



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO.87 OF 2015

BERNARD BISONGA SUNGURA1ST APPELLANT

DAIMA CONNECTIONS LIMITED.....2ND APPELLANT

VERSUS

LUCAS OYOLO OWINO.....RESPONDENT

(Being an appeal from the judgment of the Honorable Mwinzi (SRM) delivered on the 25th August 2015 in Naivasha CMCC No 726 of 2013)

JUDGMENT

Background

1. This is an appeal against the quantum of general damages awarded in the lower court of Kshs 250,000/=. Liability was agreed at 90:10% in favour of the plaintiff, and the final amount awarded was Kshs 225,000/=. The accident, which occurred around Suswa area on 23-10-2012, involved vehicle registration No KBT 871A, in which the plaintiff was a passenger. There is no cross appeal.
2. The trial court, after perusing the conflicting medical reports availed at the hearing, found that the plaintiff suffered soft tissue injuries to the neck, to the chest, and to the right hip. The plaintiff was hospitalized for four days and the injuries he suffered are classified as harm. He sought Kshs 1,000,000/- in damages.
3. The appellant submits that the award cannot stand for the reasons that:
 - The damages awarded are inordinately high for soft tissue injuries;
 - The trial magistrate failed to consider the appellants' evidence on injuries and their submissions on quantum
 - The trial magistrate failed to consider the conventional awards for general damages for similar injuries

Award of general damages

4. I now deal with the award of general damages which was challenged, liability having been resolved and the same having been apportioned by consent.
5. The duty of the court in a first appeal was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally” (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

6. With the above principles in mind, I must take the caution, whilst subjecting the evidence herein to re-appraisal, that this court did not have the opportunity of seeing and hearing the witnesses first hand. Further, that 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 for the first time.

7. The hearing in the lower court was extremely truncated. After one year of appearances for mention, hearing commenced in earnest on 8/7/2015. The parties immediately entered a consent on liability, and then agreed by consent to produce the plaintiff's exhibits 1-8, namely:

- Pexb 1 - Witness Statements
- PExb 2 - Bus Ticket
- PExb 3 - Police Abstract on Road Accident dated 23-5-2013
- PExb 4 - Discharge Summary
- PExb 5 - Medical Examination Report – P3
- PExb 6 - Medical Report by Dr Onyimbi
- PExb 7 - Demand Letter
- PExb 8 - Medical Report by Dr Jenipher Kahuthu

8. Both parties then closed their respective cases without the benefit of cross examination of witnesses. This was therefore what can be referred to as a modified documents-only trial.

9. It is noteworthy that the only witness statement contained in the record of appeal is that of the plaintiff. There is no record or indication, even in the trial court file, of any witness statement filed by the defendants. Accordingly, the only evidence available for evaluation was that of the plaintiff, and any complaint by the appellants that their evidence was not properly assessed is futile, peremptorily untenable and is dismissed.

10. The medical report by Dr Manasseh Onyimbi, details numerous serious injuries including fractures and multiple dislocations, including fractures of the skull and brain damage; dislocation of cervical spin, and many others which he referred to as "Life threatening". In his prognosis of the plaintiff's recovery he stated that recovery may take 6-8 years from the date of the report.

11. Dr Kahuthu's report based on examination and X rays and scans made no findings on fractures and dislocations. Accordingly, his report criticized Dr Onyimbi's report as being exaggerated as follows:

"The TP medical report has massive exaggerated injuries of fractures and dislocations, memory lapses, and surgeries that have not been included in the treatment notes."

12. I agree with the summary provided by Dr Kahuthu. THE Discharge summary from Naivasha District Hospital shows, for example, that the plaintiff was admitted on 23rd October 2012, and discharged the same day. He underwent cervical spine and skull x-rays and was managed with diclofenac and anti-biotics. He was discharged with a soft neckbrace and medicine. He was "referred to hospital of choice for further management".

13. It appears that the plaintiff then went to St Joseph's Hospital Nyabondo on 24th October, 2012 and was discharged the next day. The writing on the discharge summary is unclear but what is clear is that the treatment was minimal and a medication was prescribed before his discharge the next day. Had he had any of the serious injuries described in Dr Onyimbi's report, discharge

14. Accordingly, I would entirely discount the report by Dr Onyimbi, and I accept, as did the trial court, the assessment of the injuries suffered by the plaintiff as those indicated by Dr Kahuthu based on the contemporaneous discharge summaries availed to him.

15. As to whether the award of damages can be impugned, I find as hereunder.

16. The appellant sought reduction of the award to Kshs 90-100,000/- upon reliance on the following authorities:

- **George Mugo & Another v AKM (Minor suing through next friend and Mother of AKM) [2018]eKLR** where the High Court set aside an award of Kshs 300,000/- for blunt injuries to left shoulder, chest and left arm and bruises to left wrist, and awarded instead Kshs 90,000/- in 2018.

- **George Kinyanjui T/A Climax Coaches & Anor v Hussein Mahad Kuyale [2016] eKLR** where the lower court's award of Kshs 650,000/- was set aside and substituted with an award of Kshs 122,100/- for soft tissue injuries.

- **Ndungu Dennis v Ann Wangari Ndirangu & Anor [2018]eKLR** where an award of 300,000/- was set aside and substituted with an award of Kshs 100,000/- for soft tissue injuries to the lower right leg and the back.

17. The respondent's submissions, as in the trial court, relied essentially on the serious injuries set out in Dr Onyimbi's report. He climbed down from his earlier proposal of Kshs 1,000,000/- and cited **Jacob Omulo Onyango & 2 Ors v Jubilee Jumbo Hardware Ltd Kisumu Civil Suit No 130 of 2016 (Consolidated)**. There the court awarded Kshs 220,000/-for multiple soft tissue injuries.

18. I have carefully considered all the authorities availed. Given that all parties now appear to concede that the injuries of the plaintiff were soft tissue injuries. The range of damages in cases of soft tissue injuries appears to be from about 90,000/- to about Kshs 220,000/- for serious multiple soft tissue injuries. The plaintiff was awarded Kshs 250,000/-. In my view this was on the high side, given that the treatment he received when he went to both hospitals does not support the idea that the injuries were serious.

19. In the circumstances, I would set aside the award and reduce it to Kshs 150,000/-, as I hereby do. Taking into account the contributory negligence of 10% attributed to the plaintiff/respondent, the award shall be 135,000/- (150,000-15,000). He will be entitled to costs in the lower court and interest on the award. Costs of the appeal shall be borne by the respondent.

20. As there was no claim or award for special damages, none is made.

Administrative directions

21. 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 Zoom 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.

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

23. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 13th Day of October 2020

RICHARD MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Kariuki for the Appellants
2. No representation for Bruce Odeny for the Respondent
3. Court Clerk - Quinter Ogutu