



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 6 OF 2018

DONALD NGOKA KALAMA.....APPELLANT

VERSUS

LUVUNO MWANANJIRA MWALIMU.....RESPONDENT

(Appeal from the Judgement and Decree of the Senior Resident Magistrate Honourable L.N. Wasige in PMCC No. 291 of 2016 Kaloleni, delivered on 14th February, 2018)

JUDGEMENT

Background

In a plaint filed in court on 8th October, 2016 the respondent/plaintiff sought judgement for general and special damages in negligence against the defendant/appellant to this appeal.

According to the pleadings in paragraph 4 of the plaint on the 12th August, 2016 the plaintiff/respondent was lawfully travelling on board motor vehicle registration number **KBT 4821K** insured and or owned by the defendant/appellant which was being driven along Mombasa-Nairobi Road where after it was negligently driven and managed dangerously that in the course of overtaking it collided with another

As a consequence, the plaintiff/respondent sustained physical injuries, loss and damage. In the claim which was heard and determined before the trial magistrate at Kaloleni liability by consent was apportioned at the ratio of 15%:85% in favour of the plaintiff/respondent.

In response to the evidence and submissions filed by both counsels the issue of damages was assessed at Kshs.500,000 less 15% contribution liability whereas special pleaded and proved was Kshs.2,400. The plaintiff/respondent was also awarded costs and interest of the suit.

Being dissatisfied with the award on damages, the defendant/appellant filed this appeal based on the following grounds: -

- 1. That the assessment and award of general damages for pain, suffering and loss of amenities was inordinately high as to represent an entirely erroneous estimate.**
- 2. That the learned trial magistrate in assessing damages for pain and suffering and loss of amenities failed to apply the correct principles by leaving out account of the age of the plaintiff/respondent, the length of suffering and the fact that he had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.**
- 3. That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedents and the submissions by counsels. That she made an award for pain suffering and loss of amenities that was erroneous and inordinately high.**
- 4. The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of stare decisis and not taking into account public interest. He thus made an award for pain, suffering and loss of amenities that was arbitrary, inordinately high and erroneous.**

Appellant's submissions on appeal

The appellant counsel on appeal submitted the sum of Kshs.500,000 awarded by the trial magistrate was not comparable with awards in similar cases. He further submitted that such past decisions on awards ought to have been factored in during the assessment in the instant

case. Counsel also argued and submitted that the award for pain and suffering did not take into account the extent of injuries and the prognosis.

In the medical reports dated 29th September, 2016 by **Dr. Ndegwa** and on the hand by **Dr. Sheth** dated 24th April, 2016 learned counsel relying on various authorities submitted and urged this court to re-assess the award on general damages to give effect to the principles in similar awards.

Submissions on appeal by respondent

On the hand, learned counsel for the respondent submitted that the sum of Kshs.500,000 considered and arrived at by the learned trial magistrate came out as a result of the evidence, nature of injuries and comparable awards in the cases cited before the trial court.

In his contention learned counsel insisted that there is no new evidence or matter which has been presented by the appellant to persuade this court to interfere with the award of damages by the learned trial magistrate.

Concerning the first set of submissions before the trial court learned counsel for the appellant rooted for an award of Kshs.100,000 as being just and fair as an award of general damages to compensate the respondent.

Regarding the respondent's counsel he submitted that an award of Kshs.900,000 was justifiable considering the comminuted fracture of the left distal ulna and soft tissue injuries.

Analysis

I have considered the appeal, the record and submissions as urged by the respective counsels. The thrust of the matter is whether there is any reason to interfere with the judgement of the trial court. The essentials before the trial court was purely by way of submissions and admissions of documentary evidence by consent on both liability and quantum. It is against this background I will be bound to evaluate and subject the entire spectrum of material evidence so as to draw my own inferences and conclusions on the appeal. As a first appellate court am enjoined to evaluate and scrutinized the evidence of the trial court without necessarily overlooking the findings and the determination of the court on both Law and fact. However, the duty of an appellate remains to be that of re-hearing of the suit (**See Selle v Associated Boat Co [1968] EA 123; Peters v Sunday Post [1958] EA.**)

From the record learned trial magistrate awarded the respondent damages based on the evidence and the medical reports by **Dr. Ndegwa** and **Dr. Sheth**.

In **Dr. Ndegwa's** report of 29th September, 2016 he discloses the respondent injuries to be comminuted fracture of the left distal ulna, cut wound on the inner lower inner lip, blunt injury to the lower back and chest. Whereas in the opinion of Dr. Seth's medical report prepared in November 2016 two months after Dr. Ndegwa's report the fracture of lower and left ulna and soft tissue injuries to the back and chest were also confirmed. Considering both medical reports and the respective evidence there appears to be no major departure on opinion by the doctors as regards the nature of injuries suffered by the Respondent.

