



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CIVIL APPEAL NO. E1 OF 2020
BETWEEN
KENYA NATIONAL HIGHWAY AUTHORITY.....APPELLANT
AND
HELLEN ATIENO OKELLO.....RESPONDENT

(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's CMCC No. 58 of 2019 by Hon. Tom Mark Olando –Senior Resident Magistrate).

JUDGMENT

1. Kenya National Highway Authority, the appellant herein, was the defendant in Homa Bay Chief Magistrate's CMCC No. 58 of 2019. This was a claim that arose from a road traffic accident on 18th March, 2019. The accident involved motor vehicle KBJ 660U pick up and the motor cycle where the respondent was a pillion passenger. The respondent sustained injuries for which she was awarded of Kshs.1, 000, 000/= general damages, Kshs, 400,000/= for future medical expenses, Kshs. 500, 000/= for house help, Kshs. 800.000/= for loss of earning capacity and special damages of Kshs.23, 700/=.

2. The appellant was dissatisfied with both general and special damages and filed this appeal through the firm of L.G. Menezes & Company Advocates. Five grounds of appeal were raised as follows:

- a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
- b. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants.
- c. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent (if any) and failed to apply precedents and tenets of law applicable.
- d. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent's claim.
- e. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

3. The respondent opposed the appeal through the firm of Everlyne Kuke & Company Advocates.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The parties herein compromised the issue of liability by consent on 4th August 2020 at the ratio of 80%: 20%. The respondent was to shoulder 20% contributory negligence.

6. For a court to award special damages, the same must be specifically pleaded and strictly proved. The respondent had pleaded special damages of Kshs. 23,700/=. However, the receipts produced as exhibit 5 do not support the claim; the total therein is Kshs. 16,000/=. This therefore was the amount that was specifically proved. I accordingly set aside the award of Kshs. 23,700/= in special damages and substitute it with an award of Kshs. 16,000/=.

7. An award of Kshs. 400,000/= for future medical expenses was made. This figure was not specifically pleaded. In the case of Copana Limited vs. David Ouma Abanga [2021] eKLR it was held:

65. The report is dated 13th February 2015. Therefore, by the time when the Plaintiff was filed in court (in August 2017), the Plaintiff had information concerning the alleged costs of future medical expenses.

8. Similarly in this case, the respondent ought to have amended the plaint to include the claim for future medical expenses. The report was dated 28th June, 2019 while the plaint was filed on 17th June, 2019. The award was erroneously given. I set the same aside.

8. Equally an award for house help services ought to have been pleaded as special damages. I set aside this award for it was not pleaded.

9. The respondent had pleaded loss of future earnings at paragraph 8 of the plaint. She contended that she was earning approximately Kshs.10, 000/= per month. Since she did not prove the monthly income, the learned trial court was of the opinion that Kshs.5, 000/= monthly income would be appropriate. This was below the minimum salary for unskilled labour in the rural set up. I will therefore not disturb this award.

10. The respondent suffered the following injuries:

- a. Compound fracture on the right patella bone;
- b. Fracture right mid femur bone;
- c. Fracture right distal aspect of the right femur bone;
- d. Dislocation of the left shoulder joint;
- e. Cut wound right knee joint;
- f. Tenderness/swelling of right knee joint; and
- g. Cut wound right mid-thigh region.

11. At the time of the examination the doctor observed that:

- a. She has multiple scars on her leg;
- b. She is totally bedridden and cannot walk without support; and
- c. She has pain on her right leg.

For these injuries she was awarded Kshs.1, 000, 000/= general damages. The appellant has argued that the award was inordinately high.

12. An appellate court will only interfere with an award of the trial court in general damages if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at page 356 Law JA stated:

...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 a figure which was either inordinately high or low.

13. At the trial court, the appellant had submitted that an award of Kshs. 900,000/= would be adequate compensation. On the other hand the respondent had proposed an award of Kshs.2, 000,000/=. I have perused the authorities that the parties herein had relied on while urging their case. I am satisfied that the award cannot be termed as high. It may even be low owing to the injuries sustained. I will therefore not disturb the award.

14. I therefore set aside the award by the trial magistrate and substitute it as follows:

- a. General damages Kshs. 1,000,000.00
- b. Loss of earning capacity Kshs.800,000.00
- c. Special damages Kshs. 16,000.00

Total Kshs **1,816,000**

This will be subject to the contributory negligence of 20% as agreed by the parties. Since the appeal is partially successful, the appellant will be entitled to half the costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 8TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE