



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 19 OF 2018.

NDEDA OGAGA & SAMSAON ELUNGAT PAMPULA.....APPELLANTS

VERSUS.

BEATRICE AKINYI CHERIBA.....RESPONDENT

JUDGMENT.

The Plaintiff/Respondent Beatrice Akinyi Cheriba filed the suit in the magistrates court against the Respondent/Defendant Ndeda Ogaga seeking general damages for pain and suffering from injuries sustained in a Road traffic accident involving Motor vehicle Reg. No. KBU 916L Toyota Pro-box at all material time registered in the name of 1st Respondent and driven by 2nd Respondent as his driver/and/or servant. The Plaintiffs claim was that;

1. That on or about the 5th day of May 2016 the Plaintiff was lawfully selling fruits at grocery store which is located along Malaba – Busia road particularly at St. Monica Chakol when the 2nd Defendant so negligently drove and or managed Motor vehicle registration No. KBU 916L Toyota Pro-box that it lost control and knocked the Plaintiff thereby causing her to sustain serious bodily injuries.

PARTICULARS OF NEGLIGENCE ON THE PART OF 2ND DEFENDANT:

- a) *Driving motor vehicle registration KBU 916L Toyota Pro-box at a high speed in the circumstances.*
- b) *Driving without due care and attention to other road users particularly the plaintiff.*
- c) *Driving in dangerous manner and or failing to maintain any proper control of the said motor vehicle.*
- d) *Failing to stop, apply brakes, slow down and or swerve to avoid the accident.*
- e) *Failing to heed to road traffic rules.*
- f) *Failing to heed to the nature of the road.*
- g) *Driving a defective and unroadworthy motor vehicle.*

2. By reason of the aforesaid accident the Plaintiff sustained serious bodily injuries, loss and damage which he holds the Defendants jointly and severally liable.

PARTICULARS OF INJURIES:

1. *She had fracture of the right clavicle.*
2. *She had 2 cut wounds to the left leg.*
3. *She had fractures of the right tibia distal end.*
4. *Dislocation of the right ankle joint.*

COMPLAINTS:

1. She complained of pain in the right shoulder.
2. She complained of pain in the left foot.

Appellant/Defendant filed statement of defence denying the claim or any negligence. On 25.1.2016 the parties filed a Consent on liability apportioning the same at 85% in favour of the plaintiff and the plaintiff to bear 15% contribution. The only issue that was for determination by the trial court is for assessment of quantum of damages.

The learned trial magistrate after considering the submission by parties on quantum assessed the general damages to be Kshs.640,000/= and Special damages at Kshs.17,200/=. The same was to be apportioned at ratio of 85:15 as per the consent on liability. The appellant felt aggrieved by this assessment and filed this appeal. Appellants grounds are that;

1. **THAT** the Learned Magistrate erred in law and in fact in arriving at the said general damages a decision an amount not supported by the evidence on record.
2. **THAT** the Learned Magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages contrary to the evidence on record.
3. **THAT** the Learned Magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.
4. **THAT** the Learned Magistrate erred in law and in fact in failing to consider the evidence tendered by the Appellant.
5. **THAT** the Learned Magistrate erred in law and in fact in failing to consider submissions tendered by the Appellant.
6. **THAT** the Learned trial Magistrate erred in law and in fact in applying wrong principles of law on arriving at said general damages.

By Consent this appeal was canvassed by way of written submission. Both parties filed their respective Submissions. Counsel for the appellant submitted that from the Medical Report produced, the Respondent as a result of the accident sustained soft tissue injuries, fracture of right tibia distal end. Counsel submitted that there were no permanent incapacity suffered and the injuries were expected to heal in 1 to 1½ years. He submits that considering these injuries an award of Kshs.280,000/= would have been sufficient compensation. Counsel submits that the award of Kshs.640,000/= general damages was excessive and that the trial magistrate applied wrong principles in assessing the quantum of damages.

Mr. Mukisu for the Respondent in his written Submissions submitted that the appellate Court can only interfere with an award of damages where it is shown to be excessive unreasonable. He submits that the Respondent as a result of the accident sustained serious injuries which took long to heal and therefore suffered a lot of pain and mental anguish as a result of the injuries. Finally Counsel submits that the award of damages in this case was comparable to decided cases where the plaintiff suffered comparable injuries. He urged the court to dismiss the appeal.

This is a first appeal. The first appellate court is enjoined to analyze the evidence before the trial court and arrive at its own conclusion but always bearing in mind that it never saw or heard the witnesses testify.

Liability in the Lower Court was agreed by Consent at 85:15 as against the appellant. The only issue which was for determination by the trial court was the assessment of damages. The trial magistrate assessed the sum to be Kshs.640,000/=. He stated in his Judgment; The plaintiff suffered the following injuries:

1. *Fracture of the right Clavicle*
2. *2 cut wounds to the left leg*
3. *Fracture of the right tibia distal end*
4. *Dislocation of the right ankle joint*

Dr. Charles Andai supports these injuries. Taking everything into consideration I do award the Plaintiff general damages of Kshs.640,000/=. Judgment is therefore entered for the Plaintiff against the Defendant as follows:

General damages	Kshs.640,000/=
Special damages	Kshs.17,200/=

Costs of the suit and Interest.

The appellant in his submissions urges this court to find that the award was excessive and interfere with the same in *Selle & Another Vs. Associated Motor Boat Co. Ltd & Another* [1968] EA 123 where the Court thus stated as follows:-

“A court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusions.”

In the case of CHARLES ORIWO ODEYO Vs. APPOLLO JUSTUS ANDABWA & ANOTHER [2017] eKLR the court stated that:-

“On the issue of damages, It is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are [a] that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or [b] that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision.”

The Respondent in this appeal as per the Medical report sustained the following injuries;

- 1. Fracture of the right Clavicle**
- 2. 2 cut wounds to the left leg**
- 3. Fracture of the right tibia distal end**
- 4. Dislocation of the right ankle joint**

The Medical report by Dr. Charles Andai was examined the Respondent in prognosis stated;

OPINION AND PROGNOSIS.

This woman sustained serious injuries in the mishap which were mainly bone in nature. These were:-

- 1. Closed fracture of the right Clavicle**
- 2. Fracture dislocation of the right ankle**

I expect these injuries to heal within one and half years from now.

It is clear to this court from this report that the Respondent has suffered injuries which was main fracture of bones. These are serious injuries and although they were expected to heal within one and half years, they caused great pain and suffering. This is a factor the trial magistrate considered in the award of damages. Upon evaluating the evidence before the trial court, I do not find that in assessing the damages he took into account factors he ought not have considered. I do not find the damages awarded excessive or unreasonable as to attract this court interference.

I consequently find no merit in this appeal which is hereby dismissed with costs.

Dated and Delivered at Bungoma this 6th day of November, 2019.

S.N. RIECHI

JUDGE