



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 61 OF 2019

MARY AKINYI ATELLA.....APPELLANT

VERSUS

OMONDI BEATRICE MONICA.....RESPONDENT

[Being an appeal from the Judgment and Decree of the Honourable Beryl M.A. Omollo

Resident Magistrate dated 17th October 2018 in Kisumu CMCC No. 12 of 2018]

JUDGMENT

The appeal before me is on the quantum of damages which the learned trial magistrate awarded to the Appellant.

1. She awarded General Damages of Kshs 150,000/= and Special Damages of Kshs 4,295/=.
2. The Appellant has urged this Court to hold that the said award was inordinately low, as it was not commensurate with the injuries she had sustained.
3. In the judgment, the trial Court noted thus;

“It is my considered opinion that the various injuries suffered by the plaintiff as a result of the instant accident must have caused her pain and suffering. Further, the medical officer who filled the P3 Form, produced as “Exhibit 5”, by the plaintiff, categorized the injuries as harm. The Plaintiff’s injuries, in my view, are on soft tissues.”

4. The Appellant faulted the trial Court for classifying her injuries as “harm”.
5. A perusal of the P3 Form dated 25th May 2015 reveals that medical officer had classified the Plaintiff’s injuries as “Grievous Harm.”
6. It therefore follows that when the trial Court’s assessment of the compensation was based upon what was construed as “Harm”, whilst the Plaintiff had sustained “Grievous Harm”, the said Court had proceeded on the wrong footing.
7. From the Discharge Summary dated 23rd April 2015, the Avenue Hospital summarized the injuries as follows;

“1) Left elbow communitated fracture

2) Right Ulnarshaft fracture

3) Multiple lacerations.”

8. The Hospital records show that the Plaintiff was admitted on 15th April 2015; and she was discharged on 23rd April 2015.

9. In the P3 Form, it was also noted that the Plaintiff suffered the fracture of the right distal shaft of ulnar bone.

10. Similarly, the X-ray report from West Kenya Diagnostic & Imaging Centre also shows that the Plaintiff sustained a fracture of the distal shaft of the ulnar.

11. Both the P3 Form and the Report by the Radiologist at the West Kenya Diagnostic & Imaging Centre, show that the Plaintiff's elbow was dislocated.

12. In effect, the said 2 documents were inconsistent with the Discharge Summary from Avenue Hospital, which had indicated that the left elbow had sustained a fracture.

13. In the light of the inconsistent evidence concerning the injuries to the Plaintiff's elbow, I find that the Plaintiff failed to prove that her elbow was fractured. I hold that the injuries which were proved were;

(a) ***Fracture of the right ulnar shaft; and***

(b) ***Dislocation of the left elbow.***

14. Although the plaintiff had cited the other injuries, which are as follows, there was no evidence which was provided to prove the same;

(i) ***Tenderness of the neck;***

(ii) ***Swollen forehead;***

(iii) ***Backache;***

(iv) ***Chest tenderness;***

(v) ***Tender and bruised right knee;***

(vi) ***Multiple body lacerations.***

15. Nonetheless, I do agree with the Appellant, that the "Grievous Harm" she had sustained, cannot have been "soft tissue injuries" as was perceived by the learned trial magistrate.

16. I am aware that the appellate court must consciously refrain from replacing the decision of the trial court with its own, unless it is shown that the trial Court had either applied the wrong principle or had failed to take into account the correct principle.

17. Of course, if the award made by the trial court was either so high or so low, as compared to those awarded by other courts, for injuries which were comparable to those sustained by the Plaintiff, it would be right for the appellate court to conclude that there had been an error made in assessing the said award.

18. In this case I find that the trial Court erred when it described the Plaintiff's injuries as "soft tissue injuries"; and also when it classified the grievous harm sustained by the Plaintiff as "harm".

19. In effect, the trial court failed to take into account some relevant factors.

20. In **GOGNI RAJOPE CONSTRUCTION COMPANY LIMITED Vs FRANCIS OJUOK OLEWE, CIVIL APPEAL NO. 1 OF 2014**, Majanja J. reduced the award of Kshs 800,000/= to Kshs 350,000/= for the following injuries;

(1) ***Fracture of radius and ulna;***

(2) ***Dislocation of elbow joint.***

21. To my mind, that case is a mirror-image of the case before me.

22. In the case of **HUSSEIN DAIRY LTD Vs SAMUEL MOKAYA HCCA NO. 137 OF 2012**, the Plaintiff had suffered the following injuries;

(i) ***Fracture of the right radius bone;***

(ii) ***Fracture of the ulna bone;***

(iii) ***Chest contusion;***

(iv) ***Deep cut wound on the right leg;***

(v) ***Fracture of the left pelvic bone;***

(vi) ***Bruises on the back; and***

(vii) ***Cerebral concussion.***

23. The learned Judge maintained the sum of Kshs 800,000/ which the trial Court had awarded as General Damages.

24. I find that the Plaintiff in that case sustained more injuries and with greater severity compared to the case before me.

25. In **JOSEPH NJUGUNA GACHIE Vs JACINTA KAVUU KYENGO, HCCA NO. 31 OF 2017**, Odunga J. reduced to Kshs 600,000/= the General Damages which the trial Court had assessed at Kshs 1,000,000/=.

26. The Plaintiff had suffered the following injuries;

(a) ***Blunt temporal injury with swelling;***

(b) ***Facial bruises;***

(c) ***Blunt injury on the left forearm;***

(d) ***Comminuted fracture of left radius and dislocated left ulna joint.***

27. Although the Plaintiff in that case suffered more injuries, I find the authority comparable to the case before me.

28. The Appellant has urged me to award her Kshs 1,500,000/=. Frankly, there is no legal justification for the Appellant's said submission.

29. Even in **ALPHONZA WOTHAYA WARUTU & ANOTHER Vs JOSEPH MUEMA, HCCA NO. 01 OF 2017**, the General Damages was retained at Kshs 800,000/= for the following injuries;

(i) ***Deep cut wound on the forehead;***

(ii) ***Compound fracture of midshaft of right humerus;***

(iii) ***Compound fracture of the right tibia; and***

(iv) ***Deep cut wound on the right lower leg.***

30. Those injuries were more and of greater severity than those sustained by the Appellant herein.

31. In the result, I now set aside the award of Kshs 150,000/=. and substitute it with an award for General Damages in the sum of Kshs 500,000/=. .

32. The costs of the appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 2ND DAY OF DECEMBER 2021

FRED A. OCHIENG

JUDGE