



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 30 OF 2016

EASY COACH LIMITED.....APPELLANT

=VRS=

MARY LOSSA AKETCH.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – SPM dated and delivered on the 22nd day of November 2016 in the original Keroka Principal Magistrate’s Court Civil Case No. 17 of 2015}

JUDGEMENT

This appeal is against the general and special damages awarded to the respondent by the trial court, liability having been apportioned in the ratio 80:20 in favour of the plaintiff upon the consent of the Counsel for the parties. The appeal is premised on grounds: -

- “1. That the Learned trial magistrate erred and misdirected himself in fact and law in the (sic) by awarding damages to the respondent that were manifestly excessive in the circumstances and thus failed to appreciate the principles applicable in the award of damages.**
- 2. That the Learned Magistrate erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.**
- 3. That the Learned Magistrate erred in failing to consider and critically analyse the submissions made on behalf of the defendant and thus arrived at an unjustifiably high award for the injuries sustained.**
- 4. That the Learned Magistrate erred in failing to consider the nature of the injuries sustained by the respondent and awarding what was excessive and unjustified in the circumstance.**
- 5. That the Learned Magistrate erred in failing to appreciate that the respondent had conceded that the special damages pleaded were footed by the insurance company and proceeded to award the said special damages which amounts to unjust enrichment on the part of the respondent.”**

By this appeal it is proposed that the judgement of the lower court be reviewed or set aside and that this court make an appropriate award in tandem with pleadings, evidence, law and decided authorities. It is also urged that the costs of this appeal be borne by the respondent.

The appeal was canvassed by way of written submissions. While appreciating that the awarding of damages is a discretion of the trial court which this court can only interfere based on settled legal principles, Counsel for the appellant submitted that the trial court employed erroneous consideration in arriving at the award of Kshs. 750,000/=. Counsel submitted that the trial court awarded damages for loss of amenities yet the respondent did not suffer any degree of permanent disability which would form the basis of such an award. He relied on the definition of **“Loss of Amenities” Halsbury’s Laws of England** cited with approval in **Mwaura Muiruri Vs. Suera Flowers Limited & Another [2014] eKLR**. Counsel contended that the respondent had during cross examination conceded that she had fully recovered although she could not do some work. Counsel stated that the sum of Kshs. 750,000/= was plucked from the air and was no based on any precedents. He proposed an award of between Kshs. 300,000/= - 350,000/=. Counsel cited the case of **Miriti Vs. Nahashon Muriuki & Another [2018] eKLR** as a guide and also **Joseph Marulu Mutua Vs. Samuel Njoroge Mwangi [2003] eKLR** and submitted that the injuries in those case were similar to those of the respondent.

On special damages Counsel submitted that the respondent having admitted that the amount of Kshs. 664,858.34/= claimed was paid by Heritage Insurance Company Limited pursuant to an insurance policy taken out by her husband. The respondent was not entitled to recover the same. Counsel submitted that the same would amount to unjust enrichment. Counsel submitted that it is the insurance company that would be legally entitled to pursue the same under the Doctrine of Subrogation but not the respondent. Counsel pointed out that in any case it was the respondent’s husband who was the holder of the cover and the respondent did not therefore lose anything. Counsel further submitted that it would be of violation of the principle of restitutio integrum to award the respondent those special damages.

On their part, Counsel for the respondent submitted that the general damages awarded were comparable to those awarded in **Thomas Mwendo Kimilu Vs. Anne Maina & 2 others [2008] eKLR** and **Jacinta Wanjiku Vs. Samson Mwangi [2006] eKLR** where the plaintiffs sustained similar injuries.

On the special damages, Counsel for the respondent submitted that whereas the same were paid by the insurance company, it was not an act of clarity and the savings in the policy reduced and would affect further claims if any by the respondent's husband. Counsel disputed that the said special damages amounted to unjust enrichment. Counsel contended that the only reason the specials would not be paid is if the sum was paid out of charity. Counsel urged this court to find the appeal unmerited and dismiss it with costs to the respondents.

I have considered the rival submissions and also re-considered and evaluated the evidence in the trial court so as to arrive at my own conclusion. The injuries sustained by the respondent are not in contention only the quantum of damages is. Those injuries were: -

- (i) Displaced fracture of right clavicle.
- (ii) Fracture of the right scapular.
- (iii) Multiple laceration on both hands.
- (iv) Bruises on the forehead.
- (v) Contusion on the left hip.
- (vi) Contusion on the left leg laterally.
- (vii) Multiple cut wounds on the lower back.

According to Dr. Ogando Zoga, the injury to the right clavicle was severe and was likely to heal with mal-union. The other injuries had healed or were healing. Dr. Zoga's report is dated 21st October 2014 just a few days after the accident. In a subsequent report prepared at The Nairobi Hospital by Kedarnah Joshi MD, Radiologist, following an MRI there was deformity of the middle 3rd shaft of the right clavicle from a healing fracture. The same was confirmed at the Aga Khan University Hospital on 19th February 2015 (See Exhibit P. 3). Dr. Malik's conclusion after doing a second examination on the period was that she suffered total incapacity of a temporary nature for a period of six months followed by partial incapacity of a temporary nature for a further period of one month. She did not however suffer permanent physical disability. These injuries were much more severe than those of the plaintiffs in the two cases cited by Counsel for the appellant. The award proposed by the appellant was in respect to injuries that were much more severe. There was no error on the part of the trial magistrate. The award is not excessive at all.

As for the special damages I am in agreement with Counsel for the appellant that the trial magistrate erred in awarding the respondent the sum of Kshs. 664,858.34 paid on her behalf by Heritage Insurance Company. Firstly, she did not expend that money and so is not entitled to a re-imbursalment and secondly the insurance company has a right of subrogation that it can exercise to recover the money. The appeal on the special damages is upheld and the award of Kshs. 664,858.34/= as special damages is quashed. The award on general damages of Kshs. 750,000/= which is liable to the contribution agreed upon by the parties is upheld and so are the rest of the special damages. As the appellant has succeeded partially, she shall be entitled to half the costs of this appeal. It is so ordered.

Signed, dated and delivered in Nyamira this 7th day of March 2019.

E. N. MAINA

JUDGE