



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 4 OF 2016

LUISA MARIGU MUGO.....APPELLANT

V E R S U S

NGUYO JOSEPH KINGORI.....1ST RESPONDENT

HEZRON KINGARU GICHU.....2ND RESPONDENT

JUDGMENT

1. The appellant had filed a case against the respondents seeking damages for injuries sustained as a result of a Road traffic accident on 28/07/2013. Hearing was scheduled for 10/11/2015 by consent but on the said date the advocates for the respondents failed to appear hence the hearing proceeded as scheduled. The appellant adopted her statement and produced her list of documents. The matter was mentioned on 01/12/2015 to confirm the filing of submissions and advocates for the respondents requested for a week to file theirs. The matter was therefore fixed for 08/12/2015 where unfortunately the respondents had still not filed their submissions and judgment was delivered on 12/01/2016.

2. The trial magistrate held that though the respondents failed to attend court, they filed their defence and list of documents and it would be unjust for them to shoulder 100% liability. He therefore apportioned liability at 70:30 in favour of the appellant. On quantum, he held that the injuries suffered were swollen forehead, painful lower back, laceration on the dorsum of left hand and chest pains and proceeded to award her Kshs.200,000/=.

3. The appellant has appealed against the said judgment on both liability and quantum and raises the following grounds:-

1. The Learned Magistrates erred in law and in fact in apportioning liability as between the appellant and the Respondents at 70% against the Respondents herein and 30% against the appellant.

2. The Learned Magistrate erred in law and in fact in failing to find the respondents herein 100% liable for the accident.

3. The Learned Magistrate erred in law and fact in finding that the appellant was 30% liable for the accident without evidence to support the finding.

4. The Learned Magistrate erred in law and in fact in ignoring authorities quoted by the appellant in her submissions.

5. The Learned Magistrate erred in law and in fact in failing to take cognizance of the fact that the respondents did not participate in the hearing and did not file submissions regarding the suit.

6. The Learned Magistrate erred in law and in fact in awarding general damages that were inordinately low in the circumstances.

7. The Learned Magistrate misdirected himself in failing to award special damages as claimed by the appellant while the respondents did not adduce evidence to counter the appellant's evidence in that regard.

4. The respondents filed a cross-appeal dated 13/11/2016 on the grounds that:-

1. The Learned Magistrate erred in fact and law by awarding the appellant general damages of Kshs 200,000/- for injuries which were proved to be merely soft tissue injuries.

2. That the Learned Magistrate erred in awarding general damages that were inordinately high in the circumstances of this case vis a vis the injuries suffered.

5. The court directed that the appeal be disposed off by way of written submissions. The parties filed submissions which they entirely relied on without highlighting.

6. For the applicants, grounds 1, 2, 3 & 5 were argued together. It was submitted that the Advocate of the respondent did not attend court for hearing nor did he file submissions when he was given an opportunity to do so. It is submitted that the trial Magistrate misdirected himself by failing to find the respondent 100% liable and finding that they were only 70% liable and yet they did not adduce any evidence. That the reasoning by the trial Magistrate that the respondents had filed a defence and list of documents it would be unjust for them to shoulder 100% liability, this was erroneous. They rely on **Diamond Shipping Services Ltd –v- Julius Ongonga Ongwech C. A. No. 46/06 2011 Eklr** where it was held –

“The defence did not call any witness. It must therefore be appreciated that the evidence before the court is the evidence by the respondent. The defence in the absence of any evidence remains mere allegation with no evidential value.” They submit that the trial Magistrate ought to have treated the defence as mere allegations and find the defendants 100% liable.

7. On grounds 4 & 6 it is submitted that the appellant argued her case ably and cited authorities which the learned Magistrate ignored and came to an erroneous conclusion on general damages. The damages awarded were inordinately low. Ground 7 was abandoned.

8. The appellant prays that the Judgment be set aside, the respondents be found 100% liable, award general damages as pleaded in the amended plaint and costs in lower court and this court. The cross-appeal be dismissed.

