



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 6 OF 2017

ROBERT NJIRU NDWIGA.....1ST APPELLANT

NJERU SAMWEL.....2ND APPELLANT

VERSUS

LUCYMUTHANJE DAMIANO.....RESPONDENT

(Being an appeal against Judgment of L.A Mumassabba (R.M) in the Principal Magistrate's Court at Chuka delivered on 30th March 2017).

J U D G E M E N T

1. This appeal arises out of a Judgment delivered in ***Chuka Senior Resident Magistrate's Court No. 174 of 2014*** where the Respondent had sued the appellants for damages arising from Road Traffic Accident in that suit. The Respondent and the Appellant compromised and agreed on liability and therefore what was left for determination of the trial court was quantum of damages. Liability was agreed at 90:10% in favour of the Respondent.

2. The Respondent at the trial had pleaded the following injuries suffered from the accident namely;

- a) A cut behind the head
- b) Big cut on the face running from the forehead through the left side of nasal bridge to the end of the left cheek.
- c) Loose left upper 2nd incisor tooth.

The medical report tendered by the plaintiff at the trial stated as follows;

"Lucy Muthanje Damiano has reasonably recovered well from her injuries. She is however having an ugly scar on the face and has repeated eye tearing and this constitutes a major permanent disability."

3. The Respondent in her submissions asked for Kshs.2 million for General damages, Kshs.1 million for future medical expenses and special damages of Kshs.14,065/-. On the other hand, the Appellant contended in their submissions that an award of Kshs.300,000/- General damages and Kshs.9,365/- Special damages would be a fair compensation.

4. The trial court in its exercise of discretion made the following award.

- a) General damages - 800,000/-
- b) Special damages - 10,965/-
- less 10% contribution - 81,096.50

Total 729,868.50

5. The Appellants felt aggrieved about the above award and preferred this appeal citing the following grounds namely;

i. That the learned trial magistrate erred in fact and law in awarding general damages of Kshs.800,000/- which award was inordinately high for injuries that were mainly cuts on the Respondent's head.

ii. That the learned magistrate erred in fact and law in failing to appreciate conventional awards in similar cases and thereby arrived at a wrong assessment of damages.

iii. That the learned trial magistrate erred by failing to consider the authorities and submissions made by the Appellants.

6. The Appellants have sought in this appeal that the award be re-assessed. They have contended and rightfully so that the only issue in this appeal is the question of quantum. They have relied on the decision in the case of *Kigaragari -vs- Aya (1982- 88) 1 KAR 768 and Chege -vs- Vestas (1982- 88) 1 KAR 1021* where the courts observed that damages must be within limits set out in decided cases and also within limits that the Kenya economy can afford because increased costs are passed to the public.

7. They have further relied on the decision of *Millicent Atieno Ochuonyo- vs- Katola Richard [2015] eKLR* whose position was to the effect that comparable injuries should attract comparable awards. The same position was also held in *Denshine Muteti Wambura -vs- KPLC [2013] eKLR*.

8. The Appellants contend that the trial court made its finding on quantum without due consideration of the injuries suffered by the Respondent and relied on wrong principles.

9. They further fault the learned trial magistrate for misapprehending the evidence on injuries and finding that the left eye was swollen and had an ugly scar on her face which made things hard considering that a look of a woman are paramount as its the epitome of beauty.

This, in the appellants' view, was an irrelevant factor considered by the trial court. They have urged this court on that score to interfere with the award made citing the decision in *George Kinyanjui T/A Climax Coaches and another -vs- Hassan Musa Agoi [2016] eKLR* which observed that as a general rule, an appellate court will not interfere with quantum of damages unless the award is inordinately low or high or founded on the wrong principles.

10. The Appellants have cited a number of authorities where appellate courts in the past have reduced awards made in the lower courts. For the interest of time I will not go into them but suffices to say that the Appellants have submitted that an award between 250,000/- and 350,000/- would be reasonable just and equitable. They have relied on the decision of *George Kirianki Laichena -vs- Michael Mutwiri [2011] eKLR* where the Court of Appeal observed that assessment of damages is a daunting task and that a delicate balance must be found from the facts and circumstances of each case.

10. The Respondent on the other hand has opposed this appeal. She contends that the Appellants never adduced any evidence during trial. She has in fact contended that the award of Kshs.800,000/- was inordinately low and have urged this court to review the award upwards. She has however not cross appealed against the award made to her by the trial court.

11. The Respondent contends that she tendered evidence showing that she can no longer do chores she used to do and that she was due for an eye operation at Kikuyu Hospital. In her view this evidence/facts were not rebutted. She further states that the accident caused her disfigurement. She contends that she ought to have been awarded an amount for future medical expenses.

