



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 9 OF 2017

EDWIN MASESE ONSANDO.....APPELLANT

VERSUS

TERESA GESARE MASESE.....RESPONDENT

(Being an appeal from the judgment of Hon. J.M. Njoroge CM in Kisii CMCC No. 261 of 2014 delivered on the 15/12/2016)

JUDGMENT

1. The respondent, **Teresa Geasre Masese**, sued the appellant **Edwin Masese Onsando**, in Kisii CMCC 261 of 2014 for general damages and special for injuries sustained in a road accident on the 17/8/2014. The Respondent was a pillion passenger. They were knocked from behind by motor vehicle no. KBX 390F. Judgment on liability was entered in the ratio of 65:35 in favour of the respondent against the appellant. The trial court entered judgment for the respondent general damages Kshs. 500,000/- less 35%. Special awarded was Kshs. 12430/- plus costs and interest. Judgment was delivered on the 15/12/2016.

2. Aggrieved by the said judgment the appellant filed a memorandum of appeal on the 2nd February 2017. His appeal is mainly on the sums awarded as special damages and damages. He states that the trial magistrate awarded the sum of Kshs. 12430/- as special damages yet the said sum as not proved as required in law. That the award of Kshs. 500,000/- as general damages was excessive. The other 2 grounds are that the trial magistrate did not considered the appellants submissions and legal authorities relied upon by the appellant and that the trial magistrate relied on the respondent's submissions and legal authorities not relevant and did not address himself to the circumstances of the case.

3. This being the first appeal and required to consider the evidence adduced evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (see **Selle and another vs. . Associated Motor Boat Company Ltd & Others [1968] EA 123**).

4. In dealing with an appeal on quantum, I am guided by the decision of the **Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where it held that;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”

5. The plaint dated the 4th of August 2014 indicates that the respondent sustained the following injuries;

- a. Head injury due to brain concussion and lost conscious for more the 1w hours
- b. Injury to the right kidney following blunt trauma to the abdomen
- c. Blunt trauma to the back
- d. Contusion on the head leading to massive haematoma formation

Special damages were particularised at paragraph 5 amounting to Kshs. 33500/- costs of future was to be adduced at the hearing.

6. Doctor Ezekiel Zoga in his medical report indicates that he examined the respondent on the 7.5.2014. According to the report the respondent was treated at Nyagena hospital and referred to Kisii Level 5 and as per the treatment notes the abdominal ultra sound confirmed injury to the right kidney, there was skull x-rays, head injury management and analgesics. Her complaints as at 7.5.2014 was pain on the

right renal angle, persistent headaches and persistent back pain. Doctor Zoga's conclusion was that the respondent sustained severe head injury whereby she has persistent head and episode of memory lapse. She also sustained injury to the right kidney which had not healed and needs long term following with a possibility of losing its function and that the other soft tissue injuries were healing well. Analgesics was recommended.

7. Doctor Olima's report is dated 9.9.2015. As per his report the respondent sustained head injuries with loss of consciousness and a blunt injuries involving the right kidney. Her head injury was managed conservatively. Her complaints then was pain in the right renal angle region and headaches on and off with inability to carry heavy weights on the head. Findings on examination was non-significant. His prognosis and opinion was that the respondent suffered soft tissue injuries and blunt abdominal injuries from which she has recovered.

8. In quantifying the award for damages, the respondent proposed Kshs. 1,500,000/- as general damages and relied on the following cases during the trial ;*Ann Muriithi Lillian Kathoka, Naomi Nzisa, Mary Nzomo, Anne Njeru, Jane Syombua Sammy vs. the Headmistress MKS Girls & 3 others (2003)* where the court in 2003 awarded Kshs. 700,000/- to a plaintiff who sustained injuries less severe. *Isaac Rigondi & another vs. T. M & another (2012) eKLR* where the court upheld an award of Kshs. 780,000/- made in 2010. The Respondent also relied on the case of *Simon Muchemi Atako & Another vs. Gordon Osore (2013) eKLR* where the plaintiff was awarded Kshs. 120,000/- as general damages.

9. The appeal was canvassed by way of written submissions. I have considered the said submissions. The appellant submitted that from the respondent's testimony in court it can only be concluded that the respondent had recovered as she did not testify that she was still under medication or that she had not recovered for the head injury. The appellant submitted that the award of Kshs.120, 000/- was adequate compensation on the grounds that she did not return to hospital after the first treatment. The appellant relied on the case of *Simon Muchemi Atako and another vs. Gordon Osore [2013]* the plaintiff had suffered blunt injuries to the chest and knee amongst other soft tissue injuries and had fully recovered. It was submitted that the authorities quoted by the trial Magistrate in arriving at his decision had more serious injuries. That in the case of *Isaac Rigandi and another vs. T.M & another (supra)* the minor had lost consciousness for 7 days and sustained a fracture and in the case of *Cecilia W. Mwangi & another vs. Rith W. Mwangi Nyeri CA 251/1996* the plaintiff had a head injury and a fracture among other injuries and was awarded Kshs. 300,000/- as general damages. It was further submitted that the trial court over relied on the respondent's submissions and authorities. The appellant sought to have the award of Kshs. 500,000/- set aside and substituted with Kshs. 120,000/-. The appellant abandoned their ground challenging the special damages awarded.

