



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL APPEAL NO. 86 OF 2018

BUDGET DRIVING SCHOOL.....APPELLANT

VERSUS

ANN SYOMBUA MUSELE.....RESPONDENT

(Being an appeal from the Judgment of the Hon J. Munguti C.M delivered on 19/09/2018 in Kitui CMCC No. 463 of 2016).

JUDGMENT

1. The Respondent **Ann Syombua Musele** sued the Appellant **Budget Driving School** and another for special and general damages, loss of earning capacity, costs and interest following injuries she suffered when she was knocked down by the Appellant's vehicle registration No. KBS.629V. The Appellant's co-defendant did not enter appearance and judgment was entered against him.

2. The Appellant filed defence denying the claim. Later on 8th August 2018 a consent was recorded for entry of judgment on liability. It was to the effect that the Appellant bears 80% while the Respondent bears 20% liability.

3. No witness testified so the court relied on written submissions filed to do its judgment. Finally judgment was entered for the Respondent for Kshs.1,924,400/= plus costs and interest.

4. The Appellant appealed against the judgment citing the following grounds:

a) **That**, the learned trial Magistrate erred in law and in fact in awarding an amount in general damages that was manifestly excessive given the nature of the injuries.

b) **That**, the learned trial Magistrate erred in law and in fact in failing to appreciate and consider that the Respondent herein was not awarded any permanent incapacity by Dr. Patrick Mutuku, the Respondent's doctor.

c) **That**, the learned Magistrate erred in law and in fact in awarding general damages of Kshs.2,400,000/= without having the opportunity to assess the Respondent's injuries at trial as parties herein filed written submissions on quantum.

d) **That** the learned trial Magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities attached thereto wherein the Plaintiff sustained comparable injuries to the Respondent herein while assessing general damages.

e) **That** the learned trial Magistrate's award was an erroneous estimate of the damages due in the particular case and was manifestly excessive.

5. When the appeal came for hearing counsel for the parties agreed to file written submissions which they did for disposal of the said appeal.

6. It is the Appellant's submission through S.M Chege advocates that the award made for general damages was manifestly high. The pleaded injuries were: -

i. Crush fracture of the right femur.

ii. Intracondlar fracture of right femur.

iii. Tibia plateau fracture right limb.

iv. Treated by skeletal traction and skin grafting.

He summoned up the said injuries to a fracture of the right tibia and femur. To him the Respondent just fractured the right leg.

7. He submits that the Respondent did not suffer any permanent incapacity as per Dr. Patrick Mutuku's report dated 21st June 2016. He further contends that the award was made without the court seeing the Respondent for it to do a proper assessment of the injuries. The reason is that parties filed submissions to the case before the court.

8. Counsel was of the view that the trial court should not have relied on the case of **Gabriel Mwashuma –vs- Mohammed Sajjad & Anor 2015 eKLR** as it did. The reason being that the injuries in the **Gabriel Mwashuma** case were more serious than the present one. Further that the case of **Kirinjit Singh Magon –vs- Bonanza Rice Millers (2014) eKLR** relied on involved a permanent disability assessed at 35%.

9. According to counsel, the court should have relied on the case of **Sammy Mugo Kinyanjui & Anor –vs- Kairo Thuo (2017) eKLR** which had been submitted by the Appellant. In the said case an award of Kshs.600,000/= was given for similar injuries. Relying on the cases of **Butt –vs- Khan (1981) KLR 349 & Shabani –vs- City Council of Nairobi (1985) KLR 516**, he submits that the award by the lower court was manifestly high and should be interfered with by this court.

10. Musili Mbiti & Associates advocates for the Respondent submits that the Respondent suffered serious injuries as shown in the report by Dr. Patrick Mutuku dated 21st June 2015 as well as the P3 form and treatment notes which were all produced by consent. He submits that the injuries suffered as per the medical report were:

- a) Crash fracture of the right femur
- b) Intercondylar fracture of the right femur
- c) Tibia plateau fracture of the right limb
- d) Treated by skeletal traction and skin grafting
- e) Walking with a limb
- f) The affected limb is very likely to develop severe osteoarthritis
- g) Degree of injury was assessed as grievous harm

11. He said they had relied on the cases of **Gabriel Mwashuma (supra)&Kirinjit Singh Magon (supra)** to argue the Respondent's case. In the said cases, awards of Kshs.3,000,000/= and Kshs.2,000,000/= had been made respectively. The Appellant had on its part relied on **Sammy Mugo & Anor (supra)** to ask for an award of Kshs.600,000/=.

