



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. 589 OF 2015

ANDY FORWARDERS SERVICES LIMITED.....1ST APPELLANT

JOSEPH MBOLETI MUTISYA.....2ND APPELLANT

GALCHA HUSSEIN.....3RD APPELLANT

VERSUS

JAMES MUNGAI WANJIRU.....RESPONDENT

(Being an appeal from the Judgment delivered on 6th November, 2015

by Hon. L Gichobi (Resident Magistrate) Milimani Commercial Courts

in

CMCC No. 3357 of 2013).

JUDGMENT

1. By the consent of the parties herein, liability was apportioned at 85% against the Appellant and 15% against the Respondent. The medical report by Dr. G.K. Mwaura dated 29th January, 2013 and by Dr. Wambugu dated 17th March, 2015 were produced as exhibits. Special damages were agreed at Ksh.10,735/=. The parties then filed written submissions on the assessment of general damages.

2. The trial magistrate assessed general damages at Ksh.250,000/=. The Appellant was dissatisfied with the said quantum and appealed to this court on the following grounds:

1. That the learned magistrate erred in law and fact and ended up misdirecting herself in awarding exorbitant quantum of damages of Ksh.250,000/= for pain and suffering by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the Plaintiff herein.

2. That the learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.

3. That the learned magistrate's award on damages was so high as to be entirely erroneous.

4. That the learned magistrate's award was made without considering the medical evidence before the court and failed to appreciate the nature of injuries sustained by the Plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award in view of the medical evidence presented before the court.

5. That the learned magistrate erred in law and fact in failing to consider the Defendant's submissions and authorities in making a finding on quantum.

6. That the whole judgment on quantum was against the weight of evidence before the court.

3. The appeal was canvassed by way of written submissions. I have considered the said submissions.

4. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

5. All the grounds of appeal dwell on the issue of the quantum of damages. This court will therefore address them together as one.

6. In the lower court the Appellant had submitted for an award of Ksh.50,000/= as general damages and stated that the injuries sustained were soft tissue injuries to wit a blunt trauma to the back and neck, a cut wound right eyebrow and a blunt pelvic trauma as evidenced by the medical reports by Dr. G. K. Mwaura and Dr. Wambugu.

7. Authorities relied upon had general damages assessed as follows:

(a) Cyrus Gachanja Muya & 4 others v Abbas Mohammed & another [1999] eKLR where a sum of Ksh.20,000/= was for a cut wound on the leg and closed injury of the spine.

(b) South Nyanza sugar Co. Ltd v Steccy Awuor Lawrence & 2 others [2011] eKLR where Ksh.60,000/= was awarded for soft tissue injuries and loss of two incisor teeth.

8. The Respondent had submitted for the sum of Ksh.1,000,000/= as general damages. He relied on the following authorities.

(a) Catholic Diocese of Meru v Regina Munanie Mutinda (Minor suing thro’ her father & next friend John Mutinda Mutemi HCCA No. 18 of 2003 where an award of Ksh.962,320 was made for blunt injuries to the chest, blunt injury to the stomach and fracture of the pelvic bone.

(b) Catherine Wanjiru Kingori & another v Gibson Gichumbi [2005] eKLR where Ksh.300,000/= was awarded as general damages for injury on left ankle, injuries on the legs and injuries on the chest.

(c) Timothy Kiarie Kimani v Kapchorua Tea Estate & another [2012] eKLR where Ksh.600,000/= was awarded as general damages for blunt injuries to the chest, fractures of the 11th & 12th ribs fracture of the right humerus, dislocation of the right ankle, dislocation of the right wrist, dislocation of the spinal column and soft tissue injuries to the right arm.

(d) Mageri Wambugu Namu v Mr & Mrs Nyaga Nairobi HCCC No. 821 of 1990 where Ksh.300,000/= was awarded as general damages for a head injury, bruises to the abdomen, ruptured bladder and urethra and fracture of the pelvis bone.

9. The authorities cited by both sides are old. The passage of time has to be taken into account. It is noted that most of the cases cited by the Respondent’s side bear much more severe injuries than in the instant case.

10. Although the consent entered into by the parties reflects that the medical reports by Dr. Mwaura and Dr. Wambugu were produced as evidence, the only medical report in the lower court record and in the record of appeal is that of Dr. Mwaura. There was no application for a further record of Appeal to be filed nor any application for the production of further evidence during the hearing of the appeal. This court will therefore rely on the only medical report on record, that of Dr. Mwaura.

11. Dr. Mwaura’s medical report spells out the injuries sustained as follows:

(i) Cut wound above right eye.

(ii) Blunt chest injury – right side

(iii) Frictional burns – right thigh

(iv) Blunt pelvic injury and a scrotal wound.

According to Dr. Mwaura medical report, the Respondent healed but was left with a scar on the face and scrotum and experienced back pain.

12. I have also looked at the following authorities:

(a) Simon Muchemi Atako & another v Gordon Osore [2013] eKLR where the Court of Appeal assessed the quantum of damages at Ksh.120,000/= for soft tissue injuries to the head, blunt injuries to the chest blunt injuries to the hip, bruises and cuts to the limbs.

(b) Ndungu Dennis v Wangari Ndirangu & another [2018] eKLR an award of Ksh.300,000/= as general damages was set aside and substituted with an award of ksh.100,000/= for soft tissue injuries to the lower right leg and back.

(c) Channan Agricultural contractions Ltd v Fred Barasa Mutayo [2013] eKLR where an award of Ksh.250,000/= general damages was reduced to Ksh. 150,000/= for blunt injury to the chest, cut wounds to the head and left leg.

13. I find the award of general damages to be inordinately high and outside the range of similar awards and I am persuaded to interfere with the same. In my view an award of Ksh.150,000/= is reasonable.

14. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia 91985) 1 KAR 727**, where the Court of Appeal observed:-

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

15. Consequently I, find the appeal has merits. The judgment of the lower court on the award of general damages at Ksh.250,000/= is hereby set aside and substituted with a judgment for the sum of Ksh.150,000/=. Each party to bear own costs of the Appeal. The lower court costs to the Respondent.

Dated, signed and delivered at Nairobi this 7th day of March, 2019

B. THURANIRA JADEN

JUDGE