



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 70 OF 2019
(CORAM: F. GIKONYO J)

JOHN MWENDWA KUTI.....1ST APPELLANT
DUNCAN KOOME.....2ND APPELLANT
CHARLES MWIRIGI.....3RD APPELLANT
VERSUS
IBRAHIM KUNYAGA.....RESPONDENT

(Being an appeal from the judgement of Hon, P.M. Wechuli (SRM))

Tigania delivered on 28th May 2019 in Tigania PMCC No. 70 of 2018)

JUDGMENT

1. The Respondent herein on 5/7/2018 sued the appellants seeking General and special damages. He also sought costs of the suit. He averred that on 27/9/2016 he was riding his motor cycle Registration Number KMCK 387K along Meru Maua Road near Lukununu Academy when the 2nd Appellant so negligently drove motor vehicle registration Number KCE 152A and caused it to hit the Respondents motor cycle thereby occasioning serious injuries to the Respondent and the pillion passenger who died.
2. The appellants filed its defence on 3/12/2018 denying the averments in the claim in *toto*.
3. The trial Magistrate considered all the relevant evidence placed before him and awarded a sum of Kshs 500,000/= in general damages, Kshs 5,000/= as special damages, costs and interest.
4. Aggrieved by the aforesaid decision the appellants filed their memorandum of appeal on 26th June 2019 raising four (4) grounds of Appeal i.e.

(a) THAT the learned magistrate erred in both law and in fact when she awarded Kshs. 500,000 as general damages an amount which is unreasonably high in the circumstances.

(b) THAT the learned magistrate erred in fact and in law by failing to follow the rules of precedents in awarding general damages.

(c) THAT the learned magistrate erred in law and in fact for considering irrelevant matters in arriving at the said decision in favour of the respondent as against the appellant.

(d) THAT the learned magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the defendant on record and the authorities annexed therein in support of the defendant's case.

Submissions

5. On 12/9/2019 this Court directed the parties to canvass the appeal by way of written submissions. Both parties filed their respective

appeals. The appellant submitted that the Respondent only suffered soft tissue injuries which did not cause him permanent disability. He urged this court to revise the award to a sum of Kshs 150,000/=. They relied on the cited cases of **Godwin Ireri v Franklin Gitonga [2018] eKLR**, where the respondent had suffered a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the knee the Court awarded Kshs. 90,000/= on account of general damages. In **Mokaya Mochama v Julius Momanyi Nyokwoyo [2013] eKLR**. The plaintiff suffered Cerebral Concussion, deep cut on the back of his head and the appellate court awarded a sum of Kshs. 70,000/= on in general damages.

6. The respondents submitted that as per the plaintiff's evidence and the Doctors evidence the injuries were serious hence the award of Kshs. 500,000/= was not manifestly high in the circumstances. They also relied on the following authorities; **Agnes Ndume Kioko vrs Alexander Njue [2019] eKLR**, & **United millers Limited & Anor v John Mangaro Njogu [2016] eKLR**. The two cases have no co-relation with this case as they deal with a deceased person. In **Zipporah Nzioka vrs PKW (minor suing through the father and friend JWN) [2019] eKLR**, the plaintiff also suffered fracture of the acetubular pelvic fracture, severe pain in the hip shortening and internal rotation of the right lower limb and soft tissue injuries was awarded a sum of Kshs. 3,000,000/=.

Analysis and Determination

7. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123**, thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

8. **Pw1 Ibrahim Enyaranga** testified that on 27/9/2016 he was requested by a police officer to take him to Kianjai. That on his way he was hit by motor vehicle KCE 152A, a miraa lorry and knocked off the road. That the pillion passenger died but he was lucky to escape with injuries on the head, eye, teeth and right shoulder. It was his testimony that he was later taken to Mithene then transferred to Meru General Hospital. He relied on the following exhibits; **Statutory notice dated 30/5/2018 Pexh 1, P3 form PEXH 3, Discharge Summary Pexh4, Certificate of examination and test vehicle Pexh 5, Bond to attend Court, Copy of Records Pexh 6.**

9. **Pw2 James Gikumba** a medical practitioner working in Meru District Hospital produced the medical report. It was his findings that the Respondent had multiple skull bruises, thigh shoulder laceration with severe tenderness. He was admitted for 3 days at Meru Hospital. He had chronic right shoulder pain with reduced functionality in cold weather. Right ear had reduced hearing. He had chronic headache with dizziness on physical exertion catching his actions. He required further evaluation due to multiple injuries. He needs a CT scan and perhaps surgical intervention and physiotherapy. He produced the **report and receipt totalling Kshs 5,000/= as Pexh 6a & 6b.**

