



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 19 OF 2018

JIMNA MUTHUSI KALOKI.....APPELLANT

-VERSUS-

REBECCA WANZILA MUSYOKA.....RESPONDENT

(Being an Appeal from the judgment and decree of Hon G.O. Shikwe.

Senior Resident Magistrate in Kithimani P.M.C.C. 165 of 2016

delivered on the 31.1.2018)

BETWEEN

REBECCA WANZILA MUSYOKA.....PLAINTIFF

-VERSUS-

JIMNA MUTHUSI KALOKI.....DEFENDANT

JUDGEMENT

1. Vide a plaint in the trial court filed on 31.5.2016 the suit arose out of a road traffic accident in which the respondent had been a passenger aboard motor vehicle registration number KCA 534L that was being driven by the appellant's agent. It was pleaded that on 9.10.2015 the appellant so recklessly drove and managed the said vehicle that it lost control and veered off the road into a forest and hit a stone causing an accident and as a consequence the respondent sustained serious bodily injuries. The respondent instituted **Kithimani P.M.C.C. 165 of 2016** where she attributed negligence on the appellant and she indicated that she sustained blunt back injury, blunt forehead injury, blunt fracture of T5 and T6, bruises of left calf injury, linear fracture of vertebra T5. She sought special damages of Kshs 62,440/- as well as general damages for pain, suffering and future medical expenses, costs and interest. The parties recorded a consent on liability in the ratio of 90:10 in which the respondent was to cater for the 10% contribution while the appellant shouldered the remainder. The suit was set down for assessment of damages and vide judgement delivered on 31.1.2018 the trial court awarded Kshs 300,000/- general damages to the respondent and Special damages of Kshs 62,440/- as well as costs and interest thus prompting the instant appeal.

2. The appeal is solely on quantum and sets out the following four grounds that are to the effect that the trial magistrate erred in: -

- i. Failing to consider the appellant's submissions.**
- ii. Awarding Kshs 300,000/- as general damages yet he ought to have awarded a lesser sum.**
- iii. Awarding damages that were manifestly excessive.**
- iv. Disregarding judicial authorities cited by the appellants.**

3. The appellant's counsel prayed that the appeal be allowed and that the lower court's judgement on quantum be set aside and that the award be re-assessed.

4. On record is a cross appeal filed on 27.3.2018 by the respondent where she claimed that the trial court erred in law and fact by;

- a. **Holding that the cross appellant had existing injuries before the accident.**
- b. **Holding that the cross appellant did not prove her injuries by way of the evidence produced in court.**
- c. **Denouncing the cross appellant's witness who was a doctor and relied on the defendant's witness instead.**
- d. **Declining to consider the cross appellant's submissions, evidence and documents.**
- e. **Arriving at a small award as general damages in declining to award future medical expenses.**

5. Counsel prayed that the cross appeal be allowed and that the award of damages be increased and that the court proceeds to award future medical expenses.

6. The parties agreed to canvass the appeal via written submissions which they filed and exchanged.

7. Learned counsel for the appellant vide submissions filed on 4.2.2020 submitted that the x-ray conducted on the respondent did not indicate that she suffered a fracture. It was pointed out that the report relied on by the respondent was prepared by Dr. Kimuyu where it was concluded that she had spinal bone fractures and that the estimated costs of future surgery were Kshs 500,000/-. It was further pointed out that Dr. Kimuyu testified that the fractures could have been old and that the court was of the view that the accident aggravated the fractures that were preexisting. Counsel invited the court to consider the case of **Dickson Ndungu Kiremba & Another v Theresa Atieno & 4 Others (2014) eKLR**, where the court reduced an award of Kshs 255,000/- to Kshs 127,500/-.

8. According to counsel, the award of general damages was inordinately high and ought to be set aside and substituted with an award of not more than Kshs 100,000/- as general damages.

9. In reply, learned counsel for the respondent/cross appellant submitted that the respondent proved that she suffered fractures and that the court went into error in not finding so. It was submitted that the award of the trial court was erroneous and ought to be adjusted upwards to Kshs 2.5m/- and that the cross appellant be awarded future medical expenses of Kshs 500,000/-. Counsel cited the case of **Rukia Mugoya v Johnson Juma Ogutu (2007) eKLR** where judgment was entered for the Plaintiff and against the two Defendants jointly and severally and that Kshs. 12,462,000/= was awarded as general damages in respect of Wedge compression, fracture dislocation at C4, C5; facial paralysis both upper and lower limbs, loss of stool control and loss of sensation from the naval region downwards.

10. This being an appeal against quantum, the role of the Appellate court in this regard is as was considered in the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** where the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid as down by the Court of Appeal in **Henry Hidaya Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** where the grounds were that if the trial court in assessing the damages, took into consideration an irrelevant factor, failed to take into account a material factor or otherwise applied a wrong principle of law. Secondly, it may intervene where the amount awarded by the trial court is so inordinately low or inordinately high that it is a wholly erroneous estimate of the damage sustained.

