



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.88 OF 2018

JONES MAKORI MOKAYA.....APPELLANT

VERSUS

BEATRICE MORAA OGORO.....RESPONDENT

(Being an appeal from the judgment of Hon. Lutta- Chief Magistrate delivered on 29.8.2018 in Kisii CMCC No. 32 of 2017 between Beatrice Moraa Ogoro v Jones Makori Mokaya)

JUDGMENT

1. This appeal arises out of the judgment of the court in Kisii CMCC No. 32 of 2017. The respondent was injured in a road traffic accident that took place on 1st October 2016 along Kisii-Keroka Road while she was travelling on the appellant's motor vehicle registration mark KAW 347R when the appellant's driver negligently caused the vehicle to lose control and over turn thus causing the plaintiff to sustain grievous injuries. A consent on liability at 70% to 30% in favour of the plaintiff/respondent had been entered by the parties on 6th June 2018. The trial court was therefore required to determine the issue of quantum.

2. The Trial Magistrate after weighing the evidence and considering the submission by parties awarded Kshs. 3,000,000/- as general damages, Kshs 75,000/- being costs of future medical expenses and special damages at Kshs. 151,000/-, giving a total of Kshs. 3,226,000/-.

3. The appellant dissatisfied with the said decision lodged an appeal on the grounds that:-

1. That the learned trial magistrate erred in law and fact by awarding the respondent a sum of Kshs 3,226,000/- as general damages was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.

2. That the learned trial Magistrate erred in law and in fact in overly relying on the Respondent's evidence most of which was speculative in nature in awarding damages.

3. That the learned trial Magistrate erred in law and in fact in failing to consider the appellant's submissions and legal authorities relied upon in support to the Defence thereof.

4. That the learned trial magistrate erred in law and fact by overly relying on the respondent's submissions and legal authorities which were not relevant and without addressing his mind to the circumstances of the case.

5. That the learned trial Magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.

6. That the learned trial Magistrate's decision albeit a discretionary one was plainly wrong.

4. In exercising appellate jurisdiction, I am guided by the principle set out by the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30** that:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

5. PW1 relied on her witness statement which was to the effect that on 1st October 2016 she sustained injuries while travelling in the appellant's motor vehicle. As per her statement she sustained the following injuries; open fracture of the right tibia bone, deep cut wound on the forehead and stab wound on the left leg. She spent Kshs 145,000/- in treatment and transport expenses. The appellants did not call any witnesses. The parties agreed to admit the report of Dr Ezekiel Ogando Zoga who examined the respondent on 16th November 2016. His conclusion was that the plaintiff "sustained compound fracture of the right tibia/fibula which has developed chronic osteomyelitis a condition which will need antibiotics on and off for life. Pathological refracturing of the bones is very common hence will need to be on light duties. The implant will need to be removed after the bone has united at a cost of Kshs 75,000/-. Permanent disability was assessed at 40%."

6. The trial magistrate did not state how he arrived at the sum of Kshs. 3,000,000/- on account of general damages. It appears that pain, suffering and loss of amenities together with loss of future earning capacity were awarded by the trial court under this head. Beatrice Moraa (Pw1) testified that she was a business woman, though no documentation was produced as proof of her business. In her submissions before the trial court, the respondent proposed that to the court should use the minimum wage of Kshs 11,926/= and a multiplier of 25 in light of the fact that the plaintiff was 35 years. At paragraph 5 of her plaint she pleaded loss of future earning capacity as follows;

PARTICULARS OF LOSS OF FUTURE EARNING CAPACITY AND LOSS OF AMENITIES

The plaintiff was attended at Kisii District Hospital and Tenwek Hospital where she was admitted between 1st-10th October, 2016 and she sustained compound fracture of the right tibia/fibula which developed chronic osteomyelitis a condition which will need antibiotics on and off for life with permanent disability assessed at 40%.

7. Other than the heading, the particulars hereunder do not disclose loss of future earning capacity. Damages for loss of future earning capacity may only be awarded in cases where it has been pleaded and where evidence has been tendered. In **Butler vs Butler (1984) KLR 225** the Court of Appeal stated as follows:

"Whilst loss of earning capacity or earning power should be included as an item of general damages, it is not improper to award it under its own heading ---. Once it is in principle accepted that the victim of personal injuries who has lost his earning capacity is entitled to compensation in the form of damages it is of little materiality whether the award is under the composite head of general damages or as an item on its own, as a loss of earning capacity. At any rate, what is in a name if damages are payable."

8. In *Fairley vs- John Thomson Ltd [1973] 2 LLOYD'S Law Reports 40 at page 14*, Lord Denning made it clear when he held:-

"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity.

Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages"

9. An evaluation of the evidence indicate that the plaintiff did not prove, on a balance of probabilities that she operated a business and neither did she adduce any evidence of any earning from said business. Consequently, I find that her claim for loss of future earnings capacity cannot stand.

10. In the lower court the Respondents relied on the case of **Samuel Mwangi Kamau v Joseph M. Kimemia & Another (2004) eKLR** where the plaintiff in that case had suffered depressed fracture of the skull that resulted into the plaintiff's left had being permanently disabled, fractured fibula and tibia and soft tissue injuries on upper limb and the court awarded Kshs 1,000,000/- for general damages. In **Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR** the plaintiff had fractures of the left tibia and fibula, suffered a complication leading to amputation of the leg, had a fractured collarbone, and disability was assessed at 55-60% and was awarded general damages of Kshs 3,794,160/-. In **Ngure Edward Karega v Yusuf Doran Nassir [2014] eKLR** the road traffic accident became a quadriplegic and disability was assessed at 100%.The appellant relied on the case of **Agroline Hauliers Limited &another v Michael Abongo Kisemba [2015] eKLR** where the plaintiff sustained a knee fracture and soft tissue injuries and was awarded Kshs 400,000/- as general damages.

11. Having reviewed the cases quoted by the appellant and respondent before the trial court, I note that the cases are not comparable in terms of the injuries suffered by the Plaintiff. The plaintiffs in the cases quoted by the respondent suffered more severe injuries. The plaintiff in the case quoted by the appellant, though suffered a knee fracture and soft tissue injuries the issue of disability did not arise unlike in this case where disability has been assessed at 40%.The Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

12. In the case of **Mwavita Jonathan v Silvia Onunga [2017] eKLR** the court awarded Kshs 400,000/- where the plaintiff had sustained a fracture at the hip joint leaving her to walk with crutches and pain, she also had suffered soft tissue and disability was assessed at 85%. In **Continental Hauliers Ltd & 2 others v Isack Kipkemei Bitok [2019] Eklr** the plaintiff sustained a fracture of left femur, cut wound on left forearm and permanent disability assessed at 40%, the court set aside an award of Kshs.900,000/= and substituted it with an award of Kshs.600,000/=.

13. I therefore find the sum of Kshs. 3,000,000/- on the higher side and reduce the same to Kshs. 600,000/- which I now award as general

damages. The sums of Kshs.75, 000 cost of future medical expenses, special damages of Kshs.151, 000/= are not reduced. The sums awarded shall be reduced by 30% as per the consent on liability. The amount shall accrue interest from the date of judgment before the trial court and the appellant shall have costs of the appeal assessed at Kshs. 30,000/-.

Dated signed and delivered at Kisii this 6th day of JUNE 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Angasa For the Appellant

Respondent Absent

Ms Rael Court clerk