



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO 69 OF 2020**

**MARA TEA FACTORY LIMITED.....APPELLANT**

**VERSUS**

**JOSHUA MAKWORO ONKOBA.....RESPONDENT**

***(Being an appeal from the judgment and decree of Hon. DO***

***Mac'andere (RM) delivered on 9<sup>th</sup> October 2020 in Kisii CMCC No 984 of 2019)***

**JUDGMENT**

1. This Appeal relates only to the issue of quantum. The appellant's appeal was filed on 6<sup>th</sup> November 2020 vide Memorandum of Appeal dated 23<sup>rd</sup> October 2020.

2. The respondent who was the plaintiff before the trial court and pleaded that he was injured following a road traffic accident that occurred on 12<sup>th</sup> October 2019. The accident occurred while he was walking along Kisii-Mirani road near Egesa Upper Hill area. According to the respondent, the accident was caused by the appellant's motor vehicle KCS 026A which was being driven in negligent manner thus knocking down the respondent. The respondent claims that he sustained physical injuries, suffered loss and damage as a result of the accident.

3. The issue of liability was settled by consent in the ratio 70:30 in favour of the respondent. After conducting a hearing, the trial magistrate in her judgment awarded the respondent Kshs 400,000/- for general damages less 30% contribution, special damages of Kshs 87,000/-. The respondent was also awarded costs of the suit.

4. The appellant's grounds of appeal are as follows:

1. *That the Learned Trial Magistrate erred in law and in fact by failing to critically consider and analyse the medical evidence tendered by the appellant.*

2. *That the Learned Trial Magistrate erred in law and in fact in failing to analyse the medical evidence, the admission by the medical officer (Pw1) on the issue of management of the alleged injuries and thus arrived at erroneous finding that there was no inconsistencies in so far as the injuries are concerned.*

3. *That the learned trial magistrate erred in law and in fact in failing to consider that the P3 (PEX2) and the medical report (PEX3) were filled by one and the same person and thus not a proper basis to find that the injuries were consistent.*

4. *That the learned trial magistrate erred in law and in fact in completely failing to consider the report by Dr. Malik (DEX1) and thus arrived at an erroneous finding on the nature of injuries sustained by the respondent.*

5. *That the learned trial magistrate erred in law and in fact and in fact misapprehended the evidence tendered by Pw1 by assuming that he was the author of the medical report (PEX3) which further accentuates the legal and factual errors made by the trial court.*

6. *That the learned magistrate erred in law and in fact in failing to critically consider and apply the submissions made by the appellant as well as the authorities cited.*

7. *That the learned trial magistrate erred and misdirected herself in fact and law in the by (sic) awarding general damages to the Respondent that were manifestly excessive in the circumstance and thus failed to appreciate the principles applicable in the award of damages.*

8. That the learned magistrate erred in law and on fact in assessing damages and failed to apply the principle applicable in award of damages of comparable awards made for analogous injuries and failed to consider the authorities cited by the appellant on issue of damages.

9. That the learned magistrate erred in law and in fact in failing to consider that the receipt tendered as PEx. 5 for Kshs 80, 500/- bore inpatient number that was different from the one captured in the discharge summary PEX 1 and thus erred in making the award to the plaintiff.

10. That the learned trial magistrate erred in law and in fact in failing to subject the award for special damages to contributory negligence.

5. As observed above, the appeal is against quantum of damages only. This court gave directions that the appeal be canvassed by way of written submissions. The appellant's counsel filed written submissions on 29<sup>th</sup> June 2021 while the Respondent's counsel filed written submissions on 23<sup>rd</sup> July 2021.

#### **ANALYSIS AND DETERMINATION**

6. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR** thus:

*The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*

7. The first issue for consideration is whether the respondent proved that he suffered the injuries pleaded in the plaint.

8. The respondent submitted that the trial magistrate failed to critically consider the medical evidence tendered by the appellant and in particular she ignored the medical report by M.S. Malik. It was also submitted that the treatment records presented by the respondents were also littered with inconsistencies.

9. According to the plaint, the respondent sustained the following injuries:

- i. Head injury with cut wound on the temporal region (right) and optical area.
- ii. Fractured ribs and tenderness on palpation.
- iii. Inability to use the upper limbs well.
- iv. Multiple bruises and lacerations noted on the upper limbs.
- v. Dislocation on the right knee.
- vi. Dislocation on the right hip joint.
- vii. Multiple cut wounds and lacerations noted on the lower limbs.

10. The evidence of both parties was adduced as follows; the respondent did not testify, rather his statement and the documents he relied on were adopted as testimony of the respondent by consent. The trial magistrate failed to indicate the name of the sole witness who testified as Pw1 but the evidence recorded indicates it was a person who could testify on a medical report and discharge summary. The trial court also adopted the medical report by Dr. M. S Malik as defence EXh 1 by consent of both parties.

11. Pw1 testified that the respondent was a patient at Kisii teaching and Referral Hospital. He testified that the respondent suffered a head injury, dislocation of the right hip joint, fracture of the ribs, dislocation of the right knee joint and deep cut wound on the head. A reduction of the dislocation was done. He told the trial court that CT scan of the head, chest, pelvis and knees were done. In the respondent's statement adopted as his evidence in chief he enumerated the injuries in the plaint.