10. **Pw3 Pc Bethwel Kiptoo** at Tigania traffic base stated that he was the investigating officer with PC Ali Galole. That the driver of the motor vehicle KCE 152A was charged with the offence of causing death and careless driving. He was convicted and fined Kshs 400,000/=. He produced the **police abstract as Pexh 2.**

11. The trial Court in its determination found that the Respondents evidence was unchallenged by the appellants as they did not adduce any rebuttal evidence. He also considered the matter and the extent of the injuries sustained by the Respondent, the submissions referred to and the authorities in arriving at the award. From the reading of the judgement it is clear that the trial Magistrate did not rely on irrelevant matter and he also referred to the submission of the parties. Accordingly, there is no merit in the third and fourth grounds of appeal.

12. Be that as it may, the major point of contention in this appeal is quantum of damages awarded in the lower court. The Appellant argues that the award is inordinately high and that the court should reduce it to Kshs. 150,000. Assessment of damages is at the discretion of the trial court, and the appellate court will only disturb the discretion where the trial court committed an error in principle or the award is completely erroneous estimate of damages. See the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30: -**

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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 damages.”

See also; **Gabriel Maina Mungai v Jane Wanjiku Mwaura [2019] eKLR**

13. See also the case of **Butt vs Khan (1977) 1 KAR** that:-

“An Appellate court will not disturb an award for damages unless it is 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 at a figure which was either inordinately high or low.”

14. According to the Plaintiff, the Respondent herein sustained the following injuries;

- (i) Serious Head Injury.
- (ii) Multiple bruises on the scalp.
- (iii) Injuries on the shoulder.

15. The Injuries set out in the plaint are not similar to those in the medical report and in the discharge summary notes. The Discharge summary notes states that the Respondent suffered from mild head injuries. The medical report stated that the Respondent suffered from mild head injury with blood discharging from right ear, multiple scalp bruises and right shoulder laceration with severe tenderness of the joint complex. Such situation would be avoided if pleadings are filed after the claimant has been examined by the doctor. I should also state that any doctor examining a claimant cannot afford to ignore treatment notes or prescriptions or materials on the patient which relate to the injuries in question if he is to justify his findings on the patient.

16. I take it that the trial Magistrate relied on the testimony of the medical practitioner other than the medical and treatments. Faced with the same difficulty the appellate court in **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** discounted the medical report and relied on the treatment notes which were consistent that the Respondent had suffered soft tissue injuries.

17. I have also looked at the submissions cited by the Respondent both in the trial court and in this appeal. They relate to more serious injuries than those suffered by the Respondent. Such decisions only offer guidance but are not to be applied in the manner and with the force of precedent. For instance, in **Francis Ochieng & another v Alice Kajimba [2015] eKLR** the plaintiff suffered multiple soft tissue injuries which included head injuries, sub-conjunctival haemorrhage and periorbital scymosis on both eyes. The appellate court substituted an award of Kshs. 500,000/= issued by the trial court and granted as sum of Kshs 350,000/= on account of general damages. In **Nkaruarau Lejumurt v Vegpro (K) Limited t/a Kantara Farm [2018] eKLR** the Appellant suffered the Appellant suffered traumatic injury to the right leg, blunt trauma to the right hand, a deep cut in the right upper limb, a traumatic mild head injury and multiple soft tissue injuries. The appellate Court awarded a sum of Kshs. 200,000/= on account of general Damages.

18. I am therefore in agreement with the appellant that the award by the trial magistrate was inordinately high in light of the injuries sustained. I set aside the award of Kshs. 500,000 on general damages made by the trial court. In lieu thereof, after considering the cases cited and inflationary trends, I award the respondent a sum of Kshs. 350,000/- in general damages, costs and interest. This is fair and reasonable compensation in the circumstances of the case.

19. I also award the Respondent a sum of Kshs. 5000 in special damages. Therefore, the appeal succeeds in the terms above.

20. Each party shall bear their own costs of the appeal.

Dated signed and delivered in open court at Meru this 6th February, 2020

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F. GIKONYO

JUDGE

In presence of

Omari for Anampiu for respondent

Kibicho for appellant – absent

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F. GIKONYO

JUDGE