The purpose of awarding damages pursuant to injury claims is not to punish the tortfeasor but to assess a fair compensation arising out of the act in negligence. See the legal principles in **Tayab v Kinamu 1982-88 1 KAR 90**

As stated earlier in the case of **West H & Son Ltd v Shepherd 1964 AC 326** it is important to bear in mind when faced with an issue on assessment of damages to take into account the following principles: -

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach.

By concern consent awards must be reasonable and must be assessed with moderation. Furthermore, it is amicably desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that awards which are awarded are to ca considerable extent conventional.”

This represents the concise exposition of the law pertaining to award of general damages in claims arising out of road traffic accidents.

The jurisdiction of an appellate court to review and interfere with the trial court decision and to draw its own conclusion should be exercised with caution to the extent that the discretion is not merely substituting its own decision with that of the trial court. The basis of the discretion is predicated on the principles illustrated in **Peter v Sunday Post Ltd 1958 E.A. 424.**

I have considered the grounds of appeal, the evidence and submissions from the Learned counsel for the appellant. I have subjected the entire record to a fresh scrutiny and evaluation from the guidelines set out in the case **Peters (supra)**, it is clear that the learned magistrate relied on an authority which did not reflect the principles elucidated in the case of **West (H) Ltd (supra)** and **Tayabu v Kinamu (supra)**.

Whereas I bear in mind that I did not hear the witnesses nor have the advantage of observing their demeanor there is apparent misapprehension of the facts and the law by the learned magistrate in exercise of her discretion on this issue on general damages. In upholding or interfering with the decision of the trial court, some of the key elements from the facts of the case before me will be in the formulated guidelines in the English case of **Cornilliac v St. Louis [1965] 7 WIR 491** and for our purposes as the court held on the more

critical question of assessing damages as follows:

- a. The nature and extent of the injuries sustained.**
- b. The nature and gravity of the resulting physical disability.**
- c. The pain and suffering which had to be endured.**
- d. The loss of amenities suffered and**
- e. The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.**

In the instant case the respondent injuries and prognosis is clearly set out in the medical report of **Dr. Sheth** and **Dr. Ndegwa** both dated 24th November 2016 and 29th September 2016. The two consultants are in agreement with the nature of the personal injuries sustained by the respondent save for the percentage of disability being the resultant effect of the loss and damage. It is clear from **Dr. Ndegwa's** opinion the respondent was expected to suffer 3% permanent disability whereas **Dr. Sheth** opined that the respondent will recover fully without deformity and permanent incapacity. Consequently, the respondent concluded the trial against the appellant and Judgment delivered on 14.2.2018 without the benefit of the recent medical report whether she continues to suffer the disability indicated in Dr. Ndegwa's medical report. Based on the initial injury, the investigations and clinical findings by the two medical specialties the residual difference in opinion on disability could have been significantly narrowed if evidence of the latest examination was provided to the court.

In the respondent witness statement, she alluded to the occurrence of the accident and the injuries suffered. There was no mention of real any difficulty that she had endured from the injuries sustained as inferred by Dr. Ndegwa. Therefore, a loss of amenity to attract a higher award was not ascertainable from the evidence. The consideration therefore of damages should have been made by the trial court with all these factors in place.

In the instant appeal there are recent authorities that demonstrate the normal measure of assessment of damages was side stepped occasioning an error in the final award. This has been expounded in the following cases: **Naomi Momanyi v G4S Security Services Kenya Ltd HCCA No. 145 of 2014 (2018) eKLR**. As regards the facts of this case appellant is stated to have sustained a fracture of the left right condylar tibia, blunt injuries to the back and multiple bruises the court awarded Kshs.300,000.

Further in **Gogni Construction Company Ltd v Francis Ojuok Olewe HCCCA. No. 1 of 2014 (k2015) eKLR**. The appellant here suffered fracture of the left distal radius and ulna. The court set aside an award of Kshs.1,500,000 substituting it with Kshs.350,000 as general damages.

Considering the above similar awards it is not in doubt that the aggregate sum of Kshs.500,000 awarded to the respondent was excessive and therefore erroneous in the circumstances of the case.

Whilst I am alive to the principles in the **Ann Wambua Ndembe v Joseph Kiprono Ropkai of another C.A. No. 345 of 2000** and **Shah v Mbogo 1958 E.A.** I have had the opportunity to go through the evidence and appraised myself of the principles applicable to cases of this nature.

There is need to interfere with the award as the error and misapprehension is self-evident sufficient to depart from award of general damages of Kshs.500,000 as being excessive and substitute it with an award of Kshs.380,000.

The upshot of all this, appeal on quantum partially succeeds. In the final result the respondent's judgement and decree to be subjected therefore to contributory negligence of 15% as per the consent Judgment.

The respondent should have the cost of the suit in the High Court and interest of Kshs.380,000/= from the date of Judgment in the lower court whereas the appellant would have 50% of the costs in the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF OCTOBER, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Atyang for Jengo for the appellant