



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 62 OF 2014

PAN AFRICAN HAULIERS LTD.....APPELLANT

VERSUS

PAUL WEBUYE CHITERE.....RESPONDENT

(An appeal from the Judgement and Decree of Hon. R Ngetich CM

in Bungoma CMCC No. 946/2009 delivered on 17/6/2014)

JUDGEMENT

The respondent sued the appellant claiming general and special damages for personal injuries sustained and damages caused to his motor vehicle arising from an accident which occurred on 8/8/2009 at Mayoni area.

In its statement of defence, the appellant denied liability and attributed the occurrence of the accident, if any, to the respondent's negligence.

PW1, the respondent testified that he was involved in an accident with the appellant's tractor and sustained both bodily injuries and damage to his Motor Vehicle and spent Kshs 1, 015, 580/= in repairs and the vehicle was in the garage for 6 months. On personal injuries, he was treated at St. Mary's Hospital and examined by 2 doctors; Dr. Charles Andayi and Dr. Aketch. He stated that he was using his vehicle for business and earned Kshs 4,000/= per day excluding expenses.

PW2, George Mathu, a motor vehicle assessor stated that he assessed the respondent's motor vehicle. He formed the opinion that the vehicle was damaged beyond any scope of repair and ought to have been treated as a write-off.

The appellants did not call any witnesses.

The trial court consequently found the appellant 70% liable and awarded Kshs 80,000/= for personal injury, Kshs 1, 015, 580/= as costs for motor vehicle repair, Kshs 150,000/= for loss of user and Kshs 10,500/= in special damages.

The appellant being dissatisfied, filed its appeal vide the memorandum of appeal dated 16/7/2014 setting out the following grounds

- 1. That the learned magistrate erred in law and fact in awarding general damages of Kshs 80,000/= where the proven injuries were only cut wound on the lower lip of the mouth, blunt injury to the chest and blunt injury to the abdomen which were classified as soft tissue injuries, well healed without complication thus rendering the award as not only manifestly excessive but also a miscarriage of justice.***
- 2. That the learned magistrate erred in law and fact when she failed to consider and/or glossed over relevant and recent authorities cited by the defendant in its submissions.***
- 3. That the learned trial magistrate erred in law and fact in awarding special damages of Kshs 10, 500/= when the same were not proved.***
- 4. That on the bulk of the plaintiff's claim for special damages relating to the value of the lorry, the learned trial magistrate erred in law and fact when she failed to consider that the plaintiff failed to produce any evidence to prove that the plaintiff actually paid out any monies to repair and or replaced the lorry.***

5. *That the learned trial magistrate erred in awarding Kshs 150,000/= as loss of user whom there was no credible evidence to prove no credible loss of user. Plaintiff admitted to have lost original records for use of the vehicle and attempted to mislead the court by concocting and producing figures relating to use of the lorry.*

6. *That the learned magistrate erred in law when she failed to consider and or give adequate weight to recent binding authorities cited by the defendant.*

Directions were taken for the disposal of the appeal by way of written submissions. Only the respondent complied with this directive.

On the first ground, the respondent submits that whereas in the trial court, he had sought Kshs 200,000/= on this limb, the trial magistrate awarded Kshs 80,000/= which he submits is reasonable. He cites the case of *David Munera & 3 Others Vs Ronald Barasa Civ Appeal No. 103 of 2003*.

On the second and third grounds, counsel submits that the special damages of Kshs 10,500/= was proved as expenses incurred in procuring medical report, and motor vehicle assessment report.

As regards the fourth ground, counsel submits that the motor vehicle assessment report stated that the motor vehicle was damaged beyond scope of economic repair and should be treated as written off, there was no economic value in repairing the Motor Vehicle thus the award of Kshs 1, 015, 580/= being the cost of repairs. He points out that the appellant did not produce counter report disputing the figure and therefore the trial court's finding on the head was correct.

On the fifth and sixth grounds, counsel submits that the award of Kshs 150, 000/= is reasonable for the reason that the respondent lost business for 3 months for which he produced receipts of his income per day.

This is a first appeal, the guiding principles are as enunciated in *Oluoch Eric Gogo -Vs- Universal Corporation Limited [2015] eKLR*, where the court restated the duty thus;

“As a first appellate court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.....”

Damages for personal injury

The sum of Kshs 80,000/= was awarded under this head. The respondent suffered cuts on the head, mouth, chest and abdomen. It is not in dispute the injuries sustained were soft tissue. This is clear from the reports of Dr Charles Andayi produced as Pexh 5(a) and 6 respectively.

The general principles on award of damages as espoused by authorities of are that:

It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles.

See *Catholic Diocese of Kisumu Vs Tete (2004) eKLR*.

In *A.A. M.Vs Justus Gisairo Ndarera & Another (2010) eKLR* it was held;

“Money cannot renew a physical frame that has been battered and shattered and all the courts can do is to award sums which must be regarded as giving reasonable compensation and the award must be fair---”

In their submissions in the trial court, the respondent proposed a sum of Kshs 200,000/= as adequate and reasonable while the appellant proposed the sum of Kshs 40,000/= based on the authorities in *Johnstone Amanya Vs Baraka Odhiambo & 2 Others Bungoma HC Civil Appeal No. 47/2003* and *John Otieno Olwok Vs Samuel Onyango Abunga H C Civil Appeal 2001 of 1992*.

Having considered the authorities supplied by parties on this issue and other similar awards on this head, the court is inclined to affirm the award of Kshs 80,0000/= as being reasonable and resonates well with the injuries sustained.

Special Damages

This class of damages must both be pleaded and proved. The Court of Appeal in *Hahn V. Singh, [1985] KLR 716*, held:

Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

The award of Kshs 10, 500/= was for medical report and the motor vehicle assessors report.

Having perused the record, I am unable to find evidence of the amount awarded for the assessor's report and accordingly proceed to set aside this award. Consequently, the award of Kshs 6,000/= for the assessors report is set aside while the award of Kshs 4,500/= for the medical report is affirmed.

Award for loss of user.

The sum of Kshs 150,000/= was awarded under this head. The respondent testified that he used his vehicle for business and was in the garage for 6 months sometimes due to lack of funds or spare parts. He produced the records as Pexh 10. He stated he used to earn Kshs 4,000/= per day excluding expenses.

The award under this head was merited and I proceed to affirm.

In the end, the appeal succeeds only to the extent that the award under special damages is set aside and substituted thereof with a finding that the special damages awardable under this limb is Kshs 4,500/= .

The respondent shall have interest and costs in the trial court. Since the appeal has partially succeeded, each party shall bear his own costs.

DATED AT BUNGOMA THIS 5TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE