



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 48 OF 2018

RICHARD GITUKU GAKINYA.....APPELLANT

-VERSUS-

ANTHONY KIBIRII WAITHAKA.....RESPONDENT

JUDGMENT

1. By a Plaintiff dated 12/06/2014, the Respondent sought general damages and special damages Kshs.126,001/- and future travelling expenses Kshs.2,000/- per month. The said had arisen as a result of road traffic accident on 02/06/2013 whereby the Respondent while riding a donkey cart along Ol Kalou – Nyahururu road, motor vehicle KBU 520L knocked same donkey cart. The Appellant was the owner of KBU 520L. It was alleged the Appellant driver drove said motor vehicle recklessly thus he occasioned the accident.

2. After court heard the case, the Appellant was held 100% liable and Respondent was awarded;

a. General Damages Kshs.400,000/-

b. Special Damages Kshs.115,000/-

c. plus costs and interests.

3. Thus the Appellant lodged instant appeal setting out 3 grounds of Appeal challenging the awards afore stated. The grounds of appeal complained of

a. General damages of Kshs.400,000/- and special damages were manifestly excessive.

b. Appellant submissions was not considered.

c. Trial court ignored the fact that injuries sustained mere soft tissue injuries.

4. The parties agreed to canvass the appeal via submissions.

APPELLANT'S SUBMISSIONS:

5. The trial Magistrate erred in principle in failing to adhere to the principles applicable to assessment of damages by applying wrong principles and therefore coming to a wrong conclusion. In the case of **Simon Taveta v Mercy Mutitu Njeri [2014] eKLR** it was held that ***“the Appellant court must be satisfied that the trial court in assessing damages took into account irrelevant factors or left out relevant factors or that the amount is inordinately low or high to be an erroneous estimate”***.

6. In addition, in **Morris Mugambi & Another v Isaiah Gituru Nairobi Court of Appeal CA No. 138 of 2012** the court stated the principle to be applied in assessing damages ***“that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.”***

7. The Applicant herein sustained minor soft tissue injuries and as such an award of Kshs.400,000/- general damages is inordinately high and therefore constitutes an erroneous estimate.

8. Further, the trial Magistrate did not provide the basis he used and/or employed to make the aforementioned award. In his judgment he only made reference to authorities provided by both Plaintiff and Defendant by stating that he has read the authorities but did not proceed to analyze the authorities to enable us and/or demonstrate how he arrived at the aforementioned award.

9. It is submitted that an award Kshs.150,000/- General Damages shall fairly compensate the Respondent for the injuries she suffered taking into consideration all the relevant factors.

10. Appellant relies on the case of **Daniel Gatana Ndung'u & Another v Harrison Angore Katana [2020] eKLR** where the Court of Appeal allowed the appeal and entered judgment for Kshs.140,000/- reducing the award from Kshs.350,000/- whereby the Plaintiff had sustained almost similar injuries to the Respondent herein.

11. In **Purity Wambui Muriithi v Highland Mineral Water Company Ltd [2015] eKLR** the court awarded Kshs.700,000/- was reduced to Kshs.150,000/- for the Plaintiff who had sustained injuries to the left elbow, public region, lower back and right ankle.

SPECIAL DAMAGES:

12. On special damages it is submitted that, the court should only award those that have been strictly pleaded and proved.

RESPONDENT'S SUBMISSIONS:

13. In the instant appeal, the Respondent sustained the following injuries;

- *Deep cut wound on the supra – orbital region*
- *Right ankle joint dislocation*
- *Soft tissue injuries*

14. It is submitted that the above injuries cannot be described as soft tissue injuries. The Respondent sustained a deep cut wound on the supra – orbital region, and an ankle dislocation, and in addition, he sustained soft tissue injuries. The Appellant appears to have concentrated on the soft tissue injuries, and lost sight to the deep cut wound and dislocation.

15. The Appellant is challenging an award of Kshs.400,000/- for the above stated injuries. However, the Appellant has not demonstrated what makes the said award to an erroneous estimate in view of the injuries sustained. It is submitted that the trial court exercised its discretion and made an award that was commensurate with the injuries sustained.

