



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 62 OF 2016

MARLES VIVIAN.....1ST APPELLANT

IAN JAMES HANDERSON MACBETH.....2ND APPELLANT

VERSUS

AMW (Minor suing through the mother and

next friend ANW).....RESPONDENT

(Being an appeal from the judgement and decree of the Honorable L. Mbugua CM in Machakos CMCC 609 of 2012 delivered on 31.5.2016)

JUDGEMENT

1. According a plaint filed in the subordinate court on 2nd August, 2012 and amended on 9.2.2015, the respondent was a passenger in a Motor Vehicle registration number KAG 032Q and that while she was travelling on 11.11.2011 along Nairobi Road another vehicle registration number KAH 167W registered in the names of the 1st appellant and beneficially owned by the 2nd appellant caused an accident as it collided with the vehicle she was travelling in and caused her severe injuries. The respondent pleaded negligence as particularized in Paragraph 4 of the Plaint and future medical expenses of Kshs 90,000/-. The respondent sought special and general damages for pain and suffering and loss of amenities, future medical expenses and interest and costs of the suit. The respondent pleaded res ipsa loquitor.

2. In their joint defence the appellants denied the accident; denied ownership of the suit vehicle and denied negligence and further denied that the respondent was a passenger as well as the applicability of res ipsa loquitor. They denied the injuries and loss and future medical expenses and pleaded that the accident was caused by the negligence of the driver of motor vehicle KAG 032Q and prayed that the suit be dismissed with costs.

3. The parties recorded a consent on liability in the ratio of 85:15 in favour of the respondent and that the matter proceeded for formal proof. After hearing the matter, the learned magistrate awarded general damages of Kshs 1,500,000/- ; future medical expenses of Kshs 90,000/- and special damages of Kshs 75,675/- together with costs and interests which decision has triggered this appeal.

4. This appeal is against the finding of the trial court on quantum. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 28.6.2016. Counsel prayed that the judgement of the trial court on damages be set aside; that the finding on quantum be substituted with a commensurate one.

5. Counsel for the appellant submitted that the amount of Kshs 500,000/- ought to have been awarded as general damages.

6. Counsel for the respondent submitted that due to the life threatening injuries suffered by the respondent the award was low and urged the court to enhance the same to Kshs 2,000,000/-.

7. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

8. The evidence in the trial court was thus; Pw1 was the respondent who testified that she was injured on 11.11.2011 and taken to Machakos Level 5 Hospital and later to Kenyatta National Hospital. She testified that she saw Dr Loimpasho who prepared a report upon examining her and that she broke both legs and that the said doctor reported that she needed Kshs 1.5m/- for future medical expenses. She tendered the medical report of Dr Wambugu, the treatment notes, abstract and demand notes. She produced receipts amounting to Ksh 16,225/- and testified that she had a metal rod in her leg. On cross examination, she testified that Dr Wambugu reported that she needed Kshs 90,000/- to remove the metal gadget in her leg.

9. The plaintiffs closed their case and so did the defendant who called no witnesses.

10. The following issues are to be determined.

a) *Whether the court can interfere with the finding of the trial court on damages.*

11. Has there been a case made for disturbing the award of the trial court? The law is now well settled that an appellate court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. In **Phillips vs The London South Western Point Way Company (1879 -80) 5. Q.B.D. 78**, James L. J. said on page 85:-

“The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which generally speaking is considered to be within their exclusive province, that is to say the amount of damages. We agree that Judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less. Still the verdicts of juries as to the amount of damages are subject, and must for the sake of justice, be subject to the supervision of a Court of first instance and if necessary of a Court of Appeal in this way that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small then the Court is bound to send the matter for consideration by another jury.”

12. In **Owen vs Sykes (1936) I.KB.192** the Court of Appeal of England felt that although if they had tried the case in the first instance they would have probably awarded a smaller sum as damages yet they would not review the finding of the trial Judge as to amount of damages as they were not satisfied that the trial Judge acted upon a wrong principle of law, or that amount awarded as damages was so high as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. The Court of Appeal followed the case of- **Flint vs Lovell (1935) I.KB.354**

13. In this regard the Particulars of injuries as per the plaint were as follows

(a) **Mild head injury.**

(b) **Deep cut wound left eye brow**

(c) **Soft tissue injuries to the chest**

(d) **Fracture of left femur**

(e) **Bilateral fracture of tibia/fibula open**

(f) **Deep cut wound left leg**

14. The evidence on record on the injuries suffered by Pw1 as per the undisputed medical report on record indicate that the respondent suffered fracture of both femurs as well as soft tissue injuries. There is no indication of 20% permanent disability by Dr Wambugu vide report dated November, 2012 and this is not the case by Dr Loiposha who examined the respondent in May, 2012. There is a variance on the amount of future medical expenses and I opt to believe the amount of Kshs 90,000/- that was given by Dr Wambugu who is a surgeon. In the case **Simon Taveta c Mercy Mutitu Njeru [2014] eKLR** that placed reliance on the case of Kenya Bus Services Ltd v Gituma, (2004) EA 91, the court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

15. I find that the respondent pleaded Kshs 90,000/- and I see no reason not to award the same. In the premises I uphold the award of the said sum by the trial court.

16. With regard to general damages for pain and suffering, Kshs 1,500,000/- was awarded and no reason was given; there was no indication of what factors were taken into consideration. I would agree with the finding in **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** and have observed that there was indication of permanent disability that was not observed by the other doctors. However I am convinced that indeed there was disability at 40% but that notwithstanding I am of the view that the amount awarded was rather high. In **SBI International Holdings (AG) Kenya v William Ambuga Ongeru [2018] eKLR** the court upheld an award of Kshs 800,000/- that was awarded by the trial court where permanent disability was assessed at 40% to 45%. The circumstances in that case are similar to the present case which warrants a reduction of the award from Kshs 1500,000/ to Kshs 800,000/.

17. On the issue of special damages, the same was unchallenged and the same will be undisturbed.

18. In the result the appeal partly succeeds. The judgment of the trial court on quantum is hereby set aside and substituted with the following:

a. General Damages	Kshs 800,000.00
b. Special Damages	Kshs 75,675.00
c. Future Medical Expenses	<u>Kshs 90,000.00</u>
Total.....	<u>Kshs 965,675.00</u>
Less 15% thereof.....	Kshs 144,851.25
Grand total.....	<u>Kshs 820,823.75</u>

The respondent is therefore awarded the sum of **Kshs 820,823.75**. The appellant will have half costs of the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at **Machakos** this 5th day of **February, 2020**.

D. K. Kemei

Judge