12. The Respondent feels that an award of Kshs.2 million considering inflation would be fair. She cites the decision in *Laban Buyole Mamboleo- vs- Rift Valley Textiles (Court of Appeal No. 59 of 1996)* where the court awarded Kshs.650,000/- for cuts a fracture, eye injuries, mouth injuries and severe pain in support of her contention.

13. She opines that the amount suggested of Kshs.300,000/- is too little for pain and physical injuries she suffered especially given that she is unable to work like before.

14. I have considered this appeal and the response made through written submissions by both the appellants and the Respondents. As I have observed above this appeal is only on quantum. The injuries pleaded by the Respondent at the trial court as indicated above were mainly a cut on the head and face which led to an ugly scar on the face and a loose incisor tooth. The P3 form produced however never classified the injuries and only mentioned a facial scar extending to the left cheek from the frontal area and a scar on the occipital region of the head. The medical report mention the same scars and a loose incisor tooth. It also mentioned that the scar was healed but with a deformity on the left eye.

15. It is true that where a trial exercises its discretion and makes an informed award on damages, an appellate would rarely interfere unless it is shown that the trial court took into account an irrelevant factor or disregarded a relevant or that the amount awarded in so inordinately high or so low as to amount to erroneous estimate of principle. This principle was well illustrated in the decision of *KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE & ANOTHER -VS- MM. LUBIA & ANOTHER [1998] eKLR* where the Court of Appeal held as follows:-

" 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 high that it must be a wholly erroneous estimate of damages."

16, It is also true that that when assessing damages courts should be guided by comparable decisions because comparable injuries in principle should attract comparable awards and it should be borne in mind that an award should reflect the present economic realities of

Kenyans and make awards that are commensurate with the injuries without this misconception that the amount will after all be paid by insurance companies. That consideration in my view is a fallacy that perhaps explains why most insurance companies have fallen into liquidation. A trial court has a tough balancing act as every accident is unique and the injuries suffered by victims are most of time different and unique. It is therefore difficult to come up with exactly similar injuries in any given situation. In principle however it is possible to discern from the past decisions in regard to the nature of injuries suffered and make a comparable award. In Simon Taveta -vs- Mercy Mutitu Njeru [2014] eKLR the court held as follows:

" The content in which compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in past. "

17. Having considered the injuries suffered and the award made by the trial court and in view of the authorities cited by the appellants, I am of the view that the award made by the trial court was a bit too high in the circumstances. The doctor's report indicates that the Respondent healed with only a scar on her face. While I agree that the scar will for the Respondent remain an ugly reminder to the incident, evidence on the age or marital status of the Respondent was not given so as to tell if the scar would affect her future prospects of say a partner or anything of that sort. There was an error of omission from the trial court in this respect. Furthermore this court is embolded by the decision of **George Kirianki Laichena** (supra) where the Court of Appeal observed that in awarding damages, it must be always considered that money cannot renew a physical frame and the court's concern is to give a fair and reasonable compensation. The trial court relied on the Respondent's authorities which showed far more severe injuries than those suffered by the Respondent because of presence of fractures in the injuries suffered in the cited authorities.

18. I have re-looked at the authorities cited by both parties and compared to the authorities cited by the Respondent, the injuries she suffered are not as serious while the doctor stated in his report that she had "**permanent major disability**" he did not assess the degree of disability to aid or justify the assessment on quantum. I also note from the proceedings that the Respondent produced medical reports and the trial court noted that the left eye was swollen, however the doctor did not give medical opinion about the need for future medical treatment. There was also no estimated cost of any future medical treatment tabled in the trial court. The claim for future medical expenses was not well established and I am not persuaded to give an award on that limb. The Respondent did not plead particulars for it at the trial besides that she did not cross appeal over the same.

In view of the foregoing I find merit in this appeal. There is basis for this court to interfere with the award of General Damage as that the same was a bit high. The award of Kshs.800,000/- is set aside and in its place the Respondent is awarded Kshs.400,000/-. The award on special damages remains. I enter judgment therefore as follows:-

General damages - 400,000

Special damages - 10,965

Total 410,965/-

The appellant shall have half costs in this appeal but the costs given to the Respondent at the lower court is upheld.

Dated, signed and delivered at Chuka this 17th day of September, 2019.

R.K. LIMO

JUDGE

17/9/2019

Judgment signed dated and delivered in the open court in presence of Kijaru holding brief for Ndege for Respondent and in the absence of Appellants and their Counsel.

R.K. LIMO

JUDGE

17/9/2019