11. The case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** listed some principles to guide the court in awarding general damages, viz;

- a. **An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.**
- b. **The award should be commensurate to the injuries suffered.**
- c. **Awards in decided cases are mere guides and each case should be treated on its facts and merit.**
- d. **Where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration**
- e. **Awards should not be inordinately high or too low.**

12. The Appellant avers that the learned magistrate's award was **extremely high**. He asked the court to review the evidence and facts on record and reduce the award. The cross appellant/ respondent's case is that the award was low and the court was urged to enhance the award in view of the injuries suffered.

13. The evidence in the trial court was as follows; **Pw1** was **Rebecca Nzila Wambua** who sought to adopt her witness statement and testified that she was injured on the back, forehead, left leg and right hand and was initially taken to Matuu District then Machakos Level 5, Inner care medical center, Mama Lucy Hospital and Nairobi Spinal Injury and Orthopaedic Clinic. She tendered in court the respective treatment notes from Matuu Hospital, Machakos Level 5, Mama Lucy Hospital, Nairobi Spine Centre, Plaza Imaging Solutions and Plaza X-ray services. She tendered in court receipts of Kshs 42,000/- and told the court that she had a fracture on her back. On cross examination, she testified that there was a query on an old fracture of TC vertebrae in respect of a scan that was done at Mama Lucy. She also told the court that a CT scan was done at Plaza x-ray Centre.

14. Pw2 was Dr. Susan Musyoka, a holder of Bachelor of Medicine and Surgery who testified that she examined Pw1 on 22.4.2016 with a history of a road accident and having been managed at Mama Lucy Kibaki Hospital. She testified that the patient sustained blunt injury to the back, forehead fracture T5-T6 vertebral bone, bruises on the left leg, linear fracture of T5. She testified that she estimated future medical expenses to be Kshs 500,000/-. She testified that the report from plaza rays dated 2.2.2017 confirmed a compression fracture on T2 and T6. On cross examination, she testified that the old fractures could be as a result of TB. On reexamination, she testified that the fractures were confirmed in the report of 2.2.2017. That was the close of the respondent's case and the appellant presented his case.

15. Dw1 was Dr. Jennifer Kalondu, a general practitioner who testified that she examined Pw1 on 9.10.2016 and she relied on treatment records dated 9.10.2016 and 22.4.2016 by Dr. Richard and Dr. Kimuyu and a scan from imaging Plaza and Mama Lucy. Her report dated 8.12.2016 was to the effect that Pw1 sustained soft tissue injuries to the back and that there was an old trauma of the T6 but however no recent vertebral fractures were noted. She told the court that the scan was about five days after the accident hence the fracture ought to have been fresh. She also told the court that her report queried the old compression fracture that could have been due to osteopenia, old trauma or TB spine. On cross examination, she testified that she believed Dr. Imalangat's report as he was more qualified than her hence she referred the patient to him; she told the court that the reports did not indicate whether the fractures were fresh or old. She was the only witness for the appellant.

16. I analyzed the evidence that was adduced by the parties. The issues for determination as elicited from the appeal are: -

1) Whether a case for disturbing the award by the trial court has been made.

2) If yes, how much is the respondent entitled to?

17. The respondent testified that she was involved in a road traffic accident and was injured. The trial court made a finding on liability at 90:10% that was after a consent had been entered into by the parties.

18. On quantum, the appellant pleaded that she suffered blunt back injury, blunt forehead injury, blunt fracture of T5 and T6, bruises left calf injury, linear fracture of spinous T5.

19. According to the treatment note dated 9.10.2015, the respondent was noted as having suffered tenderness at the back, spinal injury and she was referred to Machakos Level 5 Hospital for x-ray. On record are a cervico-thoracic x-ray and thoraco-lumbar x-ray requests to Mama Lucy Kibaki hospital and the undated reports indicate that there was a mild reduction in the C5/C6 disc that were attributed to degenerative disc disease. It was also reported that there was a mild reduction of the T6 vertebra that did not appear to be fresh and that there were no recent vertebral body fractures seen.

20. I have seen the conclusion in a report dated 28.10.2015 from Plaza Imaging Solutions that indicated burst fracture of T5 and T6 vertebral body, linear fracture of spinous process of T5.

21. I have also seen the P3 form dated 20.11.2015 that indicated that the injury suffered was harm and reliance was placed on the reports from Matuu Level 4, Machakos Level 5, Mama Lucy and Consultant Spine and Orthopedic Unit from Nairobi

22. According to a medical report dated 21.3.2016 by Dr. Richard Bwana Ombachi who is a consultant orthopaedic surgeon, it was reported that the respondent was advised to use a corset and that she had on and off back pains; it was reported that if there was further collapse of her vertebral bodies then the respondent may need surgery to remove the collapsed bodies and replace them with cage insertion.

23. On record is a medical report dated 22.4.2016 that was prepared by Dr. Kimuyu that noted the presence of soft tissue injuries and that the respondent had not recovered from as well as bone injuries that required an estimate of Kshs 500,000/- future surgery in a private hospital in respect of the mild spinal canal narrowing at the T6.

