



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.7 OF 2018

TOBIAS HENRY OMUGA.....APPELLANT

VERSUS

GRACE A.O. SONGA.....RESPONDENT

(Being an appeal from the Ruling of the CM's Court Homa Bay

delivered on 8th December 2017 in Homa Bay Civil Suit No.7 of 2016 – N. Kariuki, RM)

JUDGMENT

[1] By a plaint dated 2nd February 2016, the appellant (defendant) was sued by the respondent (plaintiff) for damages arising from a road accident which occurred along the Homa Bay-Rongo Road at an area known as Murram on the 19th June 2015.

It was pleaded that on the material date, the respondent was walking along the said road as a pedestrian when she was violently hit and injured by a motor vehicle Reg. No.UAF552Y Jeep Cherokee belonging to the appellant and driven at the time by his driver.

[2] The respondent further pleaded that the accident was as a result of the appellant's driver careless and reckless manner of driving such that the vehicle went out of control and hit the respondent who suffered serious bodily injuries.

The respondent therefore prayed for special and general damages against the appellant together with costs and interest of the suit.

[3] The appellant denied the claim on the basis of the averments and/or facts contained in the statement of defence dated 17th March 2016, and contended that if the accident occurred, then it was occasioned by the respondent's negligence and/or recklessness and due disregard of her own safety. This defence was however disregarded by the trial court in favour of an earlier defence dated 24th February 2016, filed by the appellant in person.

In the course of the trial, the parties recorded a consent to the extent that judgment on liability be entered in favour of the respondent against the appellant in the ratio of 80%:20%.

The quantum of damages remained the sole issue for determination by the court.

[4] In that regard, the trial court considered the evidence provided by the respondent, Grace Anyango Songa (PW1) and a traffic police officer, CPI Nicholas Muthama (PW2) and entered judgment in favour of the respondent for general damages in the sum of Kshs. One (1) Million less 20% contribution i.e. Kshs.800, 000/=.

[5] Being dissatisfied with the award, the appellant preferred this appeal on grounds contained in the memorandum of appeal dated 16th March 2018.

Hearing of the appeal proceeded by way of written submissions. In that regard, the appellant's submissions were filed herein on the 26th April 2019 by the firm of Mose, Mose & Millimo Advocates, while those of the respondents dated 6th May 2019, were filed by H. Obach & Partners advocates.

[6] The rival submissions were duly considered by this court in the light of the grounds of appeal. It was apparent that the appeal is basically on the quantum of damages as the issue on liability was settled by consent at the trial.

In *Kemfro Africa Limited t/a Meru express Services –vs- A.H. Lubia & Another (1982-88) 1 KAR 777*, the Court of Appeal held that:-

“The principles to be observed by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be 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 damage”.

(See also, **Butt –vs- Khan - Nbi Civil Appeal No.40 of 1977[1978] e**

KLR)

[7] It is the appellant’s contention that the award made by the trial court was inordinately high and farfetched as it was not based on any tangible evidence.

The respondent on the other hand contended quite rightly that the issue of damages is a matter of the court’s discretion and that authorities cited by parties in agitating for a specific award are mere guidelines.

The respondent therefore argued that the trial arrived at the impugned award on the basis of the evidence presented before it.

[8] In the plaint, the respondent prayed for general damages for pain and suffering as well as special damages in the sum of Kshs.13, 200/= for the police abstract, medical report and medical treatment. In her submissions in the trial court, she prayed for a sum of Kshs.2.5 million general damages for pain and suffering.

The trial court rightly declined to award the claimed special damages for want of proof.

[9] With regard to the impugned award in the sum of Kshs.1 (one) million less 20% contribution i.e. Kshs.800,000/=, it was pleaded that the respondent suffered bruises to the head, chest wall and back, fracture on the right mid shaft ulna bone and dislocation of the right shoulder joint and right hip joint. This was confirmed by the police medical report (P3 Form) which was relied upon by the respondent and was not disputed by the appellant.

[10] Although the medical report indicated that the respondent suffered grievous harm which meant that she suffered serious injuries, it did not indicate the residual effects of the injuries on the general wellbeing of the respondent and whether they were capable of causing permanent disability and/or disfigurement.

In the absence of such disclosure, it cannot be farfetched for this court to opine that the respondent recovered from her injuries without any permanent disability.

[11] It would therefore be safe to state that the proposal of Kshs.2.5 million made by the respondent for general damages for pain and suffering was rather excessive as the victims in the authorities cited by the respondent suffered more serious and extensive injuries compared to the injuries suffered by the respondent herein.

However, in the authority cited by the appellant, the injury was confined to the right humerus mid-shaft spinal where there was a fracture which healed with a permanent incapacity of 10%. Herein, the injuries suffered by the respondent were more extensive. She actually suffered multiple injuries of a serious nature.

[12] It is therefore the finding of this court that the award of general damages in the sum of Kshs.800, 000/= made by the trial court in favour of the respondent was inordinately high and ought to be reduced. In that regard, this court is of the opinion that a sum of Kshs.700, 000/= less 20% respondent’s contributory negligence (i.e. Kshs.560, 000/=) shall suffice as adequate compensation for pain, suffering and loss of amenities.

The award made by the trial court for the sum of Kshs.1 (one) million less 20% contribution i.e. Kshs.800, 000/= is hereby set aside and substituted for an award of Kshs.700, 000/= less 20% contribution i.e. Kshs.560, 000/=.

It is to that extent that this appeal succeeds with each party bearing their own costs.

Ordered accordingly.

J.R. KARANJAH

JUDGE

02.07.2019

[Delivered and signed this 2nd day of July, 2019]