



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 48 OF 2016

JAMES NGANGA KIMANI.....1ST APPELLANT

VERSUS

GIACHAGI NJOROGE alias

PAULINA GIACHAGI.....1ST RESPONDENT

KIRINYA JOSEPH.....2ND RESPONDENT

FRANCIS NGANGA KINYUA.....3RD RESPONDENT

(Being an appeal from the Judgment of the Hon. S. K. Arome (RM) delivered on the 20th August 2015 at Kiambu CMCC No. 162 of 2014)

JUDGMENT

1. This appeal emanates from the judgment of Arome, Resident Magistrate in **Kiambu CMCC No. 162 of 2014**. By a plaint filed on 25/06/2014, the Plaintiff in the lower court and now the 1st Respondent herein, had sued the two Defendants now the 1st and 2nd Appellants claiming compensation for the severe injuries she sustained on 2nd May, 2014. She averred that while she was lawfully travelling in motor vehicle registration number **KBK 196Y** along **Kiambu –Nairobi Road** when the 1st and/or 2nd Appellants' driver and/or 3rd Defendants' driver so negligently drove the said motor vehicle registration number **KBK 196Y** and **KBG 366E** respectively, that they caused the two motor vehicles to collide and as a result the 1st Respondent sustained severe bodily injuries and has suffered loss and damage.

2. The 1st and 2nd Appellants filed a defence dated 28th July, 2014, denying any liability for the accident. In particular, the Appellants denied ownership of the accident motor vehicle.

3. The matter proceeded to a full hearing. Liability was found at 80:20% in favor of the 1st Respondent as against the Appellants. On quantum, the trial Magistrate entered judgment as follows:

a. General damages	Kshs.	300,000/=
Less 20%	Kshs.	60,000/=
	Kshs.	240,000/=
b. Special damages	Kshs.	2,650/=
TOTAL	Kshs.	242,650/=

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present appeal based on the following grounds: -

“a. The learned trial Magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Kshs. 300,000/= which were inordinately excessive in view of the injuries allegedly suffered by the Plaintiff.

b. The Learned Magistrate erred in fact and in law in finding that the Respondent herein was entitled to general damages that were too high in view of the injuries suffered by the Plaintiff and without considering the provisions of schedule 39 of

The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act No. 50 of 2013) which gives a guideline on how compensation of the type of injuries sustained by the Respondent ought to be compensated and further the trial Magistrate disregarded section 3 of The Judicature Act Cap. 8 Laws of Kenya, which provides that an Act of Parliament is superior to case law.

c. That the Learned trial Magistrate erred in law and in fact in totally disregarding the evidence adduced in court and the testimony of the witness (Dr. Jeniffer Nyawira) which indicated that the plaintiff had sustained soft tissue injuries.

d. That the learned trial Magistrate did not apply the correct principles of the law in determining quantum and his award represents a totally erroneous estimate given that the Respondent had completely healed and required no further medication.

e. The Learned Magistrate erred in fact and in Law in failing to give due regard to the submissions and authorities filed by the Appellant.

5. The 1st Respondent's case, as it emerged at the trial was that she was travelling in motor vehicle registration number **KBK 196Y** when the vehicle was involved in an accident at Kirigiti junction. She testified that she sustained injuries on the forehead, chest, left hand and legs. She was treated at **Kiambu District Hospital**. She prayed for compensation for pain and suffering and loss and damage.

6. **Dr. George Kungu Mwaura (PW1)** is the doctor who examined the 1st Respondent . He stated that she sustained a deep cut wound on the nasal bridge, a cut wound on the left eye brow, bruises on the forehead, a blunt injury front aspect of the chest wall, swelling on left chest , cut wounds on the left leg and a broken right upper incisors tooth. His findings on examination was that healing was fair That she could not walk for long or lift heavy objects and complained of headaches. Her upper right incisor was broken

7. **Dr. Jennifer Nyawira (DW1)** testified that she too examined the 1st Respondent and noted a scar across her nasal bridge and on her lower limb, and broken upper incisors and a missing lower incisor tooth and that she had multiple dental carries.

8. The Court directed that the appeal be canvassed by way of written submissions. Through their counsel, the Appellants submitted that the sum total of the evidence adduced in court by **PW1, PW2 and DW1** point to soft tissue injuries. That the alleged broken tooth was not proved on a balance of probabilities and should have been disregarded by the trial court. In their view, the award of Kshs. 300,000/= was inordinately high. Counsel contended that damages must be based on past awards for comparable injuries. Reliance was placed in the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co. Ltd (2013) eKLR** where it was held that the general method of approach for assessing damages is that comparable injuries should be compensated by comparable awards.

9. Further, that the claimants in authorities relied on by the trial court, had suffered more serious injuries. Counsel reiterated the principle that an appellate court would not interfere with the quantum of damages unless the award is so high or so low as to be an erroneous estimate. The court was invited to consider several cases which are relevant to the instant case among them **Channan Agricultural Contractors Ltd vs Fred Barasa Mutayi (2013) eKLR** where an award of Kshs. 250,000/= was replaced with that of Kshs. 150,000/= for moderate soft tissue injuries, the case of **George Kinyanjui t/a Climax Coaches & Anor vs Hassan Musa Agoi (2016) eKLR** where an award of Kshs. 650,000/= was set aside and an award of Kshs. 109,890/= was made for soft tissue injuries, the court discounting an injury to the teeth. Counsel urged the court to reduce the award of Kshs. 300,000/= to between Kshs. 100,000/=–80,000/=.

