



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 142 OF 2015

MATUNDA (FRUITS) BUS SERVICES LTD.....APPELLANT

VERSUS

AGNES CHEMNGENO TUIYA.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT OF HON. M KISERA (SPM))

DATED 17TH NOVEMBER 2015 IN ELDAMA RAVINE SPMCCC NO. 97 OF 2014)

JUDGEMENT

1. The respondent was involved in a road traffic accident on 22nd March 2014 while travelling as a fare paying passenger aboard motor vehicle registration number KBK 706D owned by the appellant along Nakuru –Eldoret road near an area known as Danger. She sustained injuries, namely, **deep cut wound on the scalp, cut wound on the right temporal region of the scalp, deep cut wound on the right shin, blunt injuries to the neck, loose two upper incisor teeth, loose two lower incisor teeth and cut wound on the lower lip.**

2. She thereafter filed her claim against the appellant for both general and special damages where the trial court awarded her general damages of Kshs. 390,000 as well as special damages of Kshs. 13,600.

3. The appellant was dissatisfied with the said award and has filed this appeal which basically centres on quantum, that is, that the award was excessive in the circumstances considering the injuries sustained by the respondent. According to the appellant the trial court took into consideration extraneous issues and facts when arriving at the said decision.

4. In disposing this appeal the court directed the parties to file their written submissions which they complied and the court shall revert to them shortly.

5. The question of how the accident occurred is not in dispute. As a matter of fact, the trial court found the appellant 100% liable for the same. The respondent was indeed a fare paying passenger in the appellant's bus. The only defence tendered by the appellant was the production of the medical legal report from its doctor.

APPELLANTS SUBMISSIONS.

6. The appellants attack on the trials court finding on quantum centres on the fact that in the medical documents produced there was no mention of loose lower incisors teeth a fact which was admitted by Dr. Omuyoma who prepared the medical report on behalf of the respondent. It argued that there was need to critically examine the treatment notes as was stated in the case of **TIMSALES LIMITED V. WILSON LIBUYWA. NAKURU HCCA NO 135 OF 2006.**

7. On this score therefore the appellant submitted that the only relevant notes to be relied upon are those from Eldama Ravine district hospital which showed the proper injuries sustained by the respondent.

8. On quantum the appellant submitted that the correct amount which the respondent should be awarded is Kshs. 150,000 which it deemed commensurate to the injuries sustained. It relied on several authorities which it has enumerated in the submissions.

RESPONDENTS SUBMISSIONS

9. The respondent opposed the appeal and reiterated that the trial courts findings was sound both in law and fact and the same ought not to be

disturbed. That the courts award was discretionary which it did as per the law established. She said that the authorities cited at the trial was for an award of Kshs. 450,000 and the trial court in exercising its discretion awarded the sum of Kshs. 390,000.

10. The said award was not high in the circumstances but commensurate to the injuries sustained. On the issue of the defence the respondent submitted that the trial court took into consideration the same and the same features prominently in the judgement.

ANALYSIS AND DETERMINATION.

11. It is apparent that the only issue in this appeal is on quantum. The question of liability was well settled by the trial court. At this juncture this court shall only interfere with the lower courts findings if it took into account irrelevant factors, left out of account a relevant factor or if the award was manifestly too high or low in the circumstances. See **KEMFRO AFRICA LIMITED & ANOTHER V. LUBIA & ANOTHER (1985) eKLR.**

12. There are several sets of medical documents produced by the respondent and one by the appellant. The first is the initial treatment notes or the admission sheet from Eldama Ravine hospital which was produced as exhibit p1. It lists the injuries as” **cut wound on the scalp, bruised left limb, loosed upper incisors, neck pain, swollen posterior and neck injury**”.

13. The P3 form dated 5th May 2014 save for the fact that it indicates the other injuries enumerated above adds that the respondent lost two lower incisor teeth. That has been captured as well by Dr. Obed Omuyoma in his report produced as an exhibit.

14. Dr Jenipher Kahuthu report dated 26th March 2015 indicates that the respondent did not have any loose teeth as at the time she was carrying out her examination. She seems however to agree on the other injuries sustained by the respondent namely soft tissue injury to the neck, left leg and upper incisor.

15. When the respondent tendered her evidence she said among others that she went to Kericho for treatment of her teeth and that although she was healed the teeth were still shaking.

16. Dr Omuyoma testified and produced his report where he found that the respondent had lose 2 incisors both upper and lower.

17. All the parties agree on the nature of the injuries sustained save for the loose lower incisors teeth. Apparently the first medical sheet summary from the Eldama Ravine which i suppose was the first port of conduct does not mention the same but only indicates loosed upper incisors.

18. Dr Omuyoma prepared his report on 26th May 2014 about two months after the incident and he concluded that the two lower incisor teeth were loose. In my view the summary from Eldama Ravine district hospital being the first was more accurate and reliable. The rest of the reports were prepared way after it and they relied on the same.

19. The p3 for instance and Dr. Kahuthus’ report came way afterwards. If there were such injuries, they would have examined and concluded so.

20. These findings do not lessen the fact that the respondent did not sustained any injuries as found by the medical experts. They all agree on the nature and extent of the same which were classified as harm and or soft tissue in nature.

21. Was the trial court justified in awarding the award it did based on the said injuries.? The trial court from the judgement based its decision on the report by Dr. Omuyoma which as i have stated above was erroneous in concluding that the lower incisors teeth were loose.

22. In my view the award of kshs. 390,000 was slightly on the higher side considering the observations above. At the same time the suggestions by the appellant that an award of kshs. 150,000 would be an adequate compensation based on the two authorities relied upon is too low in the circumstances. The nature of the injuries and pain suffered by the respondent was enormous.

23. I find that an award of kshs. 250,000 for general damages would be a fair compensation taking into consideration inflation of our currency. The authorities cited by the respondent were way too high.

24. In the premises the appeal is hereby allowed as hereunder.

a) The award of Kshs. 390,000 for general damages is hereby set aside and substituted with a sum of Kshs. 250,000.

b) The special damages of Ksh13, 600 shall remain the same.

c) The respondent shall have half costs of this appeal as well as at the lower court.

d) The above general and special damages totalling Kshs. 263,600 shall attract interest from the date of the lower court’s judgement till payment in full.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 18TH DAY OF NOVEMBER 2021.

H K CHEMITEI

JUDGE