



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: E. K. O. OGOLA, J.

CIVIL APPEAL NO. 62 OF 2016

MUMIAS SUGAR COMPANY LIMITEDAPPELLANT

VERSUS

ESHIUCHI APOLO RESPONDENT

(Being an appeal from the Judgment by Hon. S. Wahome, SPM, dated 20th July, 2016 in Kakamega Magistrates Court Civil Case No. 342 of 2015)

JUDGMENT

1. The appellant being aggrieved and dissatisfied with the judgment delivered vide Kakamega CMCC No. 342 of 2015 on 20th July, 2016 by Hon. S. Wahome Senior Principal Magistrate (as he then) lodged the instant appeal against the respondent.

The Background

2. The Appeal originates from the plaint filed in court on 14th August, 2015 in which the respondent prayed for judgment against the appellant for general damages for pain, suffering and loss of amenities, special damages, costs and interests.

The brief facts of the case are that on 8th August, 2014 the respondent was a lawful passenger aboard motor vehicle registration mark KAS 341V Isuzu Bus which motor vehicle was owned and in the possession of the appellant. The said motor vehicle was negligently driven causing it to lose control and roll into a valley thus occasioning the respondent serious body injuries.

3. By consent of the parties therein, liability was entered in favour of the respondent in the ratio of 90:10 as against the appellant. The parties then filed their submissions on quantum and consequently the court delivered a judgment in favour of the respondent, awarding the Respondent Shs. 600,000/= in general damages and Shs. 5,000/= special damages. It is that finding on general damages which has prompted this appeal.

The Appeal

4. The Appeal raises the following grounds:-

1. THAT the learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently came to a wrong conclusion on the same.

2. THAT the learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum presented and filed by the appellants.

3. THAT the learned trial magistrate misdirected himself in awarding a sum in respect of damages which was so inordinately high and excessive in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim resulting in a miscarriage of justice.

4. THAT the learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence tendered on quantum and thereby arrived at a decision unsustainable in law.

5. The Appellant prays for the following:-

(a) That the appeal herein be allowed.

(b) That the judgment of the lower court and all subsequent orders be set aside.

(c) That the Honourable court do review the evidence on record and make its own findings on quantum.

(d) That the respondent be condemned in the costs of this appeal.

(e) Any other or further relief the Honourable court may consider just to grant.

The Response

6. The appeal is opposed by the Respondent.

7. The appeal was heard by way of written submissions.

8. This being the first appeal it is the duty of this Court to re-examine and re-evaluate the evidence tendered in the trial court and to reach its own findings on the issues raised.

9. The issue before the court is on assessing of quantum for general damages. This court must begin from the general principle that the assessment of general damages is at the discretion of the trial court and an appellate court must proceed carefully so as not to substitute its own figure for the sum awarded in the court below merely because it would have awarded a different sum if it had tried the case in the first place. The appellate court can still justifiably interfere with the sum awarded by the trial court if the appellate court is satisfied that the trial court applied the wrong principles in assessing damages or that the damages given is manifestly excessive or low.

10. The basis upon which damages are awarded in accidental injury claim is the Medical Report. I have looked at the Record of Appeal filed herein on 30.5.2017. It has no copy of the medical report. It has copies of Police Abstract and P3 form. However, in both submissions parties made reference to a Medical Report prepared by Dr. Andai dated 19.5.2015. That Report is in the original file as Plaintiff Exhibit No. 5. According to that report, and also supported by submissions of both parties, the Respondent suffered the following injuries:-

TRUNK

1. He had crack fracture of the right ischiopubic ramus

2. He had blunt injury to the chest

3. He had blunt injury to the back

LEFT LOWER LIMB

He had a cut wound to the left leg.

He was treated at Eldoret hospital Ltd where he was admitted for 2 days. Treatment included injection tetanus toxoid, analysis and antibiotics.

