



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 56 OF 2019

NYAMAI PETRONILLA.....1ST APPELLANT

PETER KIMANTHI.....2ND APPELLANT

-VERSUS-

MONICAH MUSYOKI.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. A.G. Kibiru Chief Magistrate

delivered at Machakos in CMCC No. 432 of 2015 on 29.1.2019)

BETWEEN

MONICAH MUSYOKI.....PLAINTIFF

-VERSUS-

NYAMAI PETRONILLA.....1ST DEFENDANT

PETER KIMANTHI.....2ND DEFENDANT

JUDGEMENT

1. The suit in the trial court arose out of road traffic accident in which the respondent had been a pedestrian off the road near Maiyani along Salama-Nunguni Road on 15.12.2012 when motor vehicle registration number KBJ 040H registered in names of the 1st appellant and driven by the 2nd appellant veered off the road and occasioned an accident in which the respondent was injured. The respondent pleaded negligence, vicarious liability and *res ipsa loquitur*. The respondent sought special damages of Kshs 9,800/- as well as general damages, costs and interest.

2. The appellants in their joint defence denied that the 1st appellant was the owner or the 2nd appellant the driver of the suit vehicle; they denied the accident and negligence on their part; denied the particulars of loss and injuries and denied the applicability of *res ipsa loquitur*. The respondents pleaded that the accident was wholly caused or substantially contributed to by the negligence of the respondent as particularized in paragraph 4 of their joint defence.

3. The appeal is on quantum of damages. The parties agreed to canvass same via written submissions that the parties have duly filed and exchanged.

4. Learned counsel for the appellant submitted on the finding on quantum and in placing reliance on the case of **Catholic Diocese of Kisumu v Sophia Achieng Tete (2004) eKLR** it was submitted that the trial magistrate erred; that he applied the wrong principles and arrived at a figure so inordinately high as to present an entirely erroneous estimate. It was pointed out that according to the respondent and Dr. Cyprianus Okoth Okere, the respondent suffered a fracture of the right thumb and degloving injury to the left lower leg; that the respondent did not suffer any permanent disability and therefore the award of Kshs 350,000/- was erroneous. Reliance was placed on the case of **Oluoch Eric**

Gogo v Universal Corporation Ltd (2015) eKLR in submitting that an award of Kshs 200,000/- was adequate and the court was urged to so find. Learned counsel took no issue with the finding and apportionment on liability.

5. In response, learned counsel for the respondent submitted that the award of the trial court was fair and reasonable. Reliance was placed on the case of **Oluoch Eric Gogo v Universal Corporation Ltd (2015) eKLR**.

6. The role of the Appellate court is now a matter of judicial notice, that is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court had the advantage of seeing and hearing the parties and therefore the appellate court must give an allowance for that and to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**

7. The evidence on record is as follows; Pw1, the respondent testified that on the material day she was walking on the left side of the road when a motor vehicle came and hit her. She told the court that she was injured on her right hand thumb and left leg and that she went to Shalom Hospital where she was admitted for three weeks. It was her testimony that she reported the matter to Salama police station and was issued with a P3 form as well as given an abstract. She told the court that she was later examined by Dr. Okello. She tendered in court the discharge summary, the receipts for Kshs 2,000/- paid to Dr. Okello, the discharge summary, the receipts for Kshs 7,100/- paid at the Hospital and the police abstract. On cross examination, she told the court that she was the only eye witness.

8. Pw2 was Pc Henry Gatithi who testified that as per the copy of the OB extract and original for 17.6.2012 to 11.8.2013, OB No 6 of 15/12/12 there was an accident that involved the suit vehicle and that the respondent was a victim. On cross examination, he testified that he was not the investigating officer but relied on the police record.

9. The respondent's case was closed. The appellants called the second appellant as their only defence witness. He sought to rely on his witness statement and admitted hitting two pedestrians including the respondent who was injured.

10. The trial court found that an award of Kshs 350,000/- would be reasonable for general damages and Kshs 9,100/- as special damages that were proved. The award was subject to 20% contribution.

11. I have analyzed the evidence adduced by the parties in the trial court. The issues for determination are: -

1) Whether a case for disturbing the award herein has been made.

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

12. Having considered the grounds of appeal, the general principle upon which this court, as an appellate court, will interfere with an award of damages is if it is inordinately high or low as to represent an entirely erroneous estimate. It was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

An appellate court will not disturb an award of damages unless it is so inordinately must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"

13. In the case of **Lukenya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA** the learned Judge restated the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in **Henry Hidayat Ilanga v Manyema Manyoka (1961) EA 705, 709, 713** that if the trial court;

a) Took into account an irrelevant fact or,

b) Left out of account a relevant fact or,

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

14. The Appellants have averred that the trial court's award was **extremely high**.

15. 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.

16. Cases involving multiple fractures, that are cases more serious than the instant one attract amounts of Kshs 350,000 to 450,000/-. In **Hassan Farid & another v Sataiya Ene Mepukori & 6 others [2018] eKLR** one of the respondents on appeal was awarded Kshs. 450,000/- for:

- a) Deep facial cut wound.*
- b) Blunt injury to the back.*
- c) Fracture of the metacarpal bone of the right thumb.*
- d) Comminuted fracture of the right humerus.*
- e) Blunt injury to both thighs.*

Again, in the same case Kshs 200,000/- was awarded on appeal to one of the respondents who suffered a fracture with dislocation of the right hand fingers.

17. The evidence on record vide the unchallenged medical report are as follows. The P3 form dated 31.1.2013 indicated injuries to the right thumb and elbow region as well as a left leg cut wound at the ankle region. The discharge summary dated 18.12.2012 is to the effect that the respondent suffered a fracture to the right thumb. The medical report dated 24.7.2014 is to the effect that the respondent sustained a fracture to the right thumb and a degloving injury to the left leg; in addition, a permanent incapacity of 1% on the right thumb was noted. The trial court seemed not to have noted that there were three medical reports on record and seemed to have relied solely on the 2014 report and ignored the two previous reports. The initial reports have no indication on permanent incapacity as in the earlier reports and hence I find that the trial court erred in taking into account permanent incapacity and thus arrived at an erroneous estimate of the damages. The three reports agree that the respondent suffered a fracture of the right thumb and a degloving injury to the right leg. I am therefore persuaded by the decision in the above cited case in giving an award of Kshs 200,000/- and find that the same would be sufficient as general damages. I therefore substitute the award of the trial court on general damages with an award of Kshs 200,000/-.

18. Since the award of special damages was unchallenged, I deem it unnecessary to interfere with the same. The same remains undisturbed.

19. The upshot is that the appeal succeeds. The trial court's award of general damages is hereby set aside and substituted with an award of Kshs 200,000/-. The award on special damages remains undisturbed. The appellant is awarded half costs of 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