



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 30 OF 2018

JOSEPH MWANGI KIARIE.....1ST APPELLANT

LUCAS ODHIAMBO ODHIAMBO.....2ND APPELLANT

VERSUS

ISAAC OTIENO OTIENO.....RESPONDENT

[Appeal from a Judgment and decree of the Chief Magistrate's Court at Kisumu Hon. Ndombi dated the 16th day of April 2018 in Civil Case No. 402 of 2013]

JUDGMENT

The Appellants have challenged the amounts which the learned trial magistrate awarded to the Respondent.

1. First, the Appellants submitted that the trial court did not take into account the awards made in similar cases. She is said to have disregarded the pleadings and the documentary evidence on record.
2. The Appellants also submitted that the trial court failed to take into account the legal principles applicable when determining Dependency.
3. As a result of that which the Appellants have described as a misdirection on the part of the trial court, the Appellants concluded that the sum awarded to the Respondent was excessive.
4. Being the first appellate court, I am obliged to re-evaluate all the evidence on record.
5. The record shows that on 21st November 2017 the parties recorded a consent on the issue of liability, so that the Defendant bore 80% liability whilst the Plaintiff bore 20% liability.
6. In the circumstances nothing arises on the issue of liability.
7. My evaluation of the evidence on record would thus be centred on the questions of the injuries sustained by the Plaintiff, and the appropriate compensation in that respect.
8. This court reminds itself that it ought not to tinker unnecessarily with the findings which the learned trial magistrate made on matters of fact.
9. However, if it is shown that the trial court failed to take into account any relevant factors or that the trial court took into account matters which were not relevant, this court would have an obligation to interfere with the decision arrived at.
10. Furthermore, if it was demonstrated that the sums awarded as compensation were so high, (as alluded to herein), this court would be entitled to draw the inference that the trial court had made an error in its application of the guidelines for the assessment of appropriate compensation. Appropriate compensation is that which is fair; and it would be deemed to be fair if it was commensurate with the injuries sustained by the Plaintiff.
11. The most objective manner of ascertaining fairness of an award is by comparing it with awards made in other cases which were comparable to that of the Plaintiff.
12. In this case the Appellant has asserted that the Plaintiff did not adduce evidence to support the particulars of the injuries he pleaded in the Plaint.

13. At paragraph 8 of the Plaintiff the following are the injuries which the Plaintiff said he had suffered from;

“i) Head injury with cut wound and loss of Consciousness.

ii) Injury on the chest.

iii) Injury on the right knee.

iv) Injury on the left elbow joint.”

14. **PW3**, Dr. Were Okongo is the medical doctor who examined the Plaintiff and then prepared a Medical Report which the Plaintiff relied upon at the trial.

15. During cross-examination, **PW3** said that according to the Treatment Notes from the Ahero District Hospital, the Plaintiff did not have any history of loss of consciousness.

16. He also said that there was no injury on the Plaintiff's chest or knee, according to the Treatment Notes dated 10th April 2013.

17. On the other hand, the P3 Form dated 7th May 2013 indicated that the Plaintiff's injuries were to his head, chest, left elbow and the big toe on his leg.

18. Parties are bound by their pleadings. In other words, the court would evaluate the evidence adduced, so as to determine whether or not it proves that which was asserted in the Plaintiff.

19. That therefore means that if a party produces evidence which does not relate to his case as pleaded, such evidence would be irrelevant.

20. In so far as the pleadings did not indicate that the Plaintiff suffered any injury to his toe, such evidence as suggest that he had sustained an injury to his toe, would be of no use in advancing the Plaintiff's case.

21. I also find that the evidence of Dr. Were Okongo implies that the assertions regarding the Plaintiff's alleged loss of consciousness, or the injuries to his chest and his knee, were without foundation.

22. Effectively, therefore the injuries which the Plaintiff proved he had suffered from are the Head Injury with a cut wound and the injury to the left elbow joint.

