



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 18 OF 2015

SANGANYI TEA FACTORY COMPANY LIMITED.....APPELLANT

VERSUS

PATRICK ONANO CHUNGO.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. J. Njoroge – CM dated and delivered on the 5th day of March 2014 in the original Nyamira Chief Magistrate’s Court Civil Case No. 197 of 2012}

JUDGEMENT

The appellant being dissatisfied with the judgement and decree in Nyamira CMCC 197 of 2012 preferred this appeal on both liability and the quantum of damages. The court found the Appellant 70% liable and the Respondent 30% liable and proceeded to award the respondent Kshs. 700,000/= for injuries described in the medical report as follows: -

- (i) Head concussion with loss of consciousness for two weeks;
- (ii) Bruises on the scalp
- (iii) Fracture of the left femur
- (iv) Fracture of the left tibia fibula
- (v) Multiple cut wounds on the left leg.
- (vi) Large cut wound on the left heel.

It is the appellant’s contention that the respondent did not prove his case on a balance of probabilities and so did not prove negligence against the appellant. Counsel for the appellant alluded to evidence given by one PC James Gitonga in Nyamira CMCC 46 of 2013 Norah Nyaboke Atei & Sylvester Deba Ondari (suing as the Legal Representatives of the Estate of Felix Bosire) Vs Sanganyi Tea Factory which exonerated the appellant from blame. Counsel stated that during cross examination the respondent himself stated that the lorry was parked off the road on the right side and that the motor cycle contributed to the accident. Counsel contended that the accident occurred on a straight stretch of the road and the rider should have seen it and that therefore negligence was not proved. Relying on the case of **Kiema Muthuku Vs. Kenya Cargo Handling Services [1991] 2 KAR**, Counsel urged that there is no liability without fault and that the respondent’s case should be dismissed.

On the quantum of damages, Counsel for the appellant submitted that an award of Kshs. 230,000/= would have sufficed. She relied on the case of **Regina Namata Benaars Vs. Farmers Choice Co. Ltd & Another [2005] eKLR** where Kshs. 200,000/= was awarded for similar injuries.

For the respondent, it was argued that negligence was proved on a balance of probabilities on the evidence of the respondent, the appellant and his witness. On the quantum of damages, Counsel for the respondent submitted that it is now trite law that the appellate court can only interfere with the trial court’s discretion on the award where it is satisfied that the trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence. For this proposition he relied on the case of **Kemfro Africa Ltd Vs. A. M. Lubia & Another [1982 – 88] 1 KAR**. Counsel submitted that the sum awarded to the respondent was very reasonable and was supported by the following authorities: -

- 1. Thomas Muendo Kimilu Vs. Ann Maina & 2 others [2008] eKLR.**
- 2. Florence Njoki Mwangi Vs. Peter Chege Mbitiru [2014] eKLR.**

Counsel urged this court to find that the lower court's finding on liability and the quantum of damages was based on the evidence adduced and there is no reason to interfere with the sum. Counsel urged this court to dismiss the appeal.

An appeal being in the nature of a retrial, I have not only considered the submissions but also reconsidered the evidence in the lower court so as to arrive at my own conclusion. It is my finding that the appellant's evidence that its vehicle was parked off the road was discounted by its own witness Dw2 who stated that it was parked on the road. According to her testimony it was in the middle of the road. Counsel for the appellant did not annex a copy of the investigating officer's testimony in the other case and so this court did not appreciate it. Be that as it may the appellant's own witness having confirmed that the vehicle was parked on the road, there is evidence that demonstrates that the appellant's driver was negligent. The rider of the motor cycle did not have a driver's licence and that too could have contributed to the accident. It is therefore my finding that the trial magistrate's findings of fact and on liability was based on evidence and I would have no justification to interfere with it.

On the quantum of damages, the principles upon which an appellate court can interfere with the trial court's finding are settled – see **Kemfro Africa Ltd Vs. A. M. Lubia & Another [1982 – 88] 1 KAR**. The injuries sustained by the respondent were proved through medial evidence and are not disputed. Those injuries were more severe than those in the case of **Regina Namata Benaars Vs. Farmers Choice Co. Ltd & Another (supra)** which in any event was decided nine years before this one. The cases cited by Counsel for the respondent were more recent. Courts are required to be consistent in their awards and similar injuries ought to attract similar awards. The courts must also take into account the passage of time. It is my finding that the quantum of damages in this case was neither based on a wrong principle nor inordinately excessive to warrant this court to interfere with it. The appeal lacks merit and it is dismissed with costs to the respondent.

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

E. N. MAINA

JUDGE