



IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL APPEAL NO. 5 OF 2019

RENTCO EAST AFRICA LTD.....1ST APPELLANT

THE HON. ATTORNEY GENERAL.....2ND APPELLANT

GEOFFREY MURIITHI NDEGE.....3RD APPELLANT

VERSUS

HUSSEIN IGU KIYAI a.k.a HUSSEIN KIYAYI IGU.....RESPONDENT

(Being an appeal against judgment in Garsen PMCC No. 66 of 2018

delivered by Hon. Kadima SRM on 9/5/2019)

JUDGEMENT

1. On 22nd September, 2017 The Respondent (then Plaintiff) was riding motor cycle registration no. **KMED 273C** along Idsowe- Minjila Road when he was hit by a motor vehicle registration No. **GK B 030 J/ KCB 479 K** owned by the 1st and 2nd Appellants and driven by the 3rd Appellant. The Respondent filed suit vide a Complaint dated 20th September, 2018 and filed on 21st September, 2018 claiming general damages for pain, suffering and loss of amenities. The Appellants (then Defendants) filed a Defence dated 9th October, 2018 in which they denied liability.

2. The trial commenced on 6th March, 2019 where the Respondent called 2 witnesses while the Appellant did not call any. At the conclusion of the trial, the court rendered judgment in favour of the Respondent with a liability ratio of 75:25%.

3. The Appellants were dissatisfied with the judgement and filed the present appeal on the grounds reproduced verbatim that:-

i. The Learned Trial Magistrate erred in law and in fact in awarding Kshs. 2,000,000/= in general damages.

ii. The Learned Trial Magistrate erred in law and in fact in awarding Kshs. 18,900/= as special damages.

iii. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellants' submissions and judicial authorities on quantum and instead considered the plaintiff's authority where the plaintiff therein suffered severe injuries than the respondent in this case and thereby arrived at an erroneous figure on quantum.

iv. The Learned Magistrate erred in law and in fact in failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which was excessive and exaggerated.

4. This appeal proceeded by way of written submissions. The Appellant filed his submissions through the firm of Wambua Kilonzo & Co. Advocates on 23rd July, 2020 while the Respondents filed their submissions dated 23rd July 2020 through the firm of Anne M.Kiusya & Co. Advocates.

5. In their submissions, the Appellants conceded that the accident did occur involving their motor vehicle GK B 030J/ KCB 479K driven by the 3rd Appellant. They concede that liability which they wanted apportioned at 70:30% contributory negligence. The Appellants however faulted the trial court for basing its assessment of damages on cases with more severe injury than those sustained by the Respondent. They submitted that the trial court did not consider the evidence and submissions which they presented and consequently arrived at an erroneous assessment of damages.

6. On general damages, the Appellants submitted that the same should be reasonable and must not be aimed at raising the fortunes of the plaintiff. They cited the case of **Boniface Waiti & Anor vs Micheal Kariuki Kamau (2007)** eKLR in which the court distilled the principles on award of damages as follows :-

i. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

ii. The award should be commensurable with the injuries sustained.

iii. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

iv. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

v. The awards should not be inordinately low or high.

7. In the Appellants' view, the award of Kshs. 2,000,000/= was inordinately high and ought to be substituted with one of Kshs. 1,500,000/= subject to liability. They relied on **P.N Mashru Limited vs Omar Mwakoro Makenge 2018** eKLR, in which the court made an award of Kshs. 1,200,000/= for similar injuries.

8. On the other hand, the Respondent identified one issue for determination as whether or not the trial court applied the wrong principles of law in assessing damage and arrived at an inordinately high award. He submitted that he proved the injuries sustained and that the award was commensurate with the said injuries. He dismissed the authorities cited by the Appellants in the trial as not being relevant to the case. He further submitted that the Appellants had not raised any issue with respect to the award on loss of earning capacity and that therefore the court ought not interfere with the same. With respect to the special damages, the Appellant submitted that the amount awarded had been proved.

9. This being a first appeal, I am cognisant of the duties of an appellate court to re-evaluate the evidence and make my own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. (**See Selle V. Motor Boat Co (1968) EA 123; Mugo Muiru Investments Limited V. Elizabeth Wanjiru Bagaine & 2 Others Nairobi Court of Appeal Civil Appeal No. 262 of 2004**)

10. This Appeal is against quantum only. As such I am guided by the principles stated in **Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini vs AM Lubia and Olive Lubia (1982-88)** 1 KAR 727 and aptly restated by the court of appeal in **Arrow Car Ltd V Elijah Shamalla Bimomo & 2 Others (2004)** eKLR that:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it 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 damage. ...”

