



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 56 OF 2019

(CORAM: F. GIKONYO J.)

EVA KAREMI1ST APPELLANT

REBECCA MWONJA2ND APPELLANT

JUDY LEBUTE MWITI3RD APPELLANT

TONY GITONGA4TH APPELLANT

KENFREY MWITI MBAE.....5TH APPELLANT

JOHN LUMIRI6TH APPELLANT

-VERSUS-

KOSKEI KIENG.....1ST RESPONDENT

WU XIANG2ND RESPONDENT

(An appeal from the judgment of Hon. E. W Ndegwa (RM) at Githongo CMCCC No. 50 of 2018 delivered on 22nd May 2019)

JUDGMENT

1. The appellants were the plaintiffs in the trial court. They sued the respondents for special damages of Kshs. 81,148/-, general damages as well as costs and interest of the suit. On 22/5/2019 the trial court entered judgment in favour of the appellants as follows:

a. Liability100%

b. General Damages

1st Plaintiff Kshs. 70,000/-

2nd Plaintiff Kshs. 40,000/-

3rd PlaintiffKshs. 45,000/-

4th Plaintiff Kshs. 40,000/-

5th PlaintiffKshs. 60,000/-

6th Plaintiff Kshs. 65,000/-

c. Special DamagesNone

d. Cost of the suit and interest

2. The appellants being aggrieved by the decision filed their appeal and stated grounds which may be summarized into one: **that the learned trial magistrate erred both in law and fact in her assessment of damages/quantum.**

3. This appeal was canvassed by way of written submissions. The appellants submitted that the trial magistrate wholly relied on the submissions of the respondents consequently awarding them damages that were inordinately low. On 27/02/2019 both parties entered a consent that one of the appellants to produce in evidence the list of documents on behalf of the others. The 6th appellant produced the list of documents comprising of bundle of receipts, original police abstracts and medical reports for the appellants. They wondered why the abstracts and medical receipts were admitted in evidence by consent of the parties but the bundle of receipts were left out. They claimed that by virtue of the consent and production of evidence thereof, they were entitled to special damages sought. Hence, they urged that their appeal is meritorious as the trial court acted on wrong principles of law. They relied on **Greco International Limited v Rift Valley Railways Limited [2018] eKLR** and **John Kipkemboi & another v Morris Kedolo [2019] eKLR** to support their appeal.

4. The respondents submitted that the appeal lacks merit firstly because the appeal is defective for the appellants failed to extract the decree making the record of appeal incomplete. Secondly, based on the merits of the appeal the trial magistrate did not error as she exercised her discretion judiciously as she took into account the relevant factors. The damages awarded were proper and the failure to award special damages was correct for it was not proved. That the issue of consent raised by the appellants is an afterthought having realized their failure to produce the receipts. There was no consent that was recorded between the parties. They relied on the cases of **Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2014] eKLR**, **Gilbert Kirima Kubania & another v Stella Mukami Karimba [2019] eKLR**, **ZNN V MWN [2015] eKLR** and **Vincent Okoso Nyende v Shengle Engineering Construction Limited [2015] eKLR**.

Duty of court

5. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses; demeanour thereof is therefore best evaluated by the trial court. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable thereof. I shall so proceed.

Issues

6. The issues for determinations are: (1) ***whether the appeal is defective***; and (2) ***whether the trial court adopted wrong principles in the assessment of damages***.

Alleged appeal defective

7. The respondents argued that failure to extract the decree makes the record incomplete and the appeal defective. According to **Order 42 of the Civil Procedure Rules. Rule 2 of the said Order**:

“Where no certified copy of decree or order appealed against is filed with the memorandum, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order and the court need not consider whether to reject the Appeal summarily under Section 79(B) of the Act until such certified copy is filed.”

8. Whereas the law requires the appellant to file a certified copy of the decree, failure to so file, especially where the original record as well as typed proceedings (including the judgment) are part of record, should be cured under **Article 159(2) (d) of the Constitution** which commands courts to serve substantive justice. The omission does not occasion any prejudice on the respondents. In fact, it would be a miscarriage of justice to strike out the appeal solely for this reason. I am aware courts especially the appellate court treated litigants harshly where they had not filed the decree with the record of appeal. Their appeals were struck out. The approach became rapid and headlong; great injustice ensued and I suspect this is one of the major reasons which impelled the people of Kenya to respond with the command in article 159 of the Constitution that courts of law should strive to serve substantive justice and avoid placing undue reliance on technicalities in determination of cases. Other legislative interventions had sought to entrench the overriding objective of the law in the **Civil Procedure Act** through **Section 1A and 1B** thereof. See also **South Nyanza Sugar Co. Ltd v. Daniel Obara Nyandoro (2010) eKLR**. Accordingly, I find that the appeal is not defective.

