no two sets of injuries in two different cases are ever exactly the same^[1].

12. Before the trial court both parties cited to the court different cases making different and varied awards on which basis the respondent proposed a sum of Kshs 5,000,000 for general damages while the appellant proposed a sum of Kshs 180,000. The trial court in his judgment having considered the submissions by both came to the decision now challenged.

13. Having carried out my mandate as a first appellate court, I find no error of principle but conclude that the sum awarded was modest and reasonable as compensation for pains and suffering from the injuries admittedly inflicted by the appellant's negligence. I find that the appellant has not discharged his onus to convince me to disturb the award. I find the appeal as wholly bereft of merits and order that it be dismissed with costs.

Dated, signed and delivered at Meru by MS teams this 1st day of July, 2021

Patrick J.O Otieno

Judge

In presence

Mr. Otieno for respondent

Ms Masamba for applicant

Patrick J.O Otieno

Judge