10. The respondent submitted that the award of Kshs. 500,000/- was on the lower side considering the previous awards for similar injuries and the circumstances of the case and that worse still the amount was reduced by contribution on liability. The appellant sought to rely on the 2previous cited before the trial courts of *Ann Muriithi and others vs. The Headmistress MKS girls & 3 others(supra)* and *Isaac Rigondi & another vs. T.M and another (supra)*. That on special damages the respondent produced a bundle of receipts in support of his claim that though he pleaded Kshs. 33,500/- the trial court Kshs. 12,430/- that was proved. The respondent sought to have the appeal dismissed.

11. Turning to the evidence adduced before trial court, the plaintiff stated, "**I was injured on the head, back blunt tissue injuries, stomach area at the right kidney**". Doctor Ezekiel Ogando Zoga testified that he examined Teresa Gesare Masese on 2/5/14. She had, head injury losing consciousness for over 12 hours, blunt to abdomen leading to right kidney injury, blunt to the back, blunt to the head leading to haematoma. She was treated at Nyangena hospital. She had pain at the back, severe soft tissue injuries with memory loss, the kidney injury had not healed and the other soft tissue injuries were in the process of healing. During cross-examination he stated that the injuries were 3 weeks old when he saw the respondent. That the head and kidney injuries were life threatening the brain was traumatised. That the respondent had memory lapses and may recover fully and that he did not recommend the removal of the kidney. That there was no permanent disability incapacity assessed and that she had not healed.

12. The appellant took issue with the respondent's pleading and the medical documents in his submissions in the lower court. It was submitted that there was variance as the discharge summary indicated that there was swelling on the head and head injury, that the injuries stated by the respondent in her evidence was not in the initial discharge summary. The discharge summary is the initial document that gives an account of the injuries sustained. The discharge summary dated the 23/3/2014 indicates that the respondent had a right kidney injury secondary to trauma, she complained of loin pain, severe back pain. The document from Nyangena hospital dated 17/4/2014 indicates she had a head injury she was referred for CT scan of head and further treatment. When she was examined by Doctor Olima on the 9/9/2015 a year later she had pains in the right renal angle region and headaches on and off. The prognosis was that she suffered soft tissue injuries and blunt abdominal injuries from which she had recovered. In cross examination the respondent indicated that she has not healed.

13. The plaintiff in the case of *Isaac Rigondi (supra)* was a minor suffered serious permanent injuries, fracture base of the skin, left femur and bruises all over the body, unlike the respondent in this case. In the case of *Anne Muriithi and others (supra)*, the plaintiffs suffered various injuries ranging from sustained fracture of the left femur, dislocation of the knee, deep cuts left lower limb, spinal cord injury, loss of memory, headaches, compound fractures of the left femur, dislocation of the digital radial ulna. The plaintiff in *Nyeri CA No 251 of 1996 Cecilia W. Mwangi & another vs. Rith W. Mwangi* suffered a head injury (cerebral concussion) cut wound over the scalp, fracture of the pelvic RMs. These injuries were of a more serious nature than the respondent in this case. In the case of *Simon Muchemi Atako & another vs. Gordon Osore (2013) eKLR* the plaintiffs suffered injuries to the nose, blunt injury to the chest, blunt injury to the right hip, bruises wound on the right knee, cut wound on the base of the left thumb with partial loss of nail, cut wound on the left leg, bruises wound on the right knee, blunt injury to the left shoulder, cut wound above the right shoulder ,cut wound over the occipital part of the head and cut wound on the palms aspect of the left thumb. My conclusion after analysing the evidence, medical reports and the cases relied on I conclude that the respondent suffered soft tissue injuries and blunt abdominal injuries from which she has recovered as noted by Doctor Olima who saw her a year later in 2015. The respondent in her evidence in 2016 stated that she has not healed, without explaining how she has not healed.

14. The next issue is whether the award of Kshs. 300,000/- was excessive. In assessing damages it is now a well-established principle that an appellate court will not interfere with the trial court's award on general damages unless it is shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or that it was manifestly excessive or inadequate that a wrong principle or a misapprehension of the evidence may be inferred. (see *Shabani vs. City Council of Nairobi (1985) KLR 516* and *Kiragari vs Aya (1985) KLR 273*).Further each case depends on its own facts, I note that in 2013 the Court of Appeal awarded 120,000/- in the case of *Simon Muchemi*

Atako.(supra). Considering that the respondent suffered soft tissue injuries which have healed with no permanent disability, taking into account all factors, the comparable awards and inflation I am inclined to interfere with the award of Kshs. 500,000/- which I find was excessive. I substitute the award of Kshs. 500,000/- with an award of Kshs. 200000/- less 35%.The said amount shall attract interest from the date of judgment before the subordinate court.

Dated signed and delivered at **Kisii** this 2nd day of **May 2019**.

R.E.OUGO

JUDGE

In the presence of;

Miss Angasa For the Appellant

Miss Kusa For the Respondent

Rael Court clerk