



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CIVIL DIVISION

CIVIL APPEAL NUMBER 8 OF 2016

BETWEEN

ANTHONY NJIRU NYAGA.....APPELLANT

AND

DAYAH BUS SERVICE1ST RESPONDENT

RAPHAEL S. MUMO.....2ND RESPONDENT

(Being an appeal from the judgment/decree of the Hon. Machage, Principal Magistrate delivered on 13.10.2016 in Kapenguria SPMCCC No. 3 of 2013)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. The appellant herein, being aggrieved by the judgment/decree of Hon. Machage, Principal Magistrate delivered on 13.10.2016 filed his Memorandum of Appeal dated 31.10.2016 and set out the following grounds:-

1. **THAT** the learned trial magistrate erred and misdirected himself in law and in fact in his assessment of damages awarded to the appellant by awarding damages that were inordinately low in the circumstances despite overwhelming evidence on record.

2. **THAT** the learned trial magistrate failed to appreciate and/or misapplied the principles applicable in the assessment of damages under the circumstances.

3. **THAT** the trial magistrate erred and misdirected himself in law and in fact by ignoring the appellant's testimony in court and his submissions on the gravity of his injuries

2. **REASONS WHEREFORE** the appellant prays that the appeal be allowed and the judgment on quantum of damages be set aside and this court re-assesses and enhances the damages payable to the appellant under pain, suffering and loss of amenities. The appellant also prays that the respondents be condemned with the costs of this appeal.

Background

3. The appellant's case against the respondents arose out of a road traffic accident which admittedly occurred on 2.10.2012 involving motor vehicle registration number KBP 019E along the Lodwar - Kitale road. The appellant was a passenger in the aforesaid motor vehicle. As a result of the said accident, the appellant suffered a displaced fracture of the left radius and ulna. He underwent treatment at Lodwar District Hospital. Plaster of Paris was applied on the left wrist and forearm. He was issued with a P3 form which was produced in evidence as Pexhibit 1. The appellant was thereafter examined by Dr. Kiamba who confirmed in his report that the appellant suffered the injuries alluded to in the plaint, but added that those injuries were expected to heal without any resultant permanent disabilities.

4. Before the hearing the parties recorded a consent on liability at 10:90% in favour of the appellant, meaning that the appellant was to bear 10% responsibility for the accident.

5. After hearing both parties in the matter, the learned trial magistrate entered judgment in favour of the appellant against the two respondents jointly and severally for a total of Kshs.241,600/- subject to 10% contribution being general and special damages. The court also awarded costs of the suit and interest thereon at court rates.

Issues for Determination

6. The only issue for determination on this appeal is whether this court ought to interfere with the learned trial magistrate's assessment of general damages of Kshs.200,000/- which the appellant alleges are inordinately low in the circumstances.

The Law

7. It is now settled that an appellate court is under a duty to wholesomely reconsider and evaluate all the evidence that was placed before the trial court before coming to its own conclusions in the matter, only remembering that it does not have the opportunity of seeing and hearing the witnesses who testified during the trial. For this proposition see *Ndungu Dennis versus Ann Wangari Ndirangu & another [2018] eKLR*.

8. It is also settled law that in carrying out its appellate jurisdiction on matters of this nature (accident claims) it is to be guided by the principle that the accepted method of assessing damages is that comparable injuries should, as far as possible, be compensated by comparable awards. It is also a principle of law that assessment of damages is a matter of discretion for the trial court. Essentially therefore, an appellate which is asked to interfere with the award of damages by a trial court must be guided by the following:-

1. **Whether in assessing the damages the trial court took into account an irrelevant factor; or**
2. **whether in doing so, the trial court failed to consider a relevant factor; or**
3. **that the amount ordered is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.**

9. In this regard, see the case of *Josephine Angwenyi versus Samuel Onchillo [2010] eKLR*. Also see the case of *Wambaira & 17 others versus Kiogora & 2 others [2004]eKLR*. In the above case cited by the respondents in their submissions in the lower court, the court quoted from the case of *Lim Pon Choo versus Camden and Ishington Area Health Authority [1979] I ALL ER 332 at 339* in which Lord Denning MR stated in part that the plaintiff in an injury case is

“only entitled to what is, in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are as the lawyers say, only vicariously liable. In this case it is in the long run, the taxpayers who have to pay.”

10. As I have pointed out, it is the trial court, upon hearing both parties in this suit, who had the discretion to determine what, in the circumstances is fair compensation, fair both to the appellant and the respondents.

Analysis and Determination

11. I have read the rival written submissions which were filed on 2.8.2019 and 3.10.2019 respectively. The parties have supported their respective positions with relevant authorities, some of which I have already referred to in this judgment. The appellant prays that this court sets aside the award of Kshs.200,000/- and in lieu thereof, award him Kshs.800,000/-.

12. Based on the principles I have already alluded to in this judgment, I find that there is no justification for an upward adjustment of the general damages from Kshs.200,000/- to Kshs.800,000/-. In determining the award of Kshs.200,000/- the learned trial magistrate duly considered the medical evidence, and especially the evidence by Dr. Kiamba who concluded that the injuries sustained by the appellant were expected to heal without any resultant permanent disabilities. The learned trial magistrate also considered the *Pon Choo Case* (above) and determined that Kshs.200,000/- would be adequate and fair compensation for pain and suffering. I see nothing in the trial court's assessment to suggest that he did not apply the correct principles in making the impugned assessment.

13. For the above reasons, I find no merit in the appellant's appeal. The same be and is hereby dismissed. I make no order as to costs.

14. It is so ordered.

Judgment delivered, dated and signed in open court at Kapenguria on this 7th day of November, 2019

RUTH N. SITATI

JUDGE

In the presence of

M/S Chebet for Abari for the Appellant

Mr. Lowasikou for Nyambanefor respondents

Mr. Juma - court assistant