



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[CORAM: A. C. MRIMA, J.]

CIVIL APPEAL NO. 69 OF 2018

1. ABEL NYANGAU

2. HILL PARK INVESTMENT CO. LTD

t/a KISII CLASSIC BUS CO.....APPELLANTS

-VERSUS-

MUSA OTIENO MARENDE

alias PHILIP KASERA.....RESPONDENT

(Being an appeal from part of the judgment and decree by Hon. E. Nyagah Magistrate in Migori Magistrate's Civil Suit No. 656 of 2016 delivered on 17/05/2018)

JUDGMENT

1. The appeal subject of this judgment is on quantum of damages.
2. The Respondent herein, **Musa Otieno Marende alias Philip Kasera**, was involved in a road traffic accident on 28/01/2015. The accident occurred at Chamkombe area along Kisii – Migori road. The Respondent sustained injuries. He filed *Migori CMCC No. 656 of 2016* (hereinafter referred to as '**the suit**') against the Appellants as the driver and owner of the subject motor vehicle respectively.
3. The suit was heard. Judgment was rendered on 17/05/2018. The Appellants were held wholly liable for the accident. On quantum, Kshs. 2,000,000/= was awarded on General Damages for pain, suffering and loss of amenities. Special Damages were assessed at Kshs. 28,560/=.
4. Being dissatisfied with the part of the judgment on quantum of damages the Appellants preferred an appeal the subject of this judgment. In praying that the appeal be allowed and appropriate compensation be awarded the Appellants proposed the following 6 grounds as appearing in the Memorandum of Appeal dated 04/06/2018 and filed on 07/06/2018: -
 1. **The magistrate decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.**
 2. **The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (If any and failed to apply precedents and tenets of law applicable.**
 3. **The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the Respondent's claim.**
 4. **The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.**
 5. **The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same.**
 6. **The learned trial magistrate misapprehended the evidence on record to a material degree resulting in him arriving at a wrong conclusion.**

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied. Several decisions were referred to by the parties in support of their rival positions.

6. Generally, as the first appellate Court, this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

7. However, when the appeal is on quantum of damages, as in this case, an appellate Court is guided by two principles. Those principles were discussed by the Court of Appeal in **Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727** as follows: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of 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.

8. This position was restated by the Court of Appeal in **Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101** and **Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR**.

9. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

10. The Appellants' position in the appeal is twofold. On the first limb, they contended that the trial court did not satisfy itself on the correct injuries sustained by the Respondent. They vehemently contended that the court relied on more serious injuries than those actually sustained by the Respondent. In particular, they submitted that the initial treatment notes only captured the fracture of the right forearm as the sole injuries. They impugned the injuries appearing in the P3 Form and Medical Report prepared by Dr. Idagiza A. Akidiva as exaggerated.

11. On the second limb, the Appellants contended that, in view of the injuries sustained, the award of Kshs. 2,000,000/= on General damages was inordinately high and ought to be interfered with.

12. The Respondent opposed the appeal. He contended that he truly suffered the injuries as captured in the Medical Report. On the quantum, he submitted that the assessment was fair in view of the injuries.

13. Accordingly, I will now determine the nature of injuries sustained by the Respondent. The starting point are the initial treatment notes. The accident occurred on 28/01/2015. The Respondent was then rushed by a good Samaritan to Migori County Referral Hospital (hereinafter referred to as '**MCRH**') for medical intervention. The Respondent was attended to. He was later transferred to Kisii Teaching and Referral Hospital (hereinafter referred to as '**KTRH**').

14. At MCRH the following injuries were noted: *Fracture of the right hand. Seriously bleeding. Pale.* The bleeding was controlled and the Respondent was rushed to KTRH for *inter alia* blood transfusion. To me, since the Respondent seriously bled and was pale looking then it meant that his skin was likely to have been ruptured. It may have been by way of cuts and/or bruises.

15. When the Respondent was taken to KTRH he underwent several procedures. X-Rays were taken on the wrist and chest. There was dressing of the wounds. He also underwent a major surgery. These procedures were captured in the Exhibit 2c which was an NHIF Invoice. At the time of discharge, the Respondent had no other complaint rather than the fracture of the right arm. (See the Discharge Summary from KTRH produced as Exhibit 2b).

16. The above three documents were the initial primary treatment notes. I note that the treatment notes tended to cover only the major injury. The superficial ones were really not captured. However, a holistic look at the documents reveal the presence of other injuries apart from the fracture. Accordingly, one easily gathers that there was the fracture of the right forearm. The bleeding explains the presence of bruises, cuts or loss of skin. The Chest X-Ray explains the injuries to the chest.

17. I will now juxtapose the above injuries with those in the P3 Form and the Medical Report. The P3 Form was filled by Dr. Dr. Idagiza A. Akidiva of St. Akidiva Memorial Hospital in Migori. That was on 17/03/2015. St. Akidiva Memorial Hospital is a private medical facility. Ideally and for purposes of neutrality, the P3 Form ought to have been filled in at a Government medical facility.

18. The injuries in the P3 Form and the Medical Report are generally similar. I find the injuries on the chest and the right hand in tandem with the initial treatment notes. I have reservations with the other two injuries being Cerebral concussion and the loss of the two teeth. I have endeavored to see where these two injuries could have been captured in the treatment notes, albeit remotely, in vain.

19. Having so found, I agree with the Appellants that the P3 Form and the Medical Report had more injuries than those sustained by the Respondent in the accident.

20. The trial court was guided by the injuries in the P3 Form and the Medical Report in assessing damages. The assessment was therefore arrived at in consideration of more injuries than those actually proved. I find that this is a case in which I must, with reluctance and utmost respect to the trial magistrate, interfere with the finding of the trial court on quantum of damages.

21. That leads me to the re-assessment of the general damages. Relying on **Henry Albert Andera v Car & General (K) Ltd (2000) eKLR**,

the Appellants proposed an award of Kshs. 400,000/=. The Respondent relied on **Sofia Yusuf Kanyare v. Ali Abdi Saare & Another (2008) eKLR** in urging the Court to confirm the award by the trial court.

22. I have considered the two decisions. In **Henry Albert Andera** (supra) the Plaintiff sustained two injuries: Compound fracture of the right ring and little fingers and fracture of the radius and ulna bones of the right forearm. He also suffered some disability to the hand. The decision was delivered in 2000. In **Sofia Yusuf Kanyare** (supra) the Plaintiff suffered a crushed right hand with multiple cuts which was amputated, shock, nerve damage and loss 10 teeth. General damages were assessed at Kshs. 1,970,000/=. The decision was delivered in 2008.

23. The injuries in **Sofia Yusuf Kanyare** (supra) are not comparable with those sustained by the Respondent. They were very serious ones. The injuries in **Henry Albert Andera** (supra) are relatively comparable. However, the decision was rendered 19 years ago.

24. By taking into account the passage of time I find an award of Kshs. 1,200,000/= would serve as fair compensation.

25. The appeal is therefore allowed. The award of Kshs. 2,000,000/= on General Damages is hereby set-aside and substituted with an award of Kshs. 1,200,000/=. The sum shall attract interest from the date of judgment in the trial court. For equity sake, each party to bear its own costs of the appeal.

26. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 8th day of November, 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Wanjue instructed by the firm of Messrs. Kairu McCourt Advocates for the Appellant.

Mr. Owade instructed by the firm of Messrs. Owade & Co. Advocates for the Respondent.

Evelyn Nyauke – Court Assistant