



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.33 OF 2019

AGROLINE HAULIERS LIMITED.....APPELLANT

VERSUS.

KENNEDY ASIKO MAKHOTSA.....RESPONDENT

[An appeal from the judgment and decree of C.A.S MUTAI dated and delivered on 20th March 2019 in Bungoma CMCC NO.249 OF 2015]

JUDGMENT.

By way of plaint dated 30.3.2017, the Respondent in this appeal sued the appellant for orders for general damages and special damages for road traffic accident that occurred on or about 9th July 2013 along Bungoma-Mumias road involving motor vehicle registration number KAR 358 N Toyota Matatu and the Defendants motor Vehicle Registration KAL 047N Trailer registration number ZC 0452 New Holland Tractor. The plaintiff averred that the defendant's driver, servant and/or her authorized agent who was acting in the course of his employment to defendant negligently controlled the said motor vehicle that it lost control and rammmed into motor vehicle registration number KAR 358 N Toyota Matatu thereby causing accident, plaintiff sustained severe injuries, loss and damage.

The particulars of negligence on part of the defendant were set out in paragraph 4 of the plaint as follows;

- a) *Driving the said motor vehicle at a speed which was excessive in the circumstance;*
- b) *Failing to break, swerve or act to avoid the said accident.*
- c) *Driving without care and attention and failing to have regard to other road users*
- d) *Driving under influence of alcohol and failing to adhere to High Way Code of Traffic Act.*

The Defendant entered appearance and subsequently filed his statement of defence dated 19th June 2015 denying the Plaintiff's claim and setting out particulars of contributory negligence on part of the plaintiff under paragraph 7 of statement of defence as follows;

- i. *Driving without due care and attention to other road users.*
- ii. *Carelessly driving on wrong side of the road and failing to break so as to avoid the accident*
- iii. *Employing unqualified person as a driver and driving a defective motor vehicle*
- iv. *Failing to heed to the warning approach given and abruptly moving on the defendant's motor vehicle when it was not safe to do so.*
- v. *Failing to put the seat on safety belt and jumping out of a moving motor vehicle.*

The matter went to full hearing and PW1, Kennedy Asiko Makhotsa testified that on the 9th September 2013 he was travelling as a passenger in KAR 358N and while at Harambee market center a tractor carrying sugar cane suddenly entered into the highway it hit them from the left side. He testified that he was sitting at the front with the driver and was able to see the tractor. As a result of the accident he sustained injuries that he broke his left leg and he lost consciousness and found himself at St. Mary's Hospital Mumias.

He testified that he still has a wound on the left thigh and his leg is now short by 6 inches and his ankle joint cannot fold and also sustained

dislocation on left hip joint. He testified that he made a report at Bungoma Police station and was given a police abstract. He was treated at St. Mary's Hospital and Aga Khan Hospital Kisumu and produced discharge summaries and that he is still under treatment and review.

During defence hearing the defendant did not call any witness. The defendant produced Doctor D.W. Oketch's report which was produced by consent of both parties.

By consent on 9th July 2013, Judgement on liability by consent was entered in favor of the plaintiff against the defendant with the defendant being 70% and the plaintiff 30% liable.

After close of hearing the parties filed their respective written submissions on quantum and after consideration the trial magistrate entered judgement for the plaintiff against the Defendant for General Damages at Kshs.6,800,000/= less contributory negligence of Kshs.2,240,000/= making a balance of Kshs.4,760,000/= and special damages of Kshs.3,200/=.

The appellant dissatisfied with the Judgment then filed this appeal on the following grounds:

i. That the learned trial magistrate erred in law and fact when he awarded general damages of Kshs.6,800,000/=

ii. That the trial magistrate erred in law and in fact for awarding damages against the weight of the evidence based on alleged findings which he never disclosed.

iii. That the trial magistrate erred in law and in fact when he failed to appreciate that the damages he awarded in the circumstances of the case were so excessively and inordinately high.

iv. The learned Trial Magistrate erred in law and fact when he failed to rely on binding authority which the defendant had submitted.

v. That the trial magistrate in assessing and awarding the sum of Kshs.6,800,000/= to the respondent subject to apportionment of liability failed to take into account a relevant fact and circumstance that only a fair compensation could be awarded.

