



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO.38 OF 2018

DANIEL KYALO MASUU.....APPELLANT

-VERSUS-

GEOFFREY MUINDI MASUU.....RESPONDENT

(Being an appeal from the Judgment of Honourable C.A

Muchoki SRM delivered on 5th February 2018 in Tawa SRMCC No. 127 of 2017).

JUDGMENT

1. In a judgment delivered on 5th February 2018, the trial court in Tawa SRMCC No. 127 of 2017 entered judgment for the respondent, who was the plaintiff in the following terms –

“In summary, I enter judgment for the plaintiff against the defendants jointly and severally as follows –

1. Liability 90:10

2. Special damages Kshs.164,635/=

3. General damages Kshs.500,000/=

TotalKshs.664,635/=

This amount when subjected to the apportionment comes to Kshs.598,171.50. The plaintiff is awarded the costs of the suit plus interest thereon”

2. It is to be noted here that though the trial court orders talk of defendants, the defendant was only the appellant herein.

3. Aggrieved by the above judgment, the appellant, who was the sole defendant, has come to this court on appeal through counsel Ms. Kairu & McCourt on the following grounds -

1. The learned trial magistrate erred in law and misdirected herself when she failed to consider the appellant’s submissions on both points of law and facts.

2. The learned trial magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Kshs.500,000/= for injuries suffered which ought to have attracted a lesser amount than that awarded.

3. The learned trial magistrate erred and misdirected herself as to the exact nature of the respondent’s injuries and therefore assessment of damages awarded to the respondent which was manifestly excessive.

4. The learned magistrate erred in law and fact in unduly disregarding the judicial authorities cited by the appellant which are related to the injuries and the evidence adduced in the trial.

4. On the above grounds of appeal, the appellant sought that the appeal be allowed with costs, the judgment and award of the trial court be set aside and re-assessing of the award be done, and that the costs be borne by the respondent.

5. The appeal proceeded by way of filing written submissions. It is of note that the advocates representing the appellant changed in the course of appeal, to Kimondo Gachoka & Company. In this regard, the appellant's counsel M/s Kimondo Gachoka & company filed their submissions on 2nd March 2021, while the respondent's counsel M/s Sila and Company filed their submissions on 22nd March 2021. I have perused and considered the submissions of both the appellant and the respondent, and note that both counsel relied on decided court decision.

6. This being a first appeal, the appellant is entitled to expect an exhaustive re-evaluation of the evidence on record. Several reported cases have dealt with this point, including the case cited by the respondent's counsel, that is **Catholic Diocese of Kisumu –vs Sophia Achieng Tete – Civil Appeal No. 284 of 2001 [2004] 2KLR 55**. In the earlier case of **Selle & Another –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123** at 126, the Court of Appeal for East Africa, stated as follows with regard to the entry of the 1st appellate court -

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such appeals is well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard witnesses and should make due allowance in this respect”.

7. In our present case, at the trial, none of the parties called witnesses since on 7th December 2017 the parties entered a consent judgment on liability 90:10 and then parties counsel agreed to proceed further, simply by way of filing written submissions. Thus no oral evidence was tendered for proof of quantum of damages. Before entry of the consent judgment however, the respondent had already filed several documents, which were not contested by the appellant. Thus in my view the trial court was entitled to consider these in determining the outstanding issue of quantum of damages.

8. On this issue of quantum of damages, both parties' counsel filed written submissions at the trial and relied on number of case authorities. I note that at the trial, after citing a number of cases, counsel for the respondent (the plaintiff at the trial) asked for Kshs.1,200,000/= as general damages, while counsel for the appellant (defendant) asked for an award of Kshs.70,000/= as general damages. The trial court did not agree with any of the proposed figures of general damages and instead awarded Kshs.500,000/=. The appellant now says on appeal that this awarded figure for general damages was excessive.

9. This being an appeal on quantum of damages, I have to bear in mind the legal principle that appellate courts are slow in disturbing awards of damages, which is an exercise of discretionary power by trial courts, unless the trial court committed an error by not taking into account relevant factors, or by taking into account irrelevant factors in assessing such damage and thus arriving at an erroneous amount. In this regard, in the case of **Butt –vs- Khan (1977) 1KLR**, the Court of Appeal stated as follows:-

“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 is either inordinately high or low”.

10. In the present case, I note that the injuries suffered were not contested. They were contained in the medical reports filed by the respondent which were not contested. Having perused the trial court's judgment myself, I find that the magistrate considered the injuries to be those indicated in the medical reports supplied by the respondent, with the main injury suffered being on soft tissue in nature, but with an additional injury to the cervical spine though healed. In my view therefore, considering the injuries suffered per the medical reports, the award of general damages of Kshs.500,000/= in 2018 was not excessive, taking into account inflation trends and loss of value of the Kenya currency. I thus do not agree with the contention of the appellant that the trial court did not take into account the case authorities cited, nor that the amount of general damages awarded was excessive.

11. To conclude, I find no error committed by the trial magistrate in assessing general damages, to justify interference by this court, and the appeal is thus not merited and is for dismissal.

12. Consequently, I dismiss the appeal and uphold the decision of the trial court. I award costs of appeal to the respondent.

DELIVERED, SIGNED & DATED THIS 6TH DAY OF OCTOBER, 2021, IN OPEN COURT AT MAKUENI.

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George Dulu

Judge