



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 156 OF 2017

THOMAS MALENYA MANJI APPELLANT

VERSUS

HENRY NYABUTO ORAKA 1ST RESPONDENT

SOSPETER OYANO 2ND RESPONDENT

CARREN OGOLA 3RD RESPONDENT

(Being an appeal from the judgment & decree of Hon. I. Gichobi (SRM) dated 31st March 2017 in Nairobi CMCC No. 7562 of 2013)

JUDGMENT

1. The appellant was the plaintiff in the suit filed in the lower court. He had sued the respondent seeking special and general damages for injuries sustained in a road traffic accident whose occurrence he blamed on the 1st respondent who was at the time allegedly acting as an agent of the 2nd and 3rd respondents.

2. After a full hearing, the learned trial magistrate entered judgment for the appellant against the respondents on liability at 100% and awarded him damages as follows:

- i. General damages - KShs.850,000
- ii. Special damages - KShs.125,700
- iii. Future medical expense - KShs.150,000
- iv. Loss of earnings - KShs.277,927

The appellant was also awarded costs of the suit and interest from the date of judgment until full payment.

3. The appellant was aggrieved by the trial court's decision on quantum of general damages hence this appeal. In his memorandum of appeal dated 4th April 2017, the appellant advanced three grounds of appeal as reproduced hereunder:

- i. The learned magistrate erred in making an award of damages for pain, suffering and loss of amenities of life of KShs.850,000 which award was too low or was an erroneous estimate.*
- ii. The learned magistrate erred by failing to base loss of earnings on the adduced evidence and or by resorting to statutory minimum wages.*
- iii. The awards complained about above were erroneous for failure by the court to apply settled and trite legal principles in assessment of damages.*

4. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellant were filed on 18th April 2019 while those of the respondent were filed on 23rd May 2019.

5. This being a first appeal to the High Court, I am duty bound to re-evaluate and reconsider all the evidence presented before the trial court

and arrive at my own independent conclusions bearing in mind that I did not have an opportunity to see or hear the witnesses and give due allowance to that disadvantage. See *Selle & Another V Associated Motor Boat Company & Others, [1968] E A 123*; *Peters V Sunday Post Limited, [195] EA 424* among others.

6. As stated earlier, this is an appeal on quantum of damages. At the outset, it is important to point out that as a general rule, the discretion to award damages is vested in the trial court. However, an appellate court has jurisdiction to interfere with an award made by the trial court if it is satisfied that in arriving at its decision, the trial court applied the wrong legal principles or considered irrelevant factors or failed to consider relevant ones; or that the award was so manifestly excessive or so inadequate that a wrong principle or a misrepresentation of the evidence may be inferred. See: *Simon Muchemi Atako & Another V Gordon Osoore, [2013] eKLR*; *Arky Industries Ltd V Amani, [1990] KLR 309*; *Kemfro Africa Ltd & Another V Lubia & Another, (No. 2) 1987 KLR 30*.

7. In his grounds of appeal and in his submissions, the appellant complained that the award of KShs.850,000 for pain, suffering and loss of amenities was too low given the nature and severity of the injuries the appellant had sustained; that the learned trial magistrate in making the award failed to consider comparable awards made in the authorities relied upon by the appellant where the plaintiffs who had sustained comparable injuries were awarded general damages ranging between KShs.2,000,000 and KShs.2,500,000. Relying on those authorities namely; *Dorcas Wangithi Nderi V Samuel Kiburu Mwaura & Another, [2015] eKLR*, *Michael Murage V Dorcas Atieno Ndwalu, HCCA No. 390 of 2017* and *James Katua Peter V Simon Mutua Muasya, [2008] eKLR*, the appellant urged this court to enhance the award from KShs.850,000 to KShs.2,500,000.

8. On their part, the respondents supported the trial court's award of KShs.850,000. They submitted that in making the award, the trial court applied the correct legal principles and considered the injuries sustained by the appellant as well as the parties' submissions on quantum and the authorities cited; that the amount awarded was fair and justified and not manifestly low as alleged by the appellant.

9. In his further amended plaint, the appellant pleaded that as a result of the accident in question, he suffered the following injuries:

- a) Fracture of the left tibia
- b) Fracture of the left fibula
- c) Compound fracture right tibia
- d) Compound fracture right fibula.

10. From the testimony of the appellant which was supported by the evidence of PW1 *Dr. Washington Wokabi* and his medical report produced as exhibit 2 (a), it is clear that the appellant sustained two fractures on each leg on the tibia and fibula bones which were treated at the Kenyatta National Hospital. At the time of the initial examination on 19th September 2013 by *Dr. Wokabi*, the fractures on the right leg were uniting well despite signs of an infection; the fractures on the left leg had malunited causing a deformity which was completely corrected when the appellant underwent corrective surgery at St. Mary's Hospital in November 2013.