16. It is submitted that an award Kshs.150,000/- General Damages shall fairly compensate the Respondent for the injuries she suffered taking into consideration all the relevant factors.

17. Appellant relies on the case of Daniel Gatana Ndung'u & Another v Harrison Angore Katana [2020] eKLR where the Court of Appeal allowed the appeal and entered judgment for Kshs.140,000/- reducing the award from Kshs.350,000/- whereby the Plaintiff had sustained almost similar injuries to the Respondent herein.

18. In Purity Wambui Muriithi v Highland Mineral Water Company Ltd [2015] eKLR the court awarded Kshs.700,000/- was reduced to Kshs.150,000/- for the Plaintiff who had sustained injuries to the left elbow, public region, lower back and right ankle.

19. It is thus submitted that the trial court exercised its discretion appropriately and arrived at a right award under the circumstances. In any case, the award by the trial court was bordering on the lower side. It is submitted that the Appellant has not shown how the trial court applied any wrong principle in exercising its discretion, and as such court is urged not to disturb the said award.

20. In his pleadings, the Respondent had pleaded the special damages which he proved by producing receipts during the hearing. The Appellant has not pointed out (in his submissions) why he has challenged the award of Kshs. 115,000/- as special and material damages. It is thus submitted that the trial court awarded what was pleaded and proved, and as such the court is urged to confirm the said award.

EVIDENCE:

21. During the hearing of the case (Civil Case No. 126/2007) the Plaintiff called two witnesses who were the Plaintiff himself and the police officer. The Plaintiff Anthony Kibiri Waithima testified and stated as follows;

22. On 02/06/2013 he was with Jackson Liano Njambi (Plaintiff in Civil Case No. 127/2014) and one Njoroge. They were riding in a donkey cart being pulled by two donkeys. They were heading towards Ojoro Orok from Ol Kalou direction, when the Defendant was driving from Nyahururu direction towards Ol Kalou direction.

23. He states that the Defendant was driving in high speed and the process of trying to overtake another motor vehicle the Defendant lost control and veered off the road towards the right side of the road (opposite direction) where it collided with the donkey cart that was being driven from Ol Kalou towards Nyahururu direction.

24. Due to the impact of the two donkeys that were pulling the donkey cart died on the spot, where the plaintiff and two friends were seriously injured. They were rushed to Ol Jabet Hospital where they were admitted, upon recovery the three complainants reported the matter and were issued with P3 forms.

25. They were issued with P3 forms and police abstract forms. According to PW1, the traffic police officer – the driver of the motor vehicle KBU 520L (now Defendant in this case) was charged with careless driving vide court file traffic case No. 735/2013 where the Defendant pleaded guilty to the charge and was fined Kshs.20,000/- or serve six months imprisonment.

26. The Plaintiff testifies that he incurred medical expenses accumulating to Kshs.42,193/- because he was treated in different hospital. He produced receipts to support the claim and other expenses like for accommodation and physiotherapy.

27. He stated that the donkeys died and the cart was destroyed, thus he lost his means of income. That the donkeys were worth Kshs.14,500/- and the cart was worth Kshs.20,000/- as per an agreement dated 06/05/2013. He also claimed used to earn from the hand cart about Kshs.17,000/- per month.

28. The appeal is basically on award of General, Special damages and loss of user. Thus issues whether same excessive.

ON QUANTUM:

29. The Defendant proposed Kshs.100,000/- as general damages and also special damages as proved and costs of interest. The Plaintiff proposed Kshs.800,000/- as general damages, special damages as claimed plus interest and costs.