23. **PW4**, Thomas Mboya, is a Clinical Officer. He also confirmed that the medical records at the Ahero County Hospital showed that the Plaintiff did not suffer injury to his chest or knee.

24. In the judgment of the learned trial magistrate, it was indicated that the Plaintiff suffered an injury to his head, an injury to his left elbow and a severe bruise to his toe.

25. As the Plaintiff had made no reference to an injury to the Plaintiff's toe, I find that the trial court had erred when it held that such an injury had been proved.

26. In arriving at her decision, the learned trial magistrate placed reliance upon the written submissions of the Plaintiff. She pointed out that the Defendant never filed submissions.

27. However, in the Record of Appeal, there are written submissions which the Defendant filed in court on 21st December 2017.

28. As the trial court's judgment is dated 16th April 2018, it ought to have taken into consideration the Defendant's written submissions.

29. By failing to take into account the Defendant's submissions, the trial court did an injustice to the Defendant.

30. Furthermore, the trial magistrate stated that in the case of **DENNIS MABWANKA KHALUSI Vs MAWINGO BUS SERVICES, HCCC NO. 2707 OF 1990** the Court had awarded damages in the sum of Kshs 150,000/=, whereas in that case the sum awarded was Kshs 120,000/=, as damages for Pain, Suffering and Loss of Amenities.

31. In that case the Plaintiff had suffered a cut wound involving the muscles of the right arm; wounds on his right leg, involving tendons; cut wounds on the chest; and cuts on the face.

32. I find that those injuries were more serious than those sustained by the Plaintiff in this case.

33. In the case of **FANNY ESILAKO Vs DOROTHY MUCHENE, HCCC NO. 642 OF 1991**, (which the Respondent cited), the Plaintiff sustained multiple soft tissue injuries, involving;

(i) cuts over the upper arm;

(ii) multiple cuts over the left wrist;

(iii) cuts over the left knee;

(iv) cuts over the right arm;

(v) sprained ankle; and

(vi) blunt injury to the head.

34. The Plaintiff was awarded Kshs 150,000/= as general damages for pain, suffering and loss of amenities.

35. My considered opinion is that the injuries sustained by the Plaintiff in this case were much less than those in that authority.

36. In the case of **GABRIEL OWE OKELLO Vs UJENZI QUARRIES LTD (KSM) HCCA NO. 62 & 63 OF 2015**, the Appellant had sustained an injury to the right eye.

37. According to the learned Judge;

“From the evidence on record, the only injury that was pleaded and supported by evidence is injury to the right eye. According to the appellant, soil got into his right eye. Dr. Okombo’s report P Ex 5(a) shows that appellant had tenderness in the right eye.”

38. In the circumstances, the court held that if the Appellant had proved his case, an award of Kshs 40,000/= would have been sufficient.

39. In my considered opinion, the case of Gabriel Owe Okello was not comparable to that of the Appellant in this case. The injuries sustained by the Appellant in this case were more serious.

40. Having given due consideration to the submissions made by both the parties herein, I have come to the conclusion that the sums awarded by the trial court were so high that the same cannot be upheld. I so find because the cases cited by the Plaintiff and which were relied upon by the trial court, to award Kshs 300,000/=, were not comparable to the Respondent’s case.

41. In the result the appeal is allowed and the sum awarded is set aside.

42. I now award to the Respondent the sum of Kshs 180,000/= as General Damages. The said sum will be discounted by 20%, being the agreed contributory negligence attributable to the Respondent.

43. Accordingly, the Respondent shall be paid Kshs 144,000/= as General Damages and Kshs 2,000/= as Special Damages.

44. The said sum shall attract interest at Court Rates, calculated from today.

45. The costs of the suit are awarded to the Plaintiff, whilst the costs of the appeal are awarded to the Appellant.

DATED, SIGNED and DELIVERED at KISUMU This 23rd day of July 2019

FRED A. OCHIENG

JUDGE