12. Counsel referred to the case of **Mutua Kaluku –vs- Muthini Kiluto (2018) eKLR** where Justice P. Nyamweya in upholding the judgment of the trial court stated thus:

“I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries would be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is

adjusted in light of the fall in the value of money since such awards were made. See in this regard Kemp & Kemp on the quantum of damages, volume 1 paragraphs 1-003. In my view to be comparable, the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provision for adjustment.”

13. He cited the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) –vs- Kiarie Shoe Stores Ltd (2015) eKLR** where the Court of Appeal held that:

“As a general principle, assessment of damages lies in the discretion of the trial court and 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. The court 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 wholly erroneous estimate of the damages.”

14. Relying on the above two cases, plus **Peter Namu Njeru –vs- Philemone Mwangoti 2016 eKLR** he submits that this court may only interfere with the award by the trial court if the same was erroneously arrived at such that it was inordinately high or too low. He argues that in this case the Respondent suffered very serious injuries whose effects are different.

Analysis and determination

15. It is now settled that the duty of a first appellate court is to analyse and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Another –vs- Associated Motor**

Boat Co. Ltd & Others (1968) E.A 123.

16. Having considered the grounds of appeal, the rival submissions and the entire record, I find the following issues to fall for determination:

- i. What injuries did the Respondent suffer?
- ii. Whether the quantum of damages should be interfered with.

Issue no. (i) What injuries did the Respondent suffer?

17. Judgment on liability was entered in the ratio of 80:20 in favour of the Respondent. The appeal is basically on quantum. The injuries sustained by the Respondent were pleaded as follows: -

- a) Crush fracture of right femur
- b) Intercondylar fracture of right femur
- c) Tibia plateau fracture right limb
- d) Treated by skeletal traction and skin grafting.

18. In the consent recorded on 8th August, 2018 the parties agreed to rely on their submissions already filed for purposes of judgment on quantum and so no witnesses were called. Documents relied on in respect to quantum appear to have been the following: -

- a) Duly filled P3 form
- b) Medical report by Dr. Patrick N. Mutuku dated 21st June, 2016.
- c) Admission/discharge summary from Kitui district hospital dated 8th February, 2016.

19. The Respondent was admitted at Kitui district hospital on 23/07/2015 and discharged on 08/02/2016. It shows that surgical toilet skeletal fraction and skin grafting were done. She was given an appointment for 24/02/2016. She was sent to the hospital on 27/04/2016 for filling of the P3 form which was done by Dr. P.N Mutuku. The injuries shown in the P3 form are the same as those pleaded. The degree of injury was given as grievous harm.

20. Dr. Patrick N. Mutuku is the same one who did the medical report dated 21st June 2016. His reference was the P3 form and in patient notes from Kitui district hospital. On the date of the examination she was said to be still on crutches and walked with a limp on the right leg. The doctor noted that she was very likely to develop severe osteoarthritis of the affected limb. She would require strong pain killers for a long time.

21. Mr. S.M Chege for the Respondent has submitted that the Respondent generally suffered one injury which to him was a fractured right leg. That the trial court did not see the Respondent's injuries and could thus only rely on the Respondent's documents.

22. I have compared the entries of the injuries in the P3 form, discharge summary, the medical report and those pleaded in the plaint. They are all the same. The parties herein by consent agreed to rely on the medical documents without calling the makers. Even the Plaintiff was never called as a witness. Since the parties and the court were relying on the medical documents and submissions, there was no way the court could have seen the Respondent's physical injuries.