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Okongo for the appellant submitted on the injuries sustained by the respondent there was no injury or fracture to the neck or upper body parts and there is observation that the fractures on the tibia and fibula bones had healed although with shortening of the left leg. He referred this court to case of **Gabriel Mwashuma Vs Mohammed Sajjad & Another [2015] eKLR** where plaintiff suffered severe fracture injuries and was awarded Kshs.3,000,000/= compared to instant case where fracture injuries are less severe and award is high. He submitted that the award of Kshs.1,500,000/= would suffice in the circumstance of this case relying on authority in the case of **Collins Omondi Muganda V Oceanic Oil Ltd & Another[2017]eKLR**

He submitted that an amount **Kshs.6,800,000/=** was excessive in the circumstance and the award was in sharp conflict with authorities cited and the trial court as a subordinate court could not have awarded damages beyond that which superior court could have awarded for similar injuries. He prayed that this appeal be allowed with costs.

Mrs. Chunge for the Respondent in her submission urged this court to look at the highlighted injuries suffered by the respondent as per the medical reports prepared by Dr. Alushula and Dr. Oketch, and the pain and suffering endured during and after the accident. She submitted that the damages awarded are fair compensation for the same and were not excessive as the respondent had proved his case on balance of probability. She submitted that the appellant did not provide any evidence to rebut the respondent evidence on quantum of damages and decree on injuries sustained. She submitted that the trial magistrate was correct in awarding damages of Kshs.6,800,000/= to the respondent in the circumstance and prayed that this appeal be dismissed.

This being a first appeal, this court is obliged to reevaluate and reexamine the evidence before the lower court and arrive at its own independent findings. This is the principle of law that was well settled in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

I have carefully considered the evidence adduced and as analyzed by the trial court in the judgment. I have also considered the submissions made before this court by the appellant and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal are:

i. Whether the quantum of damages awarded was inordinately high in the circumstances.

ii. What order should this court make?

The appellant herein complains that the learned trial magistrate erred in law in awarding the plaintiff/Respondent award that was inordinately excessive given the injuries suffered. The respondent on the other hand states that the damages were properly assessed and awarded. It is trite law that a court of law sitting on Appeal can only interfere with an award for damages if the award is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. In order to justify reversing the trial Court on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in **Rook Vs. Rairrie [1941] 1 ALL E.R. 297**. It was echoed with approval in **Butt Vs. Khan [1981] KLR 349** when it held as per Law, J.A the court held;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

Also, in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR** thus:

1. “The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages. I find that from the medical report prepared by Dr.PW Oketch produced by consent before trial court the plaintiff sustained the following injuries;

- i. Bruises on the left upper limb
- ii. Fracture of the left hip
- iii. Fracture of the left thigh bone(femur)
- iv. Injury of the left knee
- v. Fracture of the left leg
- vi. Fracture dislocation of the left ankle joint
- vii. Loss of upper incisors teeth

The Doctor indicated the present state of the plaintiff as follows;

- i. Walks using two armpits crutches
- ii. Has persistent chronic discharge wound on the left thigh
- iii. Has deformed and significantly shortened left lower limb

Doctor Oketch gave a conclusion that the plaintiff sustained severe and crippling injuries to parts of his body and due to complicating infection of left femur he still has chronically discharging wound on the left thigh which has to be daily cleaned and dressed.

He gave further conclusion that the multiple fractures of the femur and tibia bones of the left lower limb healed and resulted to joint fusion and limb shortening thus permanently rendering the limb functionless and resultant permanent incapacitation estimated at 50%.

The trial court on 20.3.2019 awarded a sum of Kshs.6,800,000/= on general damages less Kshs.2,240,000/= and Kshs.3,200/= on special damages. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru (Supra)**

I have re-evaluated the injuries sustained and that being the case, I find that the award of Kshs.6,800,000/= as general damages plus Kshs.3200 as special damage for such injuries sustained was in the circumstances of this case sufficient to compensate the respondent. The complaint that the award was inordinately too high is not merited and I dismiss it. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs.

Dated and Delivered at BUNGOMA this 19th day of Nov, 2019.

S.N.RIECHI

JUDGE