11. In the present appeal, the Appellants contend that the award was inordinately high and that the trial court disregarded authorities on comparable injury and compensation and based its assessment on cases where the Plaintiff had suffered more severe injury.

12. The record shows that soon after the accident, the Respondent was treated at the Coast General Hospital as an inpatient and at Port Reitz District Hospital as an outpatient. He was later examined by Doctor Ajoni Adede of Gama Medical Clinic who prepared a Medical Report (Exhibit no. 3). The medical report concluded that the Respondent had suffered head injury with impaired consciousness or semi coma confusion, hallucinations, bizarre behaviour with violence, memory impairment, left eye double vision and precipitation of psychotic behaviour. He opined that the Appellant stood the risk to develop other head injury related complications throughout life; and that the patient was unsuitable to resume his job as a driver. Finally, the doctor concluded that the Appellant had suffered permanent partial disability of 30%.

13. In submitting on quantum before the trial court, the Appellants proposed general damages of Kshs. 1,500,000/= with a 30% contribution. They cited authorities in which damages for similar injuries was set at Kshs. 1,500,000/=. The Appellants' complaint in this appeal is that the trial court overlooked their authorities in assessing damages.

14. I am not entitled as an appellate court to disturb the award unless it is shown that the trial court did not take into consideration some relevant matter or considered an irrelevant matter or misapprehended the evidence in anyway. (**See Hydo Corporation Ltd vs Daniel Atela Kamuda 2018** eKLR).

15. In this case, the record shows that there was a second medical report prepared by Dr. Udayan Sheth dated 6th March 2019 (marked as exhibit 7) which was admitted by consent on 6th March, 2019. As submitted by the Appellants the medical report was done later than the report by Dr. Ajoni Adede. This second report stated that at the time of the examination, the Respondent complained of confusion and delusion. The examination revealed no visible scars; that he was fully well oriented, suffered no confusion, no loss of memory and had no neurological deficit or delusion. Dr. Sheth opined that the Appellant had fully recovered but advised him to repeat a CT scan to check on any abnormality due to recent psychological behaviour which he displayed on 9th August, 2018.

16. In considering the damages, the learned trial magistrate stated in his judgment that the Respondent's evidence in respect of the injuries suffered had not been controverted by the Appellants and that he had considered the medical reports.

17. According to the record, the 2nd medical report which was produced by consent was procured by the Defendant. Once admitted in evidence however, it was incumbent upon the trial court to consider it. Clearly the trial court did not take into consideration the findings in the 2nd report which concluded that the Respondent had healed completely and had no risk of permanent disability. The second medical report clearly controverted the evidence in the 1st medical report. The findings in the second medical report were relevant and ought to have been taken into consideration. I am persuaded by my consideration of the two medical reports that the injuries suffered by the Respondent did not cause permanent disability and in this regard, I am entitled to interfere with the award.

18. Taking into consideration that the Respondent did not suffer permanent disability, it follows that the award was erroneously high. I consider that an award of Kshs. 1,000,000/= fair and just. It follows also that without permanent disability the Respondent would still be able to get some gainful employment. The award on loss of earning capacity was therefore erroneously and inordinately high. I reduce the same to Kshs 500,000/=. The Special damages of Kshs 18,900/= were proven and must be sustained.

19. In the end, the award shall be:-

General damages **Kshs 1,000,000/-**

Loss of earning capacity **Kshs 500,000/=**

Special damages **Kshs 18,900/=**

Total **Kshs1,518,900/=**

Less 25% contributory

negligence **Kshs 379,725/=**

Kshs1,139,175/=

20. As the appeal has partially succeeded, each party shall bear their own costs in the appeal. The Respondent shall however have costs in the lower court and interest on the award from date of judgment till payment in full.

21. Orders accordingly.

Judgement delivered, dated and signed at Garsen this 10th day of September, 2020.

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R. LAGAT KORIR

JUDGE

Due to the COVID -19 pandemic, this Judgement has, with the consent of the parties, been emailed to:

i. The Appellants' advocates at wambuakilonzoadvocates@gmail.com

ii. The Respondent's advocates at annekiusya@yahoo.com