12. The P3 form and the medical report relied on by the respondent were prepared by Dr. Ombati Timothy Mokuia. However, the P3 report does not disclose that the respondent had fractured ribs. Dr. Mokuia simply notes that the ribs were tender on palpation. Similarly, upon conducting his examination for purposes of preparing the medical report, he noted that the respondent had cut wounds and scars from bruises were noted. His conclusion was that the respondent sustained multiple injuries and dislocations that were under management and that the injuries as graded as maim.

13. Although the provisional diagnosis was that the respondent sustained fracture of the ribs, it was not clear that he had suffered a fracture of the ribs. After a chest scan was done at Kisii Training and Referral Hospital, it was not indicated which ribs had been fractured as a result of the accident.

14. The P3 form and the medical report relied on by the respondent were prepared by Dr. Ombati Timothy Mokuia. However, the P3 report does not disclose that the respondent had fractured ribs. Dr. Mokuia simply notes that the ribs were tender on palpation. Similarly, upon conducting his examination for purposes of preparing the medical report, he noted that the respondent had cut wounds and scars from bruises were noted. His conclusion was that the respondent sustained multiple injuries and dislocations.

15. Although the appellant questioned the authenticity of the discharge summary it did not give any evidence showing that it was fraudulently prepared or obtained.

16. In my view, the discharge summary gave a clear picture of what transpired after the respondent was admitted. **Pexh1** being a 'discharge summary' simply gives a brief statement on the provisional diagnosis of the patient on admission, management of the respondent's injuries and the diagnosis upon discharge of the patient. The discharge summary notes that while the respondent was in hospital he made complaints concerning the cut wound on his head and headaches. It was also noted that he felt pain on the affected areas and had bruises on the knees. A reduction procedure/operation was also conducted owing to the dislocation suffered by the respondent.

17. The conclusion by Dr. Malik was that the respondent only sustained soft tissue injuries. However, a careful analysis of the discharge summary, leads to the conclusion that the respondent suffered soft tissue injuries as well as dislocation of the right hip joint and right knee.

18. The *discharge summary* indicates that the respondent was attended to by Dr. Mogondo and a consultant Dr. Omeddo who in my opinion gave an independent diagnosis of the injuries sustained which are indicated on the discharge summary. It is also indicated that a reduction procedure was done implying that the respondent suffered a dislocation. After analyzing all the oral and documentary evidence presented by both parties I find that the respondent proved that he sustained the following injuries: head injury with cut wound on the temporal region (right) and optical area; tenderness of ribs on palpation, bruises on the knees, dislocation on the right hip joint and right knee.

19. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** where the Court of Appeal held:

*“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”*

20. The appellant in its submissions proposed an award of Kshs 100,000/- on the grounds that the respondent sustained no fractures or dislocation. They cited the cases of **PF (Suing as next friend and father of SK (Minor)) v Victor O Kamadi & Another 2018 eKLR**; **Hassan Farid & Another v Sataiya Ene Mepukori & 6 Others [2018] eKLR**; **George Mugo & Another v A K M (Minor suing through next friend and mother of AM K [2018] eKLR**; and **Kenya Nut Company Limited v Sarah Najala Wambogo [2019] eKLR** in support of its case. In my view, the injuries are less serious than those sustained by the respondent herein noting that he suffered two dislocations.

21. Although the respondent before the trial court proposed an award of Kshs 600,000/- they now support the finding of the trial court of the award of general damages. She cited the case of **Veronicah Mkanjala Mnyapara v Patrick Nyasinga Amenity [2021] eKLR**, however argued that the injuries of the plaintiff therein were less serious as she only suffered a single dislocation.

22. In the case of **Veronicah Mkanjala Mnyapara v Charles Kinanga Babu [2020] eKLR** the plaintiff had quite similar injuries compared to those sustained by the respondent herein. In the **Veronicah Mkanjala Mnyapara v Charles Kinanga Babu (supra)** case the plaintiff sustained the following injuries: *dislocation of the left ankle joint, dislocation of the left wrist joint, deep cut wound on the forehead, chest contusion as well as bruises on the face, hands and ankle joints.*

23. **Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR** the court affirmed an award of Kshs 300,000/- for a plaintiff that had suffered a dislocation of the shoulder. In the case of **Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR** the plaintiff was awarded Kshs 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth.

24. After taking into consideration the injuries sustained by the respondent, the awards by courts on similar injuries and the issue of inflation, I find the award of 300,000/- would reasonable in the circumstances.

25. On the award of special damages, the appellant faulted the trial magistrate for failing to subject special damages to the apportionment of liability. The award of special damages does not need to be subjected to apportionment of liability. I agree with the holding of the court in **Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR** where the court stated that special damages should not be subjected to the apportionment.

26. In the end, I allow the appeal on quantum set aside the award of Kshs 400,000/- general damages awarded to the respondent by the trial court and substitute it with an award of Kshs 300,000/- less 30% contribution. For avoidance of doubt the award shall be made up as follows:

General Damages less 30% contribution Kshs 210,000/-

Special Damages Kshs 87,000/-

**TOTAL Kshs 297,000/-**

27. The appellant shall have half the costs of the Appeal.

**DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF DECEMBER, 2021.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Appellant**

**Absent**

**Mr. Omotto**

**For the Respondent**

**Kevin Isindu**

**CA**