



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.47 OF 2016

DISMAS KIPYEGO.....APPELLANT

VERSUS

PHILIP KIPRONO.....RESPONDENT

(Appeal from judgement of Hon.Oruo Resident Magistrate in Webuye PM Civil Case No.54 of 2012 dated on 9/8/2016)

JUDGMENT

By Plaintiff dated 27th March 2015, the appellant in this appeal Dismas Kipyego sued the respondent Philip Kiprono seeking general damages, special damages and cost of the suit for pain and suffering from injuries sustained in a road traffic accident involving motor vehicle registration number KBQ 198 R/ZE 6008 Renault Tipper owned by the appellant along the Eldoret-Webuye road on or about 20th July 2014. The appellant claim was that he was a pedestrian along Eldoret-Webuye road at Kipkaren area when the defendant's motor vehicle registration number KBQ 198R/ZE was so negligently and without any due care driven by Defendant's driver that it lost control and caused an accident in which it knocked the Plaintiff who as a result sustained serious injuries. The particulars of negligence on the part of the Respondent were pleaded and tabulated in paragraph 4 of the plaintiff. The particulars of injuries sustained by the appellant were set out under paragraph 4 of the plaintiff.

The Respondent filed his statement of defence dated 5th May 2015 and in his defence denied any negligence or liability in respect of the accident and averred that the accident was caused solely or substantially contributed to by the respondent. Particulars of the negligence on the part of the Respondent were stated in paragraph 9 of the defence. Respondent also denied particulars of injuries and special damages set out in the plaintiff.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to re-evaluate and reexamine the evidence before the lower court and arrive at its own independent conclusion. 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).

The evidence before the trial court was that Dismas Pw1, the Appellant testified that on 27.07.2014 at around 5.30-6.00pm was at work in Kipkaren and while walking facing Eldoret direction on the right side of the road. The suit motor vehicle which was being driven fast and when it approached him, the motor vehicle hit him and he fell down. He was taken to Lumakanda District Hospital and was referred to Eldoret where he was admitted for 16 days. He stated that he sustained head injuries, injuries to the hand and blunt injury to right hip.

The defendant did not appear in court on the hearing date despite been properly served and the plaintiff closed his case. After full hearing the trial court awarded general damages of Kshs.150,000/= and special damages Kshs.22,000/=. The entire award was thus Kshs.172,000/=.

The appellant then filed this appeal faulting the judgment and decision on the following grounds:

- i. That the learned trial magistrate erred in law and in fact by awarding damages not commiserate to the injuries suffered by the appellant;***
- ii. That the learned trial magistrate erred in law and fact awarding the appellant damages which are too low in comparison to the***

serious and severe injuries sustained.

iii. *That the learned trial magistrate erred in law and fact and failed to apply the principles of assessment of damages.*

iv. *That the learned trial magistrate erred in law and fact in ignoring the Appellant and Respondents submissions.*

v. *That the learned magistrate after considering the evidence before him including the medical report and medical notes of the appellant arrived at wrong decision.*

By consent of the parties, this appeal was canvassed by way of written submissions. Mr. Mwebi for the appellant submitted that the appellant considered the award of Kshs.150,000/= as General Damages too low after finding the respondent 100% liable for the accident. Counsel submitted that considering at nature of injuries sustained a depressed fracture of the skull and subluxation of the right shoulder plus blunt injury cannot attract a sum of Kshs.150,000/= as general damages. Counsel submitted that trial magistrate misdirected himself relying on case law authority in **John Joel Koskei Vs Kenya Power & Lighting Co. Ltd.** Counsel urged this court to set aside lower court judgement on quantum and substitute it with an award of Kshs.2,500,000/= as general damages.

The Respondent filed written submission through Advocate Kamau,

he submitted that the appellant having sustained soft tissue injuries ought to have healed by the time he appeared in court and the court ought to have awarded an amount commensurate with this kind of injuries.

He submitted that an award of general damages is discretionary and the trial court was entitled to make an award of Kshs.150,000/=. He relied in his submissions on the law authority in **Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda(2008)** where similar amount was awarded for severe soft tissue injuries. He submitted that the award made by lower court is adequate to compensate the appellant.

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 issue for determination in this appeal is whether the quantum of General Damages was properly assessed in the circumstance of this case.

On issue of quantum of damages it is important to note that 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 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".

Thereof to determine issue at hand it important to have a review of nature of injuries sustained in the said accident. According to evidence on record it is clearly set out in the medical report by Dr. Cleophas Kubasu that injuries sustained are as follows;

i. Severe blunt injury to the head, he lost consciousness

ii. Depressed skull fracture of the occipital parietal bones

iii. Blunt injury to the chest

iv. Blunt injury to the right upper

v. Sub-laxation of the right shoulder joint

vi. Blunt injury to the right hip

The learned trial magistrate in assessing the damages stated;

Counsel for the Plaintiff submitted for Kshs.2,500.000/= and relied on the authority of **NAKURU HCCC NO. 171 OF 1998 JOHN JOEL JOSGEI - Vs- DENYA POWER.**

The Defendant filed their submissions, however since they did not take part during the hearing of the main suit, I will not rely on them. I find Kshs.2,500,000/= the Plaintiff claims for injuries sustained to be excessively high considering that injuries were just sever soft tissue/bone injuries.

The trial magistrate proceeded with the assessment on the basis that appellant sustained only severe soft tissue injuries. The medical report though not detailed observed that the appellant also sustained injuries to the shoulder joint and depressed skull fracture of the occipital parietal bones. These in my view were more serious injuries that he ought to have considered in assessing the damages. I therefore find that in assessment of damages he did not take into account all the injuries sustained by the appellant or appreciate the seriousness. This in my view was a misdirection.

I therefore set aside the award of Kshs.150,000/= damages of the trial court. I hereby substitute the general damages for pain and suffering to be Kshs.250,000/=, Kshs.22,000/= Special damages and costs of the trial court and this Appeal.

Dated at Bungoma this 5th day of November, 2019.

S.N. RIECHI

JUDGE