9. For the respondents it is submitted that the damages awarded were inordinately high in view of the injuries sustained which were mild soft tissue injuries. The injuries were:-

i. Swollen forehead.

ii. Lower back pain.

iii. Laceration on the left hand.

10. The respondent submits that comparable injuries should attract comparable awards. This was the principle in **Denshire Muteti Wambua –v- Kenya Power & Lighting Co. Ltd (2013) eKLR** where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. They also rely on **George Kinyanjui t/a Climax Coaches & Another –v- Hassan Musa Agoi(2016) eKLR** where it was stated:-

“that as a general rule an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles.”

It is submitted the award is inordinately high compared to the injuries suffered and it was founded on wrong principles which calls on this court to interfere with the award. They urge the court to award damages of Kshs 80,000/- to Kshs 100,000/-. They pray that the appeal be dismissed and the cross appeal be allowed.

11. I have considered the grounds of appeal and the submissions. Two issues arise for determination i.e.

- **Liability.**
- **Quantum.**

1. Liability

The appellant claimed that the learned magistrate erred in holding that she was 30% liable for the accident without evidence to support the finding.

As per the proceedings, the respondents failed to appear on the hearing date and therefore did not adduce any evidence. In their defence they claimed that the appellant was substantially contributed to the accident by her failure to take adequate precaution for her own safety.

The respondent did not attend court for hearing. The appellant adduced evidence. The trial Magistrate found that she had proved the respondents were liable. What was in the defence filed and list of documents remains allegation which were unsubstantiated. This is what the Court of Appeal stated in **Moses Theuri Ndumia –v- I G Transporters Limited & another [2018] eKLR**

The Court of Appeal in dealing with a similar issue stated;

In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondents.....

See KENYA POWER & LIGHTING CO LTD –VS – PAMELA AWINO OGUNYO CIVIL APPEAL NO 315 OF 2012 where a Bench of this Court differently constituted had the following to say;

.... A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Section 107- 109 of the Evidence Act which place a burden of proof or what may be called evidential burden of proof on the party making the assertion. In JANET KAPHIPHE OUMA & ANOTHER V MARIE STOPES INTERNATIONAL KENYA (KISUMU) HCCC NO 68 OF 2007 Ali Aroni, J. Citing EDWARD MURIGA through STANLEY MURIGA V NATHANIEL D. SCULTER CIVIL APPEAL NO 23 OF 1997 had this to say on the said provisions of the Evidence Act;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”

12. The appellant’ evidence was never refuted since the respondents failed to appear for hearing and in addition she was just a passenger in the vehicle. The trial Magistrate erred in relying on mere allegations in pleadings and documents against the cogent evidence tendered by the appellant. The respondent ought to have been found 100% liable.

2. Quantum

13. The appellant claimed that the learned magistrate erred awarding general damages that were inordinately low in the circumstances and failed to award special damages while the respondents did not counter her evidence.

In the celebrated case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia [1982-88] KLR 727 the Court of Appeal held:

“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 wither that 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.”

These are the principles which the court has to consider when dealing with the issue as to whether it should interfere with the award.

In Power Lighting Comp. Ltd & another v Zakayo Saitoti Naingola & another [2008] eKLR

The court held;

“On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages

(1) Damages should not be inordinately too high or too low.

(2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

(3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

(4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.....

This court has taken note of the court of appeal decisions to the effect that an award of damages is a matter of the courts discretion and can only be interfered with if among others

- The award is inordinately too high or too low.

- It is based on cursory principles. The principles applied by the lower court in the assessment was that of taking a narrative of the injuries by the witnesses

- Calling for proof of the same by visual observation if pointed out and medical records

- By seeking guidance from other decisions and this is what the learned trial magistrate did and this is evident on the record. The court, therefore makes a finding that no wrong principles was applied in the assessment on quantum.”

14. I am in agreement with this holding as it sets out the correct principles which an appellate court has to bear in mind in determining

whether to alter the award of the trial Magistrate.

