REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO.25 OF 2018

DPL FESTIVE LIMITED .....APPELLANT

VERSUS

ROSE AKINYI OCHOLA .....RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court Oyugis in Civil Suit No.149 of 2016 delivered on 25th July, 2018 – Hon. J.P. Nandi, (SRM).

JUDGMENT

1. The memorandum of appeal dated 2nd August 2018 and filed herein on the 6th August 2018, by **O.M. Otieno & Co. Advocates,** on behalf of the appellant, **DPL Festive Limited**, contains three basic grounds of appeal (i.e. grounds one, two and three) against the decision of the Senior Resident Magistrate at Oyugis delivered on 25th July 2018, in **SRMCC No.147 of 2016**, in which the respondent, **Rose Akinyi Ochola**, sued the appellant for damages arising from a road traffic accident which occurred on 13th May 2016, along the Kendu Bay-Katito Road at Karabondi, involving a **Motor Cycle Reg. No. KMDJ 799Y** on which the respondent/plaintiff was a pillion passenger and a motor vehicle **Reg. No. KCD 927 N Mitsubishi Fuso**, belonging to the appellant/defendant and driven at the time by its driver, servant and/or agent.

2. The plaintiff/respondent pleaded that on the material date of the accident, the defendant/appellant's said motor vehicle was so negligently, recklessly and/or carelessly driven, controlled or managed by the appellant's driver, such that it lost control, veered off the road and knocked down the motor cycle thereby occasioning bodily injuries to the plaintiff.

3. The appellant was thus blamed for the accident on account of its driver, servant and/or agent and hence, the prayer for judgment against itself as set out in the plaint dated 8th August 2016. Its defence was a total denial of the plaintiff's claim and a contention that if the accident indeed occurred as alleged by the plaintiff, then it was wholly caused by the negligence, carelessness and recklessness of the plaintiff and the owner and/or rider of the ill-fated motor cycle.

The defendant therefore prayed for the dismissal of the claim.

4. The respondent testified at the trial as **PW1** and called a traffic police officer, **PC Kipkering Cheboi (PW2)** as her witness. In the process, several documents (P. Exhibit 1 to 11) were produced in support of the plaintiff's case. The medical report by Dr. Ogando dated 24th June 2016 (P. Exhibit 9) was produced by consent of the parties. The appellant purported to close its case even without opening it by calling necessary witnesses.

Nonetheless, the parties entered a consent on liability, to wit, judgment on liability be entered in the ratio of 30:70% in favour of the plaintiff as against the defendant.

5. The question of liability having been settled, what fell for determination by the trial court was quantum of damages due to the plaintiff from the defendant.

In that regard, the trial court considered the evidence and case law and awarded general damages in the sum of Kshs.1.5 million for pain, suffering and loss of amenities and special damages in the sum of Kshs.79,050/= making a total of Kshs.1,579,050/= less 30% contributory negligence i.e Kshs.1, 105,335/=.

6. Being dissatisfied with the award, the defendant preferred this appeal which is essentially an appeal on quantum of damages and not liability thereby bringing into the fore the relevant finding of the Court of Appeal in that regard in the case of **Kemfro Africa Limited &**

Another –vs- A.H. Lubia & another (1982-88) 1 KAR 777, where it was held that:-

> **"The principles to be considered by an appellate court in deciding whether it is justified in dismissing the quantum of damages awarded by a trial judge were held by the Court of Appeal for 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"**.

7. Herein, with regard to general damages, the plaintiff/respondent produced relevant medical notes and documents (**P. Exhibit 1-4**) while the all important medical report dated 24th June 2016 (P. Exhibit 9) was produced with the consent of the defendant/appellant. The report was prepared and signed by a Dr. Ezekiel Ogando Zoga, after examining the respondent on 24th June 2016, a few weeks after the accident on 13th May 2016. It shows that the major injury was the fracture of the right distal femur and right tibian fibula and the minor injury was a cut wound on the right elbow.

8. The report also shows that at the time of the examination, the respondent was in stable general condition but walking on crutches.

The doctor opined that the injuries were severe but in the process of healing. His prognosis was that post traumatic arthritis was likely to develop due to the respondent's advanced age and that the fracture would heal with malunion of the bones. Permanent disability was assessed at 20%.

9. No other medical report was tendered in evidence. Therefore, the report by the said Dr. Ogando Zoga, remained unopposed and could thus be safely relied upon by the trial court for purposes of assessment of general damages for pain, suffering and loss of amenities. In that regard, general damages were assessed at Kshs.1, 500,000/=. The appellant thinks that the amount is so excessive as to represent an erroneous estimate of the damages under the head. The reason for this, is that recent decisions of the court show that awards given for similar injuries are less than the award given to the respondent in this case. In that regard, the appellant cited decisions of the High Court in **David Kimathi Kaburu –vs- Dionisius Mburugu Itirai (2017) e KLR, Civicon Ltd –vs- Richard Njomo Omwancha & Others (2019) e KLR,** and **Jitan Nagra -vs- Abidnego Nyandusi Oigo (2018) e KLR**.

10. Notably, these were not the same authorities cited by the appellant at the trial. Nonetheless, the trial court considered all the authorities cited by both the appellant and the respondent and came to the conclusion that the amount of Kshs.1, 500,000/= was adequate and reasonable compensation in terms of general damages for pain and loss of amenities. This court has given due consideration to the same authorities in the light of the injuries suffered by the respondent and holds the view that the injuries suffered by the victims in the cases cited by the respondent were far much serious than those suffered by the plaintiff/respondent herein. As such, the argument by the appellant that the award of Kshs.1, 500,000/= was excessive in the circumstances is sustainable and calls for interference by this court.

11. Accordingly, the amount is now reduced to Kshs.750, 000/= general damages for pain, suffering and loss of amenities.

As regards, special damages, the trial court awarded only what was pleaded and proved i.e. Kshs.79, 050/=. This amount is not disputed by the appellant.

In sum, this appeal succeeds to the extent that the award of general damages in the sum of Kshs.1, 500,000/= made by the trial be and is hereby adjusted downwards to Kshs.750, 000/=.

12. Judgment is therefore entered against the appellant in favour of the respondent for the total sum of **Kshs.829, 050/=** less 30% contributory negligence in the sum of Kshs.248, 715/= thereby giving a ground total of Kshs.**580, 335/=** together with costs and interest.

Each party shall bear own costs of appeal.

Ordered accordingly.

J.R. KARANJAH

JUDGE

20.11.2019

[Dated and delivered this 20th day of November, 2019]