



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 717 OF 2017

BEATRICE KHAMEDE.....APPELLANT

VERSUS

ERICK WANUNU.....1ST RESPONDENT

FAST SECURITY SERVICES LTD.....2ND RESPONDENT

(Being an appeal from the judgment delivered on 8th December, 2017 by Hon. I. Gichobi

(Senior Resident Magistrate) at Chief Magistrate's Court at Milimani Commercial Courts

Civil Case No.7060 of 2013)

JUDGMENT

1. The Appellant was involved in a road traffic accident on 18th August, 2012 and sustained injuries. The Appellant subsequently sued the Respondents. The parties however agreed on liability at 20% against the Appellant and 80% against the Respondents. By a further consent, two medical reports were produced. Submissions were then filed on the quantum of damages.

2. The trial magistrate entered judgment for Plaintiff against the Respondent jointly and severally for Ksh.800,000/= general damages less 20% contribution which came to a total of Ksh.640,000/=.

3. The Appellant was aggrieved by the judgment on grounds that can be summarized as follows:

a) That the trial magistrate erred in failing to make an award of special damages.

b) That the trial magistrate erred in making an award of general damages that was so low as to amount to an erroneous estimate of the correct compensation.

4. The appeal was canvassed by way of written submissions which I have considered.

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

6. The Appellant's counsel submitted that the issue of liability having been agreed upon by consent, there was no dispute over the special

damages claim and the same ought to have been awarded. I have looked at the consent recorded by the parties. The only documents produced by the counsels for the parties were the medical reports. The documents that were filed together with the plaint including the witness statement and assorted receipts were not produced in court as exhibits.

7. Paragraph No. 7 of the plaint which made a claim for special damages particularized as Ksh.236,636/= was denied in the Statement of Defence. Paragraph No. 7 of the Statement of Defence denied the particulars of special damages pleaded in the plaint and put the Plaintiff to strict proof thereof. It was therefore the duty of the Appellant (Plaintiff) to have the receipts produced as the same were not agreed upon by consent. Without any production of the receipts and with the parties having not recorded any consent in respect of the special damages, there was no evidence before the court upon which the claim for special damages could have been allowed. Special damages must not only be pleaded but proved. There was no proof of the special damages claim.

8. The medical report by a Consultant Surgeon, Dr. W.M. Wokabi dated 11th June, 2013 reflects the injuries sustained by the Appellant as follows:

a) Fracture of the left shoulder blade.

b) Injury of the left brachial plexus (network of nerves originating from the neck)

c) Puncture wound on the left ankle joint.

9. The doctor's opinion was that:

“The medical, clinical and X-ray revealed that she had sustained major injuries to the left shoulder blade causing multiple fractures.

She also sustained injury to the network of nerves that supply the upper limb (brachial flexus) causing the weakness of the upper limb. The recovery of the nerve injury was incomplete. She still has substantial hemiparalysis. This together with the stiffness of the shoulder and elbow are conferring a lot of functional disability. Further recovery from now going forwards will be very slight.

She will suffer permanent disability of 35% (thirty five percent).

There are many day to day chores she will not be able to perform at home and at work.

She could easily be terminated from her job as a chef due to the obvious disabilities.”

10. The medical report by another Consultant Surgeon, Dr. P.M. Wambugu, dated 30th July, 2015 is essentially in agreement with the medical report by Dr. Wokabi. The opinion by Dr. Wambugu was that:

“...She sustained injuries mainly involving the skeletal, neural and soft tissue. The fracture left scapula has united. There is residual partial brachial plexus lesion resulting inability to fully abduct and extend the shoulder joint. I thence do not hesitate to award her 20% as the degree of permanent incapacitation.”

11. The two medical reports are essentially in agreement on the injuries sustained. The opinion on the degree of incapacity differs. An average thereof would come to about 27% degree of incapacity.

12. The Appellant's counsel submitted for an award of Ksh.1,800,000/= as general damages. The following authorities were relied on:

a) Mehari Tewoldget T/a Mehari Transporters v Damus Muasya Maigi [2013] eKLR where an award of Ksh.1,500,000/= was confirmed on appeal in the year 2013 for the following injuries;

i. Blunt injury to the chest;

ii. Fracture 3 ribs 4,6,7 on the right side with puncture of the pleural leading to heamathorax.

iii. Blunt injury to the abdomen with a tear in the liver and severe internal bleedings leading to heamoperitoneum;

iv. A deep cut on the upper right arm with skin and muscle deficit near the axilla;

v. Many cuts and bruises on the whole right arm;

vi. Fracture right scapula; and

vii. Several fractures on the right tibia and fibula at the ankle joint.

The injuries in the aforesaid authority are more severe than in instant case. The same involved multiple fractures.

b) Margaret Ochieng v David N. Njiha & another (Ksm. HCCC No.57 of 1993) where Ksh.250,000/= was awarded as general damages in the year 1995 for the following injuries:

Left Arm -Injured on left arm, swelling, tenderness and crepitations and inability to handle objects with left arm.

- Fracture of both radius and ulna of the lower third.

- Poor grasp in left hand – paralysis of left hand.

- Haematoma and swelling in the right side of chest.

- Contusion to the right side of chest.

— Injured at left ankle – in which she complained of pain and had difficulties in stepping down on left foot. There was swelling and tenderness in the left ankle joint.

Complaints – wasting of interosseous muscles of left hand associated with weakness of left hand. Right sided chest pain on lifting weights or performing heavy manual work.

- 20% permanent physical disability due to paralysis of the left hand.

The injuries in this authority are comparable to the injuries in the case at hand. However, the rate of inflation and the passage of time need to be taken into account.

13. On the other hand, the Respondent's counsel submitted for an award of Ksh.450,000/=. He relied on the following authorities:

a) **George Kinyanjui t/a Climax Coaches & another v Hassan Musa [2016] eKLR** where an award of Ksh.800,000/= as general damages was reduced on appeal to Ksh.450,000/= for the following injuries:

i. Two loose teeth.

ii. Blunt trauma to the neck and chest.

iii. Fracture of the left clavicle.

iv. Fractures of 4th and 5th left ribs.

v. Blunt trauma to the spinal column and right scapula area.

vi. Dislocation of the left shoulder joint.

b) **Jane Waruguru Miano v Jotham Nguvi Magondu & another [2018] eKLR** where the court confirmed an award of Ksh.250,000/= as general damages for the following injuries:

i. Headache

ii. Huge haematoma.

iii. Neck pain.

iv. Left scapular fracture with tenderness.

v. Dislocation of the right shoulder joint

vi Fracture of the 8th rib with tenderness.

vii. Lumbar spine.

viii. Pain and bruises of lower limbs.

Although the Respondent's counsel submitted that the award of general damages was on the higher side, there was no Cross-Appeal. The injuries in the authorities cited are however comparable to the injuries in the case herein.

14. In determining whether to interfere with the award of general damages herein, I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia (1985) 1 KAR 727**: where the Court of Appeal observed:-

“...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 court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.....”

15. In the case at hand, I find the award by the trial court on general damages to be within the range of similar awards for comparable injuries. This court is therefore not persuaded to disturb the same.

16. The upshot is that the appeal has no merits and is hereby dismissed with costs.

Dated, signed and delivered at Nairobi this 14th day of Nov., 2019

B. THURANIRA JADEN

JUDGE