15. The foregoing findings lays the principles which the court has to consider when assessing the quantum of damages.

16. As per the appellant's medical report, the appellant sustained the following injuries; swollen forehead, painful lower back, laceration on the dorsum of left hand and chest pain. Therefore her claim in the plaint that she suffered dislocation of the spine was not proved, and is not supported by the medical evidence. The injuries pleaded in the plaint were exaggerated. There was no evidence to prove that allegation of a serious injury to the spine.

17. Looking at the judgment, the trial court held that the appellant's list of authorities relate to more severe injuries than those suffered. He therefore proceeded to award a global sum of Kshs.200,000/=.

18. The injuries sustained by the plaintiff cannot be said to be severe. The medical report by Doctor Stephen Maina Wambugu states that:

- She had swollen forehead,
- painful lower back.
- Laceration on dorsum of left hand.
- Chest pain.

19. The laceration healed leaving up scars. Swelling of forehead healed with no abnormality detected on examining the central nervous system. The report says she recovered reasonably well safe for the pains.

20. I have considered the authorities which were cited before the trial magistrate Page 67 – 88 of the record. The appellant had urged the court to award **Kshs 600,000/-**. The respondent urged the court to consider the following authorities:-

a) In the case of Godwin Ireri –v- Franklin Gitonga (2018) the claimant sustained soft injuries being: a cut on the scalp and forehead, swelling on the dorsum of the left foot and a bruise on the right knee. The trial court awarded **Kshs 300,000/-** as general damages for soft tissues injuries. The Appellant being aggrieved with the said award, appealed to the High Court where **D. S. Majanja J** held that the award was inordinately high and set aside the same with an award of **Kshs 90,000/-** for the injuries as reasonable and just. Your Lordship in view of the above finding we urge that you review down the award in the instant Appeal.

b) In the Case of George Mugo & Another –v- A. K. M (Minor suing through next friend and mother of A.M.K (2018) eKLR the claimant sustained Soft tissue injuries to the left shoulder, Blunt chest injury interior, Bruises of left wrist region and Blunt injury left arm. The Trial Court made an award of Kshs 300,000/- as General Damages for the injuries. On Appeal, the High Court D. K. Kimei J held the award by the trial Magistrate to be inordinately high and that the same did not reflect a reasonable estimate of damages and required to be interfered with so that the damages would accord with the soft tissue injuries suffered by the Respondent. As such, the Court set aside the award of **Kshs 300,000/-** and substituted the same with an award of **Kshs, 90,000/-** and we urge your Ladyship to review downward the award in the instant Appeal in view of the mild soft tissue injuries sustained by the Appellants.

c) In Lamu Bus Services & Another –v- Caren Adhiambo Okello (2018) eKLR, the Respondent's injuries were *blunt injury A dislocation of the left shoulder joint, A deep cut wound on the left chin, A deep cut wound on the left thigh,* Blunt injury to the left thigh the trial court awarded **Kshs. 200,000/-** as general damages in that case. The Defendant being aggrieved with the said award, appealed to the High Court where **J. M. Bwonwonga J** set aside the quantum award of **Kshs 200,000/-** and replaced it with an award of **Kshs 130,000/-**.

21. Having considered these authorities, and considering that the appellant sustained mild soft tissues injuries, I find that, the award of Kshs 200,000/- was inordinately high. The trial Magistrate overlooked the principle that comparable injuries should as far as possible be compensated by comparable awards. The award of damages is meant to compensate the plaintiff but not to enrich the plaintiff. I am of the opinion that based on the two reasons I have stated, there are grounds to interfere with the award.

22. I find that for soft tissue injuries which healed without any abnormality an award of Kshs 120,000/- is just and reasonable.

23. **In conclusion:-**

1) I allow the appeal on liability and order that finding of the trial Magistrate awarding the respondent 70% liability and Plaintiff 30% is set aside and substituted with an order that the respondent bears 100% liability.

2) The award of Kshs 200,000/- general damages is set aside and substituted with an award of Kshs 120,000/-.

Cross Appeal therefore succeeds.

3) *On costs the respondent shall bear the costs in the lower court. Since the appeal and the cross appeal has succeeded, the respondent shall bear 50% of the costs of the appeal.*

Dated at Kerugoya this 7th day of February, 2019.

L. W. GITARI

JUDGE