



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO.71 OF 2016

BONFACE MUGENDI..... 1ST APPELLANT

YAYA CAR SALES LTD.....2ND APPELLANT

VERSUS

EMILIO MURIMI NJUE..... RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Senior Principal Magistrate in Embu CMCC No. 26 of 2016 delivered on the 15th November 2016.

2. The respondent sued the respondents jointly and severally for general and special damages for pain, suffering and loss of amenities following a road traffic accident which occurred on or about the 3rd January 2016. The parties recorded consent on liability on the 13/09/2016 to the effect that judgement be entered for the plaintiff against the defendants in the ratio 80:20. The trial court entered judgement for the plaintiff against the defendants jointly and severally in the sum of Kenya Shillings Three Hundred Thousand Shillings (Kshs.300,000/=) less 20% contribution leaving a balance of Kenya Shillings Two Hundred and Forty Thousand (240,000) as well as special damages of Kenya Shillings Four Thousand Two Hundred and Eighty (Kshs.4,280/=) together with costs of the suit.

3. The appellants being dissatisfied with the judgement of the trial court filed a memorandum of appeal dated 23rd November 2016 which was grounded on 5 grounds that can be summarized as follows: -

That the learned trial magistrate erred in law and in fact in awarding damages that were too excessive in comparison to the injuries suffered by the respondent and against the evidence produced by the appellants.

4. The parties herein agreed to dispose of the appeal by way of written submissions which were duly filed by the counsels on record.

B. Appellant's Submissions

5. The appellants submitted that all the evidence adduced during trial pointed to the respondent having suffered mild soft tissue injuries and thus the award of Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) must have resulted from a misapprehension of the facts and evidence on the part of the trial magistrate.

6. The appellants further restated the principle that awards must be within consistent limits taking into account comparable injuries and awards. They relied on the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** to support their argument. The appellants further submitted that the cases relied on by the respondent did not have comparable injuries to those suffered by the respondent. The appellants also relied on the case of **Channan Agricultural Contractors Ltd Vs Fred Barasa Matayo [2013] eKLR** where the same principle was applied.

7. The appellant thus urged the court to allow the appeal as prayed with costs.

C. Respondents Case

8. The respondent submitted that the award by the trial magistrate was adequate compensation for the injuries sustained and further that the trial magistrate relied on evidence tendered by the parties in arriving at his judgement and thus there was no evidence by the appellants to warrant setting aside of the trial magistrate's judgement.

D. Analysis & Determination

9. Having looked at the Appellant's grounds of appeal and the parties respective Written Submissions, and taking into consideration the fact that the issue of liability had already been consented on in the ratio 80:20 in favour of the respondent, it is clear to the court that the only issues for determination are whether the trial court erred in awarding damages that were manifestly high.

10. It is now settled law that the appellate court will not interfere with an award of damages unless it is shown that the court applied irrelevant factors, failed to take into account some relevant factors or acted on some wrong principle of law. The court will also consider whether the award is too low or inordinately high as to be wholly erroneous. This was stated in the court appeal in the case of **Kemfro Africa Ltd t/a Meru Express service Gathogo Karuri Vs. A.M. Lubia & Another (1982 – 1988)KLR** where it was 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.”

11. The award of damages is a matter of the exercise of the court discretion. In the case of **Gitobu Imanyara (Supra)** the Court stated: -

“Further formerly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the 1st instance they would have given a large sum”.

12. It is not in dispute that the respondent suffered soft tissue injuries to the chest, head, shoulders and abdomen. The appellants submit that the award of Kenya Shillings Three Hundred Thousand (Kshs.300,000/=) by the trial court was inordinately high relying on a number of cases and propose that the award should be set aside and replaced with one ranging between Kshs.80,000/= – 100,000/=.

13. I have carefully perused the authorities relied on by both parties. I also rely on the authority in **Patrick Mwiti Imanene & Another V Kevin Mugambi Nkunja [2013] eKLR** in which the court upheld the trial court's decision to award Kenya Shillings One Hundred and Seventy Thousand (Kshs.170,000/=) for comparable injuries as those suffered by the respondent herein.

14. In the case of **Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] eKLR**, a case relied on by the appellants herein, the High Court set aside the award of Kshs.250,000/= as general damages for comparable injuries and replaced it with an award of Kshs.150,000/=. I am convinced that the difference of Kshs.100,000/= resulted in an inordinately high award and that the court in that case had a good basis for reducing the award as it did.

15. I have considered the injuries sustained in this case which was soft tissue specifically tenderness on the chest, head, shoulders and on the abdomen and I am persuaded that in view of comparable authorities considered herein, the award was reasonable.

16. I find that the learned magistrate followed the laid down principles and arrived at a reasonably adequate award.

17. I find no merit in this appeal and dismiss it accordingly with costs to the respondent.

18. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF APRIL, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Mwanzia for Muthee for Appellant

Mr. Munene for Mugendi for Respondent