Assessment of damages

9. Did the trial court adopt wrong principles in the assessment of damages? Appellate court ought not to interfere with the assessment of damages by a trial court except where, in the exercise of discretion the trial court adopted wrong principles of the law, or awarded damages that was inordinately high or low as to make it an entirety erroneous estimate of the damages to which the plaintiff is entitled. See the case of **Butt v Khan [1981] KLR 349** where as her per Law, JA:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety

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.”

10. Also, the Court of Appeal in the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** similarly held:

“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 a wholly erroneous estimate of the damages.”

Special damages

11. On special damages, the appellants pleaded Kshs. 81,148/- for; medical report at a cost of Kshs. 10,000/- for each appellant; hospital charges that 1st – 6th appellant paid to wit; Kshs. 1,948/-, Kshs. 3,565/-, Kshs. 5,280/-, Kshs.2, 345/-, Kshs. 6,205/-and Kshs. 1,805/- respectively.

12. Special damages must be pleaded and proved specifically. See the Court of Appeal in the case of **John Richard Okuku Oloo v South Nyanza Sugar Co. Ltd [2013] eKLR** that:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

13. The appellants pleaded hospital expenses and costs of obtaining a doctor’s report. The appellant suffered injuries for which they were treated. They attached the hospital invoices to their list of documents but it is only the invoice of the 6th appellant that was produced. The invoices show the amount of money spent by the appellant for their treatment. Accordingly, each appellant is hereby awarded the amount pleaded as hospital fees. However, there were no receipts or invoices attached for the sum spent on medical reports. The amount claimed are also exorbitantly high. This court cannot therefore, ascertain if any, the amount spent in acquiring the report. Accordingly, the sum allegedly spent on medical reports has not been proved as required in law. It is hereby disallowed.

General damages

14. In road traffic accidents, scarcely, if at all, will two individuals suffer exactly the same injuries. Thus, assessment of general damages for injuries suffered is left to the discretion of the court. Decided cases on comparable injuries, therefore, act as a guide in assessment of damages. The aim is to achieve fair compensation.

15. The 1st appellant was awarded Kshs. 70,000/-. She sustained injuries to her right thigh and bruises on her lower and upper limbs.

16. The 2nd appellant was awarded Kshs. 40,000/- for injuries on the right shoulder pain and cut wound on her mouth.

17. The 3rd appellant was awarded Kshs. 45,000/- for injuries on and pain on her back and right shoulder pain.

18. The 4th appellant was awarded Kshs. 40,000/- for cuts on the chin and right shoulder tenderness.

19. The 5th appellant was awarded Kshs. 60,000/ for injuries sustained; 2cm cut on the forehead, cut wound on the right elbow and right limb (leg and ankle joint).

20. The 6th appellant was awarded Kshs. 65,000/- for injuries sustained being bruising on the forehead, hip and left ankle.

21. The appellants sustained soft tissue injuries. Accordingly, the following cases are a good guide:

a. In the case of **Buds and Bloom Ltd Vs Lawrence Emusugut Obwa [2016] eKLR** the lower court had awarded Kshs. 70,000/= for a deep cut wound on the left leg and soft tissue injuries on the leg. On appeal the High court reduced the award to Kshs. 50,000/-.

b. In the case of **Kipkere Limited Vs Peterson Ondieki Tai [2016] eKLR** the trial court awarded Kshs. 100,000/= for deep cut wound on the left leg, chest contusion and bruises on the left shoulder. On appeal the High Court substituted the award with Kshs. 30,000/- . Based on the foregoing, I am of the view that the trial magistrate did not error in awarding the 1st appellant Kshs. 70,000/-.

c. In the case of **Eastern Produce Ltd Vs Mamboleo Khamadi [2015] eKLR** the trial court had awarded Kshs. 120,000/- for cut wound on the right middle finger and severe pains incurred during and after the injury. On appeal this was substituted with Kshs. 50,000/-.

22. From these comparable decisions, damages awarded to each appellant by the trial court was neither inordinately high nor low to warrant

disturbance of discretion by the trial court.

23. Therefore, appeal on quantum of general damages has no merit and it fails. The appeal only succeeds to the extent that I award special damages as follows:

a. Special damages

1st Appellant Kshs. 1,948/-

2nd Appellant Kshs. 3,565/-

3rd Appellant Kshs. 5,280/-

4th Appellant Kshs. 2,345/-

5th Appellant Kshs. 6,205/-

6th Appellant Kshs. 1,805/-

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

Dated, signed and delivered at Milimani this 7th day of May 2020

F. GIKONYO

JUDGE

Representation: -

Appellants represented by –

Vivian Aketch & Co. Advocates

P. O. Box 317 – 60200, Meru

Email: vivianaketch05@gmail.com

Tel: 0705828570

Respondents represented by –

Munene Wambugu & Kiplagat Advocates

Kiricop House, 3rd Floor Room 3:20

P. O. Box 1186 – 10300 Kerugoya