



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 69 OF 2019

LAARE SPRINGS (K) LIMITED.....APPELLANT

VERSUS

LAZARUS MBILO MUTUA.....RESPONDENT

JUDGEMENT

1. The Respondent herein was a pillion passenger along Nthambiro Kanjoo Road at Maukine Area when motor vehicle registration Number KBS 273k Toyota Land Cruiser owned by the Appellant allegedly veered off the road and hit the motor cycle the Respondent was driving in causing him to sustain serious injuries.

2. The Trial Court apportioned liability at the ratio of 85%:15% in favour of the Respondent and awarded a sum of Kshs. 450,000/= on account of general damages, Kshs 92,854 on special damages, plus costs and interest of the suit.

3. Aggrieved by the aforesaid decision the appellants filed their memorandum of appeal on 11th June 2018 raising four (4) grounds of Appeal i.e.

(i) THAT the learned magistrate erred in both law and in fact when she awarded Kshs. 450,000 as general damages an amount which is unreasonably high in the circumstances and connotes an erroneous estimate of the damages suffered.

(ii) 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.

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

(iv) 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.

4. On 21/11/2019 this Court directed the parties to canvass the appeal by way of written submissions. At the time of writing this judgement only the appellant had filed its submissions. It is discernible that the only issue in this appeal is on the issue of quantum.

5. 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** as follows;

“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.”

6. The Respondent particularised the injuries he sustained as follows;

(a) Lacerated wound on the forehead

(b) Broken 1st rib

(c) Cut wound around the left eyebrow

(d) Cut wound on the upper and lower jaw

7. During the trial the Respondent testified that he was a pillion passenger along Kanyo- Ntahmbiri Road where he met the appellants Toyota land cruiser KBS 273K on coming and they had a head on collision. That the landcruiser was speeding came to their side and hit them as a result of which he sustained a broken rib, cut on the upper moustache and inside his mouth. He was taken to hospital and admitted for three days. He admitted that they were two pillion passengers. He produced the following documents in support of his averments; Discharge Summary and Treatment cards Exh 1 a-b, P3 Report Exh 4, Motor vehicle search Pexh 5, demand Letter Pexh 6, Medical Report by Dr.Karanja Pexh 7, Medical Report By Dr.Wambugu pexh 8, Receipts for Kshs 92,854/= Pexh 9.

8. Pw2 Corporal Josephine Githaiga testified that he visited the scene and confirmed that the motor vehicle came from the opposite direction. She produced the police Abstract as Pexh 2. PW2 said that nobody was blamed because the rider died.

9. The Appellant did not call any witnesses

10. The appellant submitted that the Respondent only suffered soft tissue injuries and did not cause him permanent disability. It urged this court to revise the award to a sum of Kshs 150,000/=. It relied on the cited cases of **Odinga Jactone Ouma vs Maureen Achieng Odera [2016] eKLR** where the respondent had suffered Head injury (concussion), Cut wound on the right mandible, Neck muscle contusion, Chest pain on the left side and lacerations, Cut wound on the right shoulder blade region, Multiple lacerations over the left shoulder and upper arm Cut wounds and lacerations over right forearm and Painful swollen 4th left finger. D.S.Majanja J. reduced the award of Kshs 400,000/= issued as General Damages and substituted the same with an award of Kshs. 180,000/=. It also relied on **JohnsoneMoseMyaundi (Minor suing through next friend and father WildredNyaundi v Petroleum & Industrial Service ltd [2014]** where the plaintiff suffered bruises on the face, chest, contusions, cerebral concussion, bruises on the elbows and fracture of the right tibia and fibula was awarded Kshs.180,000/= for loss of amenities by the trial magistrate. He was dissatisfied with the judgment and appealed against it on grounds that the award was inordinately low considering the serious nature of the injuries. The High Court on 7th May 2014 confirmed the award on grounds that it was commensurate to the injuries suffered.

11. This Court, as an appellate court, will only interfere with an award of damages in certain circumstances as set out by the Court of Appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** thus;

“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 at a figure which was either inordinately high or low”

12. From the treatment notes and the medical report it is clear that the plaintiff suffered three laceration wounds on the forehead, left eye and upper lip and broken 1st rib on the 1st right side.

13. In **Kenya Marine Contactors (Epz) Ltd V Mbiti Mwinga [2012] Eklr** the court substituted an award of Kshs. 350,000/= to Ksh 70,000/= for Soft tissue injury with tenderness to the chest muscle and lung tissue. The court noted that the Respondent had not proved fracture of the 7th and 8th Rib.

14. In **Hassan Farid & another v Sataiya EneMepukori & 6 others [2018] eKLR** the Respondent in CC 21 OF 2008 suffered multiple soft tissue injuries the appellate court reduced the award issued form Kshs. 250,000/= to Kshs. 150,000/=.

15. In **Hassan Farid & another v Sataiya EneMepukori & 6 others [2018] eKLR** the respondent suffered multiple soft tissue injuries. The court agreed with the trial magistrate decision that an award of Kshs. 200,000/= was commensurate to the injuries sustained.

16. *In consideration of the comparable awards and comparable injuries this court is of the view that the assessment of General Damages by the trial court was excessive in the circumstances and the same is hereby substituted with an award of Ksh. 200,000/= .*

17. Accordingly, the appeal herein is merited in so far as assessment of General damages is concerned and this court therefore makes the following final orders:

a) General damagesKshs. 200,000/-

b) Less 15% contributionKshs 30,000/-

TOTAL..... Kshs. 170,000 /-

c) Costs of the suit in the lower court and interest at court rates from the date judgment was delivered in the Lower court i.e 23rd January 2018 awarded to the Respondent.

d) Cost of the Appeal to borne by each party.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON

6TH DAY OF FEBRUARY 2020.

In the presence of :

C/A: Kinoti :-

Appellant:- M/s Kibicho & Co Advocate for Appellents – No appearance

Respondent:- M/s Shem Kebongo & Co Advocate for respondent – No appearance.

Notice to issue.

HON A. ONG'INJO

JUDGE