24. I have seen the medical report dated 8.12.2016 by Doctor Jennifer Kahuthu where it was noted that there were old compression fractures and it was recommended that the respondent suffered soft tissue injuries at the back region.

25. On record is a report on an initial CT scan and x-ray of thoraco-lumbar spine that was prepared by Dr. Imalangat on 2.2.2017. It was reported that there was no vertebral displacement but there were compression fractures of the bodies of T5 and T6.

26. I had the benefit of going through the written submissions that were filed by the counsels for the parties as well as the authorities that were supplied therein.

27. The trial court had noted that there were several medical reports on record. The court noted that the two doctors who testified were general practitioners with differing opinions on the same report and chose to believe the scan from Mama Lucy that was to the effect that the fractures did not appear as a recent event. I also note that there are several reports and some of them are prepared by specialists and others are prepared by persons not specialized in the area of injury that affected the respondent. The trial court gave an opinion that it formed in the light of the different reports, what report it believed and why it opted to believe one report over the other and I see no reason to interfere with the same. The same was taken into account when giving an award of general damages of Kshs 300,000/-. I add that the injuries that were suffered were in the nature of soft tissue injuries. It is noted that the specialists who prepared the several reports were not called to testify leaving only general practitioners. The trial court was thus left with no option but to go by what was reasonable and hence I am unable to fault the lower court's decision in arriving at the fact that the injuries suffered were soft tissue in nature.

28. The appellant seems to disagree with the finding of damages by the trial court and urged the court to reduce the award whereas the respondent in her cross appeal urged the court to enhance the amount as according to counsel, the fractures were caused by the accident. I

disagree with counsel who seems not to have convinced the trial court and I have already indicated above that I agree with the findings of the trial court. In exercising my role as an appellate court I would need to consider whether the pre-existing injury was aggravated by the accident. In the case of **Ridolfi v Hammond [2012] NSWCA 31**, the New South Wales Court of Appeal made 2 observations; Firstly, that where competing medical opinions arise in relation to the role of a pre-existing condition, considerable weight should, ordinarily, be attached to those of doctors who treated a claimant prior to the accident. Secondly, in determining whether a defendant has discharged its evidential onus of disentangling of pre-existing conditions, the court is required to evaluate possibilities, not proof on a balance of probabilities.

29. In considering the above case, the evidence is scanty to enable this court make a finding on the particular issue in view of the fact that the specialists were not called to testify.

30. In the case of **Purkess v Crittenden [1965] HCA 34**, the High Court of Australia stated that

"The defendant has the burden of adducing evidence to show that the incapacity would have come about independently of the accident, for example by reason of a pre-existing degenerative condition. However, the burden of proving the balance of probabilities that the incapacity was caused by the accident always rests on the plaintiff."

31. In **Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208** the New South Wales Court of Appeal in considering the distinction between the relevant tests of possibilities with that of the balance of probabilities stated:

"Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in Watts v Rake and Purkess v Crittenden remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate possibilities in these situations - not proof on a balance of probabilities".

32. As indicated earlier, I am not satisfied with the evidence on record. I am not satisfied that the respondent suffered fractures or that the fractures that were noted were made worse by the accident. This means that there is no reason to enhance the award of general damages by the trial court as claimed by the cross appellant.

33. In addressing the entitlement of the respondent in respect of damages, the cardinal principle in awarding damages is 'restitutio in integrum' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – See **Halsbury's Laws of England 3rd Ed. Vol. II p.233 para 400**.

31. In this regard bearing in mind the fact that the medical reports agree that the respondent suffered soft tissue injuries, it is probably true that the respondent suffered the same and comparable awards by courts are to the tune of Kshs 120,000/-. I will rely on the case relied upon by the appellant of **Dickson Ndungu Kirembé & Another v Theresa Atieno & 4 Others (2014) eKLR**, where the court reduced an award of Kshs 255,000/- to Kshs 127,500/- and retain the figure offered by the appellant. I therefore reduce the award of the trial court to the sum of Kshs 127,500/.

32. The respondent took issue with the non-award of what amounts to future medical expenses. However, she did not plead the same and neither did her evidence lay any factual basis for grant of the same. In **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** that placed reliance on the case of **Kenya Bus Services Ltd v Gituma, (2004) EA 91**, the court stated:

"And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person's legal rights should be pleaded".

33. I find that in view of failure to plead the same as well as inadequacy of the evidence on record, this court cannot award future medical expenses.

34. The plaintiff claimed for special damages of Kshs 62,440/- and the court awarded the sum. Because the amount is not disputed, I see no reason to disturb the same.

35. In sum the appeal succeeds to the extent indicated above and the cross appeal is dismissed. The court makes the following order;

a) General damages for pain and suffering Kshs. 127,500/=, subject to contribution in the ratio of 90:10% in favour of the respondent against the appellant.

b) Special damages of Kshs 62,440/.

c) The appellant shall have half costs in the appeal while the respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at Machakos this 3rd day of November, 2020.

D. K. Kemei

Judge