



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.26 OF 2017

GEORGE OTIENO.....APPELLANT

VERSUS

AM (Suing through mother & next friend LAM.....RESPONDENT

JUDGMENT:

1. This appeal arises from the trial magistrate judgment on quantum, by Hon. Obulutsa delivered on the 3rd of February 2017 in Eldoret CMCC No.349 of 2015.
2. In the said suit, the respondent herein had sued the appellant seeking both general and special damages as well as costs and interest of the suit. In the plaint, the respondent alleged that on or about the 18th of April 2015, the respondent (minor) was lawfully travelling as a passenger aboard motor vehicle registration number KAR 670B along the Eldoret-Kitale road near Sirikwa Quarry when the appellant/his driver/agent negligently drove the said motor vehicle causing the motor vehicle to be involved in an accident and as a result of which the respondent sustained injuries.
3. The matter proceeded to full trial whereupon the learned magistrate delivered judgement on the 3rd of February 2017 in favour of the respondent and awarded quantum totaling to Kshs 203,000 being General damages of Kshs 200,000/= and Special Damages of Kshs 3,000/=.
4. Being aggrieved with the decision on quantum, the appellant via a memorandum of appeal dated and filed on the 24th of February 2017 preferred the instant appeal citing 11 grounds of appeal.
5. On the 25th of May 2021, the court directed that the appeal be canvassed by way of written submissions and gave the parties 30 days to file their submissions.
6. The appellant has since filed his submissions whereas the respondent is yet to file her submissions.

Appellant's Submissions

7. The appellant in his submissions highlighted that the trial magistrate failed to take into account all relevant issues and gave an award on quantum that was so high that it amounts to an erroneous decision thus necessitating this courts intervention. In this regard, the appellant relied on the court of Appeal decision in ***Bashir Ahmed Butt vs Uwais Ahmed Khan [1982-88] KAR and Taveta vs Mercy Mutitu Njeru [2014] eKLR*** and submitted that the issues for determination are three, namely; whether the learned trial magistrate erred in law and fact in awarding the respondent a sum of Kshs 200,000/= as general damages for pain and suffering; and whether that was excessive as to amount to an erroneous estimate of loss suffered by the respondent; whether the learned magistrate erred by awarding Kshs 3,000/= as special damages and whether it was proved to the required standard in law; whether the learned trial magistrate erred in law and fact in the alleged failure to consider the appellant's written submissions and legal authorities and over-relied on the respondent's submissions thereby arriving at a decision that was plainly wrong.
8. On the first issue, the appellant submitted that the amount awarded does not correspond to the injuries incurred by the respondent. In particular, the appellant submitted that the respondent had indicated that she suffered bruises on the right ear which was tender, blunt trauma to the chest which was tender, blunt trauma to the back which was tender, blunt trauma to both shoulders which was tender, but at the hearing, what was proved was only injuries to the ear, back and chest.
9. The appellant relied on the evidence of PW1, Dr. Rono from MTRH who testified that the records indicated that the minor had sustained soft tissue injuries which had fully healed without leaving any permanent disability. This according to the appellant was corroborated by the medical report by Dr. S.I Aluda produced as PEXH 4a. The appellant avers that the amount awarded does not correspond to the injuries

suffered and as such court ought to review the same. The appellant thus submitted that an award of Kshs 60,000/= is sufficient and relied on the case of *George Otieno vs Osteen Kabaka Eldoret HCCA No. 25 of 2017*.

10. On the second issue, the appellant submitted that special damages must be specifically pleaded and strictly proved for them to be awarded, and relied on the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR*. The appellant submitted that the respondent pleaded for Kshs 3,000/= and at trial produced receipt of Kshs 3,000/= marked as PEXH 4(b). However, the appellant submitted that a closer look at the said receipt clearly shows that it has not complied with the requirements of Section 19 and 20 of the stamp Duty Act that requires receipts to bear revenue stamps, failure to which the same fails. In this regard, the appellant relied on the case of *Leonard Nyongesa vs Derrick Righa Gula [2013] eKLR* and submitted that the award should fail.

11. On the last issue, the appellants submitted that the trial magistrate did not exercise his discretion judiciously and he over-relied on the respondent's submissions while overlooking the appellant's submissions, resulting in an award that was excessive in the circumstances. The appellant thus relied on Order 21 rule 4 and 5 of the Civil Procedure Rules and the decision in *Kenjap Motors Ltd & another vs James Kemosi Nyaigero [2020] eKLR* and submitted that a judicial officer ought to give a basis of how she/he arrived at a particular decision failure to which the same amounts to a fatal error.