TRUNK

1. He had pain in the anterior wall of the chest on pressure

2. He had pain in the lumbo sacral region of the back on pressure

LEFT LOWER LIMB

He had a scar 3cm in diameter on the left leg

OPINION AND PROGNOSIS

This man sustained serious injuries in the mishap which were soft tissue and skeletal (bone) in nature as stated above. He is still undergoing treatment at the moment. I expect him to recover fully within one year from now.

11. I have also considered the Medical Report dated 8.12.2015 by Dr. P. W. Oketch prepared on behalf of the Appellant. The report agrees that the Respondent is fully healed with no incapacity.

12. On the basis of that report and judicial authorities the trial Court awarded the respondent Shs. 600,000/=. The respondent states that the award was proper and further that the medical report was not challenged in the trial court and its maker was not cross-examined and that therefore the same cannot be challenged in this appeal by way of submissions.

13. The Appellant submitted that the opinion of Dr. Andai in his aforesaid medical report dated 19.5.15 was exaggerated, but in any event the Plaintiff had fully recovered and that an award of Shs. 150,000/= should be adequate compensation for injuries suffered by the Respondent.

14. I have carefully considered the appeal. The quantum to be awarded in cases of injury is always a measure of compensation for the injuries suffered by the Plaintiff. That measure can never be exact. However, the court, based on the medical report and other expert evidence if applicable, would try to as far as possible, reach that measure that satisfies or balances the scale.

15. In this case parties have supplied the court with authorities to help the court to find that balance. I have carefully considered these authorities. The authorities cited all emphasize the fact that:-

- (i) A proper balance must be struck to compensate the plaintiff for his injuries.
- (ii) The award must be based on comparative analysis and precedent.
- (iii) The award should take care of inflation.
- (iv) The court should be slow to interfere with an award unless the same was based on wrong principle or is manifestly unjust.

16. In the case of ***Odinga Jactone Ouma –Vs- Moureen Achieng Odere Civil Appeal No. 1 of 2014 Kisumu*** cited by the Appellant, Justice Majanja dealt with a case in which injuries appear closely similar to the one at hand. In that case the Respondent had suffered the following injuries:-

- ***Head injury (concussion)***
- ***Cut wound on the right mandible***
- ***Neck muscle contusion***
- ***Chest pain on the left side and lacerations***
- ***Cut wound on the right shoulder blade region***
- ***Multiple lacerations over the left shoulder and upper arm***
- ***Cut wounds and lacerations over right forearm***
- ***Painful swollen 4th left finger***

For those injuries the Court awarded Shs. 180,000/=.

17. In ***Morris Miriti –Vs- Nahashon Muriuki & Another (2018) eKLR***, Majanja J. upheld an award of Ksh. 300,000/= where the plaintiff had sustained the following injuries: A tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula.

18. In ***Gurdev Engineering & Construction Limited –Vs- Allan Otieno Osula (2019) eKLR***, Thuranira J. upheld an award of Ksh. 350,000/= for similar injuries.

19. I have taken the above principles in assessing quantum. It is the finding of this court that the injuries suffered by the Respondent were moderately severe, but was expected to heal with no permanent injury. However, for those injuries an award of general damages of Shs. 600,000/= was excessive. It is my view that the trial court applied a wrong principle in assessment of general damages which resulted in an award variance which this court has the authority to interfere with. In my view the award which meets all the criteria cited in this Judgment including inflation is Shs. 380,000/=.

19. The appeal therefore succeeds in part and Judgment entered as follows:-

- (i) Judgment is entered for the Respondent in the sum of Shs. 380,000/= being general damages.
- (ii) Special damages of Shs. 5,000/= is also awarded to the Respondent.
- (iii) Since appeal only succeeded in part, parties shall bear own costs of appeal.

Delivered, dated and signed in open court at Kakamega this 13th day of September, 2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Otsieno for Appellant

Mr. Namatsi for Respondent

Court Assistant – Mr. Erick