



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.32 OF 2017

WEST KENYA SUGAR CO. LTD.....APPELLANT

VERSUS

MANUEL MASINDE BARASA.....1st RESPONDENT

[An appeal from the judgment and decree of Hon.Onyango senior Resident Magistrate Kimilili Law Courts in Kimilili SRMC No.111 of 2015 delivered on 06/10/17]

JUDGMENT

By plaint dated 30th September 2015, the Respondent in this appeal sued the appellant for orders for general damages for pain and suffering and special damages for road traffic accident that occurred on or about 30th day of August 2015, involving motor vehicle registration number KTCB 801H Mahindra when the plaintiff was a lawfully riding on his motor cycle registration No. KMDH 775Q TVS-star.

That while driving along Webuye-Kitale road at the Ndivisi junction when the Defendant's driver, servant, agent and/or employee while drove and/or managed motor vehicle Reg. No KTCB 801H that the said tractor lost control and it violently ram into the front tyre of the said motor cycle thus causing road traffic accident and as a result the plaintiff sustained severe bodily injuries and the pillion passenger sustained fatal injuries.

Particulars of negligence were set out under paragraph 4 as follows;

- i. Driving too fast in the circumstances.***
- ii. Failing to keep any proper look out or have regard for the safety of the plaintiff***
- iii. Failing to stop or slow down or swerve and in any way control the tractor so as to avoid the accident***
- iv. Failing to exercise due diligence and prudence while driving the said tractor***
- v. Permitting and driving a defective motor tractor on a public road***
- vi. Driving recklessly as a result knocking down the plaintiff***

The Appellant/Defendant entered appearance and subsequently filed his statement of defence dated 21st December 2015 denying the Plaintiff's claim and setting out particulars of negligence on the part of the plaintiff under paragraph 10 of statement of defence.

The matter went to full hearing and PW1, PC David Mundia testified that on 30.8.2015 an accident was reported at Kimilili Police station involving a tractor KTCB 801 being driven from Webuye to Kamukunywa by one Antony Wangila and motor cycle registration. No KMDH 775Q which was being ridden by the Manuel Masinde. He testified that motor cycle had a pillion passenger called Emily Nasimiyu.

He stated that investigation was conducted and a sketch plan drawn showing how the accident occurred and a pillion passenger Emily sustained fatal injuries and the rider was injured too and produced a Police Abstract.

He further produced police abstract that was issued to Emily Nasimiyu (deceased). He testified that recommendations were made that the driver of the tractor Antony be charged for causing death by dangerous driving. On cross examination he testified that the plaintiff did not have a life jacket, helmet nor driving license at the time of the accident and supervisor of West Kenya was charged for failing to keep records of the driver who had disappeared.

Pw2 Peter Wanyama, A clinical officer from Webuye County Hospital testified that one Emmanuel Masinde was treated at Webuye hospital on 1.9.2015 and he was involved in a road traffic accident on 30.8.2015 he had facial bruises, multiple bruises on the right lower limb, swollen right knee joint and he had a fracture of fibula with dislocation and he produced a P3 form.

Pw3 Emmanuel Masinde Barasa testified that he recalls on 30.8.2015 he was involved in a road traffic accident on the 30th August 2015 at around 10.30 hours at Ndivisi junction while riding motor cycle registration number KMDH 775Q while carrying a pillion passenger. He stated that while at Ndivisi junction motor tractor registration No. KTCB 801H Mahindra coming from opposite direction and while attempting to branch left its lane and overreached onto plaintiff lane violently hitting his motor cycle's front tyre and on impact plaintiff was thrown off into a ditch.

He stated that he sustained injuries on the face, chest, right knee and right leg and sustained a dislocation of right patella and he was treated at Misikhu Medical Clinic and transferred to Webuye hospital and he blamed the defendant for the said accident.

On defence hearing DW1 Harrison Weboo testified that he was regional transport superintendent in 2015. He recalled that on 30.8.2015 he was in the office when a security guard told me that their tractor had been involved in an accident.

He testified that he reported the accident to the police and police from Kimilili visited the scene and he was issued with a police abstract.

After close of hearing the parties filed their respective written submissions on liability and quantum and after consideration the trial magistrate awarded the plaintiff Kshs.295,488/= as compensation for pain, suffering and loss of amenities and special damages.

The appellants been dissatisfied then filed this appeal on the following grounds:

- i. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable in awarding quantum of damages and the relevant authorities on quantum cited in the written submissions presented and filed by the appellants;*
- ii. That learned trial magistrate misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to wrong conclusion on the same.*
- iii. That the learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly sustained by the respondent.*
- iv. That learned trial magistrate erred in failing to evaluate the evidence tendered judiciously.*

By consent of the parties and court directions, this appeal was canvassed by way of written submissions. Mr. Ogejo submitted on quantum that from pleadings on the record the respondent suffered soft tissue injuries and were continuing to heal and he referred to several cases on similar injury on award of quantum. The advocate referred this court to authority in *Carolyne Indasi Mwonyonyo VS. Kenya Bus Service[2012] eKLR and Kapchorua Tea Company Limited v Josephat Indulachi [2017] eKLR*. He submitted that injuries sustained by respondent herein are the same as those suffered in the *Kapchorua Tea Company (supra)* and prayed that the court disturb the said award by trial court and reduce the same to Kshs.150,000/= subject to liability as apportioned by lower court.

Mr. Yego submitted the documents produced by Pw2 the second witness confirmed the injuries sustained by the respondent on 30th August 2015.

The advocate on record referred this court to authority in the case of *Catherine Wanjiru King'ori & 3 others Vs Gibson Theuri Gichubi* where the plaintiff had similar injuries as those sustained by the respondent in