



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 49 OF 2019

SIMON KAROKI NJOROGE.....APPELLANT

-VERSUS-

JOHN PAUL KAMANU.....1ST RESPONDENT

JOHN ORINGO OGUTA.....2ND RESPONDENT

(Being an appeal against quantum of damages from Judgment of Hon. E. Kelly, Senior Resident Magistrate delivered on 22nd February 2019)

J U D G M E N T

1. The appellant herein Simon Karoki Njoroge was involved in a Road Traffic Accident on 6th September 2017. It involved the motor vehicle he was in, KBP 307K and the respondent's motor vehicle KBU 292P.
2. According to medical evidence given during the trial before the subordinate court he sustained injuries for which he claimed General Damages for pain and suffering.
3. The parties agreed on liability at 90%:10% in favour of the appellant.
4. At the end of the trial and after due consideration of the evidence, submissions, authorities cited, the trial magistrate awarded General Damages of Kshs. 150,000/= which together with Special Damages Kshs. 139,880/= totaled Kshs. 289,880/= less 10% = Kshs. 250,892/= plus costs and interest. She declined to award costs after finding that the plaintiff had not served demand or notice to sue on the defendant.
5. Aggrieved by this judgment the appellant filed this appeal on the grounds;
 1. *That the learned trial magistrate erred in law and fact in not considering the pleadings, evidence and submissions filed on behalf of the appellant in their totality.*
 2. *That the learned trial magistrate erred in law and fact in arriving at a decision that was against the weight of the evidence.*
 3. *That the learned trial magistrate erred in law and fact in awarding general damages which were inordinately low and not commensurate to the injuries sustained and does not accord to the principle for award of damages and decided authorities.*
 4. *That the learned trial magistrate erred in law and fact in declining to award costs of the suit to the appellant despite making an award in his favour.*
 5. *That the learned trial magistrate's judgement on quantum is unreasonable and untenable in law.*
6. Parties agreed to dispose of the appeal by way of written submissions.
7. I have carefully considered the grounds of appeal, submissions and authorities cited. I have perused the subordinate court's judgment and the authorities upon which the trial court relied.
8. The issue is whether there is reason for this court to interfere with the awards of the trial court. This will depend on the answers to the

question, whether the trial court acted against settled principles regarding the award of general damages and costs.

9. The principle upon which an appellate court may interfere with an award of damages are restated in the case cited by the respondents.

Paul Kipsang Koech & Another vs. Titus Osule Osore [2013] eKLR where the court stated;

“It is well-established law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion; must be exercised judicially, with wise circumspect and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court:-

(a) Took into account an irrelevant factor or

(b) Left out of account a relevant factor or

(c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

10. The issue for determination is whether the trial courts judgment exhibit any of the errors cited in the grounds, and whether this court has any reason to interfere with that court’s exercise of discretion.

11. Before the trial court the appellant cited on authority **James Gathirwa Ngui vs Multiple Hauliers [E.A.] Limited & Another NBI HCC 658 of 2009**. On appeal the appellant cites; **Mushambi Onde Gona vs Associated Vehicle Assemblers Limited and Another Mombasa HCC No. 919 of 1991 (UR)**, **Margaret Ochieng vs David N. Njihia & Another Kisumu HCCC No. 57 of 1993**, **Francis Ochieng & Gabriel Ongele Ogolla vs Alice Kajimba Migori Civil Appeal No. 23 of 2015**.

12. The respondents relied on **James Kariuki Muraya vs Daniel Muturi Mwangi NBI HCA OF 2002**, **Meru HCCA 75 of 2015**, **Paul Karimi Githinji vs Joseph Mutai Kireria**. In arriving at her decision the trial court stated;

“The only authority cited and annexed by the plaintiff on the issue of quantum i.e. James Gathirwa Ngui vs Multiple Hauliers (E.A.) Ltd. & Another. Nairobi High Court Civil Suit No. 658 of 2009 was a ruling and not a judgement. The latter matter was not in any manner helpful to the court on the said subject.

In James Kariuki Muraya vs David Muturi Mwangi (2004) eKLR, the court awarded a sum of Kshs. 150,000 for a cut over right upper eyelid, fractures of the radius and ulna bones of the left forearm and over left shoulder with a temporary disability of 8 months and a permanent disability of 15%.

In Meru HCCA 75 of 2017. Paul Karimi Kithinji vs Joseph Mutai Kireria, the court awarded Kshs. 150,000/= for segmental fracture of the right ulna and minor lacerations of the face.

I find it fair and award Kshs. 150,000/= in general damages, guided by both latter authorities in which the injuries sustained bore close similarity to those of the plaintiff in the instant case.”

13. The trial court analysed the medical evidence, analysed the authorities cited and drew conclusions that led to the exercise of her discretion in the award. The only one authority was annexed to the appellant’s submissions was not helpful to the trial court, and the trial court cannot be blamed for relying on what was placed before it. The record shows that the court considered the pleadings, the evidence and submissions. The award was guided by an award by this court in the same year the appellant was involved in the Road Traffic Accident, for similar injuries. The case, as indicated was about another plaintiff who had sustained similar injuries, hence in my own analysis, it cannot be said that the award was inordinately low to warrant this court’s interference.

14. Regarding the award on costs, the trial court stated;

“Relying on Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another. Nyeri High Court Civil Case No. 17 of 2014, the plaintiff urged the court to award costs of the suit.

I am guided by the same authority in which the learned judge held that besides the basic rule that costs follow the event, the award of costs is discretionary on the court and the court is entitled to look at inter-alia, the conduct of the parties prior to and after filing the suit. The plaintiff in this matter failed to serve a demand and notice of intention to sue to the defendant, conduct which I find to be an unfair omission on the part of the plaintiff and hence, I decline to grant costs to the plaintiff. Each party to cater for its costs of the suit.”

I have perused the record. The plaintiff/appellant did not admit to not serving demand or notice to sue. The issue was never raised in the trial, and no questions were put to the plaintiff regarding that issue. The defendant respondent did not call any evidence or demonstrate that they had suffered any prejudice, if at all the demand or notice was were not served. The conclusion that plaintiff failed to serve the said notice was drawn from pleadings, but no evidence was tendered to support the same, as the same was not admitted. In the same authority, **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR** the court stated;

“In the above cited case, [7] this court cited the decision in the Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 Others, [8] where the court citing two leading decisions on the subject held inter alia that:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial Judge is given discretion.... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.” (Emphasis mine)

In my view section 27 of the Civil Procedure Act provides the general rule which ought to be followed unless for good reason to be recorded... This provision gives the Judge discretion in awarding costs but that discretion has to be exercised judicially. (ii) A successful party can be denied costs if it is proved that but for his conduct the action would not have been brought.”

15. The discretion to award or deny costs must be exercised judiciously, and on good grounds, the conduct ought to be conduct that is prejudicial to the other party, and that prejudice should be established by evidence, it must be conduct which is established in the trial.

16. In this case, that was not established and it is my view that the order on costs was in error. The appeal therefore succeeds in part;

1. The award on General Damages remains as was made by the trial court.

2. The award on costs by the trial lower court is set aside and substituted with an award for costs to the plaintiff/ appellant from date of judgment.

3. Appellant will have half the costs of the appeal.

Both with interest at court rates.

Dated, delivered via ZOOM and signed at Nakuru this 8th July day of 2020.

Mumbua Matheka

Judge

In the presence of via ZOOM

Edna Court Assistant

Kairu & McCourt Advocates N/A for respondents

Nancy Njoroge, Kairu & Company Advocates

Kairu for appellant