30. I have looked at injuries sustained. The Plaintiff told the court that when the motor vehicle hit the donkeys and the donkey cart, he fell down on the tarmac. His two donkeys died on the spot. Him and his colleagues sustained serious injuries. He states as follows;

“..... The three of us were on the donkey cart. We were all injured. He then states that the whole of his right side of the body got injured. By the time he testified, he stated that he was still undergoing treatment. I have looked at the medical report Exhibit 14. It shows injuries sustained were;

a) Deep cut wound on the right supra – orbital region

b) Right ankle joint dislocation

c) Soft tissue injuries treatment given was;

i. Surgical toilet, stitching and dressing of the wound.

ii. Antibiotics

iii. Analgesics

iv. Tetanus toxoid

v. Application of plaster of Paris on the affected limb.

31. Examination that the doctor revealed a scar on the right supra orbital region upper limbs normal. No deformity or swelling of the right ankle joint present complaints.

a. The memory loss

b. Occasional pain and swelling of the right ankle joint.

32. The medical report shows degree of injury as harm. The P3 form Exhibit 1 also shows similar injuries and conclusion on degree of injury is harm.

33. The trial court held; Taking in the consideration the nature of injuries sustained the trial court found an award of Kshs.400,000/- would adequately compensate the Plaintiff for pain and suffering. On special damages, the Plaintiff was awarded Kshs.115,000/-.

34. He had adduced evidence and produced exhibits indicating that he incurred a lot of expenses while seeking treatment from various hospitals amounting to Kshs.169,000/-. Also in the accident he lost two donkeys and the card was damaged. He stated that the was using the donkeys and the cart do to his business that was fetching about Kshs.17,308/- per month. He also lost two donkeys both worth Kshs.20,000/- and the donkey cart was worth Kshs.19,500/-

ISSUES, ANALYSIS AND DETERMINATION:

35. This appeal is purely hinged on the issue of award made by the lower court on the question of **whether same was excessive to warrant this court to disturb the same.**

36. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and

reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

37. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

38. Similarly, in Butt v Khan (supra) it was held -

“An appellate court will not disturb an award for damages unless it is 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”.

39. I have looked at the medical report Exhibit 14. It shows injuries sustained were;

- ***Deep cut wound on the right supra – orbital region***
- ***Right ankle joint dislocation***
- ***Soft tissue injuries treatment given was;***
- ***Surgical toilet, stitching and dressing of the wound.***
- ***Antibiotics***
- ***Analgesics***
- ***Tetanus toxoid***
- ***Application of plaster of Paris on the affected limb.***

40. It is submitted that an award Kshs.150,000/- General Damages shall fairly compensate the Respondent for the injuries she suffered taking into consideration all the relevant factors.

41. Appellant relies on the case of Daniel Gatana Ndung’u & Another v Harrison Angore Katana [2020] eKLR where the Court of Appeal allowed the appeal and entered judgment for Kshs.140,000/- reducing the award from Kshs.350,000/- whereby the Plaintiff had sustained almost similar injuries to the Respondent herein.

42. In Purity Wambui Muriithi v Highland Mineral Water Company Ltd [2015] eKLR the court awarded Kshs.700,000/- was reduced to Kshs.150,000/- for the Plaintiff who had sustained injuries to the left elbow, public region, lower back and right ankle.

43. After reviewing the cited authorities, I find the injuries sustained by the respondent were in the realm of soft tissues injuries and had healed with time. Thus the award of Kshs.400,000/- was inordinately high to warrant this court to disturb the same. In the circumstances of this case, I find the reasonable award would be Kshs.300,000/- as general damages.

44. On special damages, the law is the case of Kenya Power & Lighting Co. Ltd vs Quentin Wambua Mutisya t/a Bondeni Wholesalers Civil App.No.16 of 2013 Machakos wherein Odunga J. stated that;

“Whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage and the circumstances under which those acts were done.”

45. In our instant case the respondent testified and produced receipts and documents which appellant did not rebut. The trial court accepted them and awarded Kshs.115,000 as the pleaded and proved specials. I agree with trial court and uphold the same.

46. Thus the court makes the following orders;

(i) The appeal is allowed to the extent that the award on general damages is reduced to ksh 300,000.

(ii) The award on specials is upheld.

(iii) Parties to bear their own costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 23RD DAY OF SEPTEMBER, 2021.

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CHARLES KARIUKI

JUDGE