10. The 1st Respondent filed her written submissions through her counsel. Counsel submitted that in awarding general damages, the trial court had exercised its judicial discretion based on the evidence before it and the award ought not to be interfered with unless it was shown that a wrong principle was applied. To support this proposition, counsel cited the case of **Ratnam vs Kumarasamy & another ALL ELR (1964) ?? VOLUME 3 pg 933**. Counsel further submitted that the burden of proving that discretion has been improperly exercised lay with the person challenging the decision, as held in the case of **Samken Ltd & Another vs Mercedes Sanchez Civil Application NO. 21 of 1999 (1999) EA**. It was argued that the Appellants had failed in discharging that duty.

11. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. That duty of this court as first appellate court is to re-evaluate the evidence and draw its own conclusions but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Sele and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAL**.

12. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have altered on wrong principles in reaching the findings he did”

13. The point of contention in these appeals is the quantum of damages awarded in the lower court, viewed as inordinately high by Appellants. The court, in determining the matter will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30**.

14. It was held in that case that:

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either 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 damages.” see also **Butt v Khan (1981)KLR 349** and

15. In the latter case, the Court of Appeal asserted the

discretionary nature of general damages awards and observed that “*an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance*”.

16. In her pleadings, the 1st Respondent particularized the following injuries:

- a) Deep cut wound –nasal bridge
- b) Cut wound – left eyebrow
- c) Bruises – forehead
- d) Blunt injury (tender) – anterior chest wall
- e) Swollen, tender – left wrist
- f) Cut wounds – left leg
- g) Broken right upper central incisor.

17. In her evidence -in- chief however the 1st Respondent did not include the broken tooth, and when questioned, she claimed that even though her earliest treatment notes did not contain the said injury, she had nevertheless mentioned it to the doctor who first examined her. The earliest treatment record tendered at the trial is the **P3 form** which contains all pleaded injuries except the alleged broken tooth. In the medical report prepared by **Dr. G.K. Mwaura** on 18th June 2014, it is stated that the doctor relied on treatment notes from Kilimanjaro medical complex, P3 form, prescription and attendance card from **Kiambu District Hospital**. Of these records the 1st Respondent produced a treatment card from Kiambu Hospital (**Exh. 2**), prescription from Kenyatta National Hospital [**Exh4**] and P3 from (**Exh. 5**).

18. **Dr. G.K. Mwaura** testifying as **PW1** was hard pressed during cross-examination to explain his inclusion of the broken tooth among the 1st Respondent’s injuries when the original treatment notes did not include such injury. He stated that he could not tell why the broken incisor tooth was not listed in the initial notes.

19. According to a report prepared on behalf of the Appellants by **Dr. Eric Mungai**, the 1st Respondent was found to have a scar on the nasal bridge and lower limb; broken upper incisor tooth and missing lower incisor f teeth and multiple dental carries. While confirming the soft tissue injuries the report emphasizes that the broken incisor tooth was not listed in the earliest treatment notes.

20. Nevertheless, is clear from the judgment of the lower court that in the considering damages, it disregarded the alleged broken incisor tooth. The court guided by the decision in **Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichumbi Nyeri HCCC 320 OF 1998** proceeded to award KShs.300,000/= for pain and suffering. There were three Plaintiffs in that case. In her submissions the 1st Respondent had asserted that the injuries of the 1st Plaintiff in that case were comparable to hers. The said Plaintiff had sustained soft tissue injuries to the left ankle, legs and chest. She was awarded KShs.300,000/= in 2005.

21. The Appellants had urged an award of KShs.60,000/= citing several authorities including **Mokaya Mochama v Julius Momanyi Nyakwoyo [2013] e KLR** and **Pamela Ombiyo Okinda v Kenya Bus Service Ltd. Nairobi HCCC 642 of 2002**, to urge an award of KShs.60,000/=. Considering the nature and extent of the 1st Respondent’s injuries in this case such an award would be too low.

22. However, having reviewed the authorities cited in the lower court on soft tissue injuries, I think that the award of KShs.300,000/= in this case was rather high. More so because the 1st Respondent had recovered from her injuries without any adverse consequences beyond scarring. In my view, an award of KShs.200,000 would be adequate compensation this case.

23. I do therefore set aside the award in the lower court and substitute therefor an award of KShs.200,000 [TWO HUNDRED THOUSAND] as general damages for pain and suffering, but subject to the agreed liability ratio. This sum will be in addition to the sum of KShs.2,650/= awarded as special damages. As the appeal has succeeded in part, the Appellants will get one half of the costs of the appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 13TH DAY OF JUNE 2019

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C. MEOLI

JUDGE

In the presence of:

Mr. Ngochi holding brief for Mr. Muthee for Appellant

Respondent – No appearance

Court Assistant – Nancy/Kevin