23. The Appellant had a right to have the Respondent summoned to appear in court for the court to see her. The moment the consent was entered into by the parties that right to call the Respondent was waived. If the Appellant had an issue with the injuries suffered, it should have sought for a second opinion from another doctor. On this issue, I find the injuries suffered by the Respondent to be those outlined in the pleadings as they are the same ones appearing in the medical documents relied on.

Issue (ii) Whether the quantum of damages should be interfered with.

24. As duly guided by the Court of Appeal decision in **Hellen Waruguru Waweru case** (*supra*) among others, an appeal court will only interfere with an award of a lower court if wrong principles were used to arrive at the decision, or if relevant factors were not considered.

25. Counsel for the Appellant has submitted that his submissions and authority were not considered by the trial court. This is what the trial court stated in his judgment;

" I have compared the injuries in the said cited decisions against the Plaintiff's injuries and the age of the decisions. The applicable principle in awarding damages is to award similar awards for similar injuries after considering variables in passage of time or inflation."

Before making this observation, he had made mention of all the authorities cited by the parties' counsel.

26. There is no dispute that the Respondent suffered multiple fractures and she had to undergo certain procedures. She remained for six and a half (6 ½) months before discharge. It is true the Respondent did not suffer any permanent disability.

27. The Plaintiff in the **Gabriel Mwashuma** case (*supra*); Singh Magon case (*supra*) suffered five (5) fractures, i.e. femur shaft spiral wedge fracture left thigh; pilon tibial comminuted fracture left ankle joint; fibula shaft fracture, abrasive fractures on left patella and femure condyle median plus other injuries. He was awarded Kshs.3,000,000/=.

28. The Plaintiff in **Kirinjit Singh Magon** case (*supra*) received two gunshots. One bullet was removed, another bullet penetrated the left leg in the region of the knee. It shattered the lower end of the left femur and destroyed the knee ligament. He was awarded Kshs.2,000,000/=. The injuries in the two cases above were more serious than those in the present case.

29. In the **Sammy Mugo Kinyanjui & Anor** case (*supra*) the Plaintiff suffered slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs, fracture of the right tibia, fracture of the left tibia and fibula. The Plaintiff was awarded Kshs.600,000/= on appeal.

30. The injuries the Plaintiff in this case suffered were more serious. Her stay in hospital for six and a half months speaks to that.

She was discharged while still on crutches. She did not however suffer any permanent injury.

31. I have considered other decisions where almost similar injuries were involved. A case in mind is **Kiru Tea Factory & Anor –vs- Peterson Watheka Wanjohi (2008) eKLR** on award of Kshs.800,000/= was made where the Plaintiff had multiple fractures, soft tissue injuries on the chest and a degloving injury on the right hand with extensive skin and muscle loss on the forearm.

32. Treatment involved surgical toilet of the wound, skin grafting and plating of fractures. He was admitted for three and a half (3 ½) months and endured a painful treatment which left the affected arm very stiff and more of function less. The decision in the **Kiru Tea Factory** case was made in 2008 which was ten (10) years earlier than the one in this case delivered on 19/09/2018. I find the **Kiru Tea Factory** case to be more relevant compared to those cited by the parties, which though recent were both too high and/or too low, given the nature of the injuries suffered.

33. After taking into account the law, extent of the injuries and case law, I find that the award by the trial court was excessive. The court did not do a proper comparison of the injuries in the cited cases and the present one. The trial court did not cite any particular decision that it relied on to make the award. It would not therefore be correct for the Appellant to claim that its cited decisions were ignored in favour of those of the Respondent.

34. The upshot is that the appeal has merit and is allowed. The **award of Kshs.2,400,000** is set aside and substituted with one of **Kshs.1000,000; special damages remain** at Kshs.5,500/= **less 20%** contribution of Kshs.201,100/=.

35. I therefore enter judgment for the Respondent against the Respondent for **Kshs.804,400/= (Eight hundred and four thousand, four hundred)** plus costs and interest at court rates.

36. Costs of the appeal to the Appellant.

Orders accordingly.

Delivered, signed & dated this 7th day of May 2020, at Makueni High Court.

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H. I. Ong'udi

Judge