



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 35 OF 2018

SAMWEL MIGIKI.....APPELLANT

VERSUS

MMO (Minor Suing through his father and Friend COO)....RESPONDENT

(Being an appeal from the judgment of Hon. Obina (SRM) dated 25th day May 2018 in CMCC No. 424 of 2016 at Kisii)

JUDGEMENT

1. This appeal rises from a judgment and decree entered in Kisii CMCC No. 424 of 2016. In that suit the Respondent sued the Appellant for both general and special damages respecting a road traffic accident in which the Respondent sustained some personal injuries. The appellant was the registered owner of the Motor Vehicle Registration No. KBY 109H which allegedly hit the Respondent on 4th April 2016 and as a result the respondent sustained severe bodily injuries.

2. In its statement of defence, the appellant denied that the accident took place. It however pleaded in the alternative that if it did take place, it was occasioned solely by the negligence of the plaintiff.

3. After hearing the suit, the trial magistrate assessed liability at 70:30 upon consent by the parties. The trial court awarded the Respondent general damage of Kshs 300,000/-, special damages of Kshs 18,140/-, the total award being Kshs 318,140/-. The appellant aggrieved by the judgment lodged this appeal and relied on the following grounds of appeal;

i. The learned magistrate erred in law in making a finding of excessive damages against the defendant.

ii. The learned magistrate erred in law and in fact in holding that the defendant was 70% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

iii. The learned magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to General Damages of Kshs 318,140/- without concrete documentary evidence.

iv. The learned magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to pay damages without concrete documentary evidence.

v. The learned magistrate erred in law and in fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs 222,695/=.

vi. The learned magistrate erred in law and in fact in failing to appreciate the long established principle of stare decisis, the precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

vii. The learned magistrate erred in law and in fact in failing to appreciate as follow: (sic)

viii. The plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.

ix. That the learned magistrate erred in law and in fact in entering judgment in favour of the plaintiff against the defendant in spite

of the plaintiff's miserable failure to establish his case more especially on quantum.

x. The court award is unsuitable and baseless in the circumstances (sic).

4. The appeal was disposed off by way of written submissions. The appellant in his submissions submitted that the award by the trial court was high and excessive and relied on the cases of **Johnson Mose Nyaundi (Minor suing through next of friend and father Wilfred Wadibe Nyaundi) v Petroleum Industries Ltd [2014] eKLR**, **Ndungu Dennis v Ann Ndirangu Wainana & Another [2018] eKLR** and **Godwin Ireri v Franklin Gitonga [2018] eKLR**. They proposed that an award of Kshs 80,000/= would be sufficient. The Respondents in its submissions supported the award and submitted that the appellant had not demonstrated any basis warranting interference by this court.

5. The appeal raise two issues, the first is on liability and the second is on quantum of damages. This is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see **Selle and Another v Associated Motor Boat Company Ltd [1968]EA 123**). Having perused the record I note that there was consent adopted by court in the presence of the counsels for the parties' at the ratio of 70:30. The said consent was never set aside and the only issue for determination by the trial court was quantum. It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside (see **Flora Wasike v Destino Wamboko (1982-88) 1 KAR**). I will therefore not disturb the issue on liability as the consent order was never set aside and the appellant has not demonstrated any grounds warranting the consent order to be set aside. I have also considered that the appellant in his submissions recognized that their proposed general damages of 80,000/- should be subjected to 30% liability agreed upon through consent. It so appears that the appellant abandoned the issue of liability altogether.

6. I now turn to the issue of quantum of damages. As an appellate court, I am guided by the principle articulated by the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30** that:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

7. The injuries of the respondent were not disputed. The respondent suffered bruises on the occipital area, bruises on right and left ankle joints. The respondent also suffered contusion on the chest, back and neck. Dr. Ezekiel Ogando Zoga in his medical report concluded that the plaintiff sustained multiple soft tissue injuries. In order to assist the court assess damages, the duty of the advocates is to cite appropriate cases from which the court can reach a fair decision. The Respondent before the trial court relied on the case of **Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi [2005] eKLR** where the plaintiffs in that case sustained the following injuries and the court awarded damages as follows;

- 1st Plaintiff suffered injury on the left ankle, injuries on the legs and injuries on the chest – a global sum of Kshs 300,000/-.
- 2nd Plaintiff suffered injury on the back – a global sum of Kshs 100,000/-.
- 3rd Plaintiff suffered injuries, multiple soft tissue injuries, injury on the left elbow joint, and injuries on both ankles– a global sum of Kshs 350,000/-.
- 4th Plaintiff suffered injury on the neck and had headache– a global sum of Kshs 100,000/-.

8. The appellant relied on the case of **Daniel Nyandika Kimori vs V A P (minor suing through mother next of friend)MAO [2016] eKLR** where the court awarded Kshs 80,000/- for a plaintiff who had suffered soft tissue injuries to the head and chest and cerebral concussions.

9. The case cited by the respondent vaguely describes the kind of injuries sustained by the plaintiffs therein. Though the 3rd plaintiff suffered multiple soft tissue injuries, it is unclear which injury he sustained on the left elbow joint, and on both ankles. The Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

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.

10. Considering the injuries sustained by the respondent were soft tissue injuries, the pain, the rate of inflation and the precedents, an award of Kshs 150,000/-would be adequate to compensate for the injuries suffered in this case.

11. In conclusion, the appeal is allowed and the Court sets aside the assessment of damages by the Lower Court and in its place substitutes an assessment of quantum for general damages for Kshs. 150,000/= less 30% contribution. The amount shall accrue interest at court rates from the date of judgment in the trial court while the special damages shall accrue interest from the date of filing suit.

12. The appellant shall have the costs of this appeal.

Dated, Signed and Delivered at Kisii this 20th day of February, 2020.

A. K. NDUNG'U

JUDGE

Gichana for Gichana Ben, Advocate for the respondent