



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 40 OF 2015

PAULINE KAMAU.....1ST APPELLANT

DAVID MICHAEL KAMAU.....2ND APPELLANT

VERSUS

ELGONA KEMUNTO KERINI..... RESPONDENT

(Being an appeal from the judgment of the Honorable E Kimilu (Ag PM) delivered on the 17th March 2015 in Naivasha CMCC No 9 of 2011)

JUDGMENT

Background

1. Following an accident on 16th October, 2010, the plaintiff/respondent filed suit for recovery of damages in the lower court. She stated that she was travelling lawfully as a passenger aboard motor vehicle KBH 891U Toyota matatu when it overturned. The trial court found that the injuries proved after a full hearing were:

- a) Deep wounds and bruises on the right arm
- b) Deep cut wounds on the right hand
- c) Bruises on the right forearm

2. Liability was found at 100% against the defendants, and damages were awarded by the court as follows:

- Pain suffering and loss of amenities Kshs 300,000/-
- Special damages Kshs 3,000/-

Total Kshs 303,000/=

3. Dissatisfied, the appellants in this appeal challenge the quantum of damages awarded by the lower court. They assert that the trial court erred in:

- *finding that the respondent was entitled to general damages of Kshs 300,000/- for soft tissue injuries;*
- *finding that the respondent was entitled to general damages that were too high in view of the evidence tendered;*
- *failing to consider the Appellants' submissions on quantum and the insurance (Motor Vehicle Third Party Risks) Act Cap 405; and*
- *failing to consider conventional awards in cases of similar nature.*

4. This court's role is to re-evaluate the evidence upon which the award was made, and after exhaustive scrutiny to make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty in a first appeal was stated in *Selle & Another v Associated Motor Boat Co. Ltd. & others (1968) EA 123* and, earlier, by the Court of Appeal for East Africa in *Peters v Sunday Post Limited [1958] EA 424* where Sir Kenneth O'Connor stated:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

5. Clearly, therefore, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter itself for the first time.

6. *The injuries sustained are not in dispute. Dr Kiambi's report indicates that they were:*

Deep cut wounds and bruises on the right arm, Deep cut wounds on the right hand, Bruises on the right forearm. At Mt Longonot Medical Hospital, these wounds were cleaned, sutured and dressed. At a later admission to Nyahururu District Hospital the respondent “was taken to theatre and “pieces of glass removed from the right upper limb”. Scars from the wound cuts were: 13x10cm on right upper limb limb, 9cm along 4th metacarpal, 5x1/2 cm on the dorsal surface of middle finger, and 6cm long fibrotic scar on dorsal surface of index finger. There were, however, no fractures or dislocation. Nevertheless, the Respondent was not able to flex her right index and middle fingers which the doctor indicated as permanent disability, although overall permanent disability was awarded at 20%. The degree of harm was grievous harm.

7. *As this evidence was not controverted in cross examination, all I need to do is to compare the seriousness of the injuries with similar cases and identify the awards made.*

8. *On appeal, the appellant submitted three authorities on soft tissue injuries where the first appeal court reduced the awards; namely, Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR award reduced from 300,000/- to 100,000/-; George Mugo & Another v AKM (Minor suing through next friend and Mother of AMK) [2018] eKLR, award made for 90,000/- and Godwin Ireri v Franklin Gitonga [2018] eKLR where the award was reduced from 300,000/- to 100,000/-. They argue that like injuries should accrue comparable awards, and on appeal, propose an award of between 90,000/- to 120,000/-.*

9. *The appellants had not submitted the aforesaid authorities before the trial court. Instead, they had proposed an award of 50,000/- on the strength of two authorities, namely: Pamela Ombiyo Okinda v Kenya Bus Services Ltd HCCC 1309 of 2002 where the court awarded 50,000/- for soft tissue injuries, although this authority was not supplied nor is it readily available; and Samwel Mburu N'gaari & 5 Others v Wangiki Wangare & Another HCCA No 173 of 2008 where the court awarded the 4th plaintiff 50,000/-.*

10. *The respondent submitted that interfering with the award would, essentially, be an interference with the discretion of the trial court except if good cause was shown. She reiterated the authorities cited in the trial court. In Samuel Muthama v Kenneth Maundu Muindi Machakos HCCA No 102 of 2008, an award of 380,000/- was given for injuries more serious than those sustained by the respondent in this case; In Samuel Mwangi Gatoto v Patrick Anzaya & Another Mombasa HCC No 23 of 1997, Shs 901,200 was awarded for head injury, bruises on back and right arm and rugged laceration right parieto frontal scalp; in Wiyumiririe Saw Mills v Paul Kariuki Eldoret HCCA No 1110 of 2000 Shs 230,000/= was awarded in 2005 for cut wounds on right hand that “were very severe, but had healed [and] that the scar to the right hand was growing into a keloid and that it would remain a permanent feature of the respondent's body”.*

11. *I have considered the authorities availed. I think the case of Wiyumiririe Saw Mills is fairly comparable with the present case. The authorities availed by the appellants in the lower court were not relevant, and singularly unhelpful to the trial court. As for those availed on appeal: in Ndungu Dennis the High Court reduced the award of 300,000/- to 100,000/- in 2018 based on treatment notes indicating soft tissue injuries to the lower right leg and back. In George Mugo, the reduced award of 90,000/- was for blunt injuries to left shoulder, chest, left wrist and left arm. In Godwin Ireri the plaintiff had a cut on the scalp, swelling on the dorsum of left foot and bruise on the right knee, and was awarded 90,000/=.*

12. *The common thread running through all the appellants' authorities is that the injuries involved were either substantially soft tissue*

injuries or blunt injuries or bruises, and no disability was indicated. In the present case the injuries are deep cut wounds which necessitated sutures or surgery and admission of the respondent into hospital twice. Permanent disability was indicted as 20%.

Disposition

13. All in all, I am not persuaded that the award was inordinately high given the circumstances, and taking into account the comparative authorities. Further, the special damages were not challenged. Accordingly, there is no basis for interfering with the lower court's award.

14. In the result, the appeal is dismissed with costs.

Administrative directions

15. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams/Zoom video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

16. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

17. Orders accordingly.

Dated and Delivered from Nairobi by video-conference this 21st Day of May, 2020

RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr Kariuki, for the Appellant
2. Mr Ndubi, for the Respondent
3. Court Clerk Quinter Ogutu