12. It was thus submitted that the court should allow the appeal and set aside the judgement of the lower court and substitute the same with a proper finding.

Analysis & Determination

13. This being a first appeal, this court is called upon to re-evaluate the evidence and reach at its own conclusions as was held in *Selle -vs- Associated Motor Boat Co. Ltd [1968] EA 123* where the court stated: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the 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 nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. Considering that the appellant has appealed only on the issue of quantum, this Court will re-evaluate the evidence in that regard as this is the only issue for determination.

15. The appellant contention is that the trial Court award of Kshs 200,000/= as general damages was not commensurate to the injuries sustained by the respondent. On the other hand, the appellant challenges the award of Kshs 3,000/= as special damages arguing that the receipt submitted by the respondent at trial does not comply with the provisions of Section 19 and 20 of the Stamp Duty Act.

16. As regards the issue of general damages, PW1 Dr. Rono from MTRH testified on the 8th of June 2017 and produced forms including prescription forms, continuation sheet, P3 form, medical report and receipt of Kshs 3,000/=. Further PW1 testified that he didn't see patient but filled the P3 form and the medical report.

17. The medical report marked PEXH 4a dated the 28th of April 2015 and prepared by Dr. S. I Aluda indicates that the respondent suffered injuries on the right ear which was tender, blunt trauma to the chest which was tender, blunt trauma to the back which was tender and blunt trauma to both shoulders which were tender. Furthermore, the medical report indicated that the injuries sustained were soft tissue injuries and are continuing to heal but for pains, analgesics were prescribed. Indeed, prescription form marked as PEXH 2 confirms that the doctor prescribed bruffen for the minor. This is further confirmed by PEXH 1 dated the 19th of May 2015.

18. PW2 LM also testified on the same date as PW1 to the effect that the respondent suffered injuries to the back, chest, the knee and the leg of which corresponds to what is captured in the medical report by Dr. Aluda.

19. Moreover, as regard the quantum, I have looked at a number of cases where the respondents suffered similar injuries as the respondent herein in order to determine whether the trial court erred or not and which I will highlight hereunder.

20. In *Maore vs Mwenda [2004] eKLR*, the Court of Appeal allowed an appeal and entered judgment for Kshs. 100,000/= reducing the award from Kshs. 300,000/= where the respondent had sustained soft tissue injuries to the right shoulder, chest, back and left leg.

21. Similarly, in *Michael Okello v Priscilla Atieno [2021] eKLR*, the court awarded the respondent Kshs 250,000 for similar injuries and clarified that since the decision in *Maore vs Mwenda [supra]* was made in 2004, about 16 years ago, inflation and time lapse had occurred thus the amount of Kshs 250,000 as opposed to Kshs 100,000 was sufficient.

22. In *Maimuna Kilungwa vs Motrex Transporters Ltd [2019] eKLR*, the court awarded Kshs. 125,000/= for injuries to the neck, left ear and left shoulder.

23. Taking cue from the above case law and further taking into consideration of the fact that the accident was on 18th April 2015, it is my finding that the trial court award of Kshs 200,000/= as general damages was not excessive and ought not be disturbed.

24. As regards special damages, the issue is that the receipt does not comply with Section 19 and 20 of the Stamp Duty Act. I have looked at the case relied on by the appellant and indeed share the holding that Section 19 makes it clear that no document which is chargeable to stamp duty shall be received in evidence except in the case of the prescribed exception that is pursuant to Criminal Proceedings or if produced by the collector to recover duty unless stamp duty has been charged on it.

25. However, Section 19 is not absolute and is subject to Section 19(3) and Sections 20 and 21 that indicate that an instrument for which the law requires stamp duty to be paid is not necessarily inadmissible in Court and that the same may be admitted provided the stamp duty is assessed and paid together with any penalty arising therefrom. See *Leonard Nyongesa v Derrick Ngula Righa [2013] eKLR*.

26. In the foregoing, I find that the receipt is admissible as the appellant has not shown that the same has not been paid or that there is pending unpaid penalty arising therefrom.

27. In the circumstances, I see no reason to disturb the same and it therefore stands.

26. The upshot therefore is that the appellant's appeal lacks merit and is dismissed with costs to the respondent.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 1ST DAY OF NOVEMBER, 2021

In the presence of: -

Mr Malekwa holding brief for Mr. Mwinamo for the Respondent

Mrs. Akweyu for the appellant

Ms Gladys - Court Assistant