11. According to *Dr. Wokabi's* second medical report dated 30th September 2014, on his second examination, he noted that the appellant had suffered residual disability assessed at 12%. This is in contrast to a medical report authored by *Dr. Leah Wainaina* whose prognosis was that the fractures had healed well without leaving any residual disability.

12. In her judgment, the learned trial magistrate comprehensively considered all the evidence that was adduced by the parties during the trial including the injuries sustained by the appellant. It is also clear from the judgment that the learned trial magistrate considered the submissions made by counsel on record for the parties; their proposals on quantum and the authorities cited in support thereof.

13. A reading of the judgment reveals that the trial court had in mind and took into account the principle that in the assessment of damages, comparable injuries should as far as possible be compensated by comparable awards so that there is a measure of uniformity in the awards made in similar cases.

14. After considering the cases relied upon by the parties, the trial magistrate found and correctly so, I must add, that the injuries sustained by the plaintiffs in those cases were much more severe than the injuries sustained by the appellant in this case. Those other plaintiffs had suffered several multiple fractures in addition to other injuries. The injuries in those cases were thus not comparable to the injuries sustained by the appellant in this case.

15. I have not come across any indication from the judgment of the trial court that in arriving at the award of KShs.850,000 in general damages, the learned trial magistrate considered any irrelevant factor or failed to consider a relevant one or that it applied any wrong legal principle. Considering that the appellant's fractures properly united leaving only infections which according to the two doctors were expected to fully clear after taking appropriate medication, I am of the view that the award of KShs.850,000 in March 2017 was in fact quite generous but since the law is that an appellate court should not substitute its own discretion for that of the trial court, I will leave the award undisturbed since it cannot be said to be excessively high as to lead to an interference that it was based on a completely erroneous estimate of the damage suffered. The award cannot be said to be inordinately low as contended by the appellant.

16. It is thus my finding that the appellant has not established any basis that would warrant interference with the trial court's award on general damages. The award is consequently upheld.

17. On damages for lost earnings, the trial court was faulted for applying the minimum wage for drivers in the computation of the appellant's last income instead of the daily wage of between KShs.1,000 and KShs.2,000 which the appellant claimed was his daily income. The

multiplier used by the trial court of 24 months was not contested. The learned trial magistrate correctly made reference to the case of ***Joseph Mutunga Wambua V Kantilal Khimji Patel & Another, [1986] eKLR*** where the court held that earnings should not necessarily be proved by documentary evidence. She found that in that case, the plaintiff had provided the court with figures from which it was possible to calculate the plaintiff's monthly profits from his cattle trade which was not the case in the appellant's case where he was a bus driver. The trial court then applied the minimum wage that was then applicable to drivers.

18. In his evidence, the appellant testified that he used to work as a driver employed by the Kenya Bus Service and that he did not have a regular income. His income depended on the number of days worked and each day's output. He would work for either three or four days per week and on a good day he would earn KShs.2,000 and KShs.1,000 on the worst day. This evidence was not controverted or challenged by the respondents. The law is that what is not disputed is deemed to be admitted. In the premises, the trial court erred in not accepting the uncontroverted evidence of the appellant on his earnings prior to the accident. The award for lost earnings was therefore wrongly computed and must be set aside which I hereby do.

19. Having set aside the said award, I must now proceed to assess what in my view should be payable to the appellant for lost earnings. Since the appellant did not table evidence to prove with certainty his daily income and according to his evidence, the income depended on what he described as either good, bad or worst days and he did not disclose what determined a bad or good day, I will take the sum of KShs.1,000 to represent his daily earnings since it appears to be the most reasonable of the other two. Taking the multiplier of 24 months used by the trial court which was not challenged on appeal, the award for lost earnings will work out as follows:

KShs.1,000 x 288 days (equivalent to three days for 24 months)=

KShs.288,000.

20. The trial court's award on lost earnings is accordingly set aside and is substituted with an award of KShs.288,000.

21. In view of the foregoing, the appeal has succeeded only to the extent that the award on lost earnings made by the trial court has been set aside and has been substituted with an award of KShs.288,000.

The rest of the awards made by the trial court will remain undisturbed save for the award of interest on special damages which the trial court erroneously ordered that it should accrue from the date of judgment. Though the award of costs and interest is made at the discretion of the court, the general rule is that interest on special damages should accrue from the date of filing suit. In the premises, the trial court's order on interest on special damages is set aside and is substituted with an order that interest will run from the date the suit in the lower court was filed till payment in full. Interest on general damages will accrue from the date of judgment of the trial court until full payment.

22. On costs, the appellant is awarded costs of the suit at the lower court but given the outcome of the appeal, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kaburu for the appellant

No appearance for the respondents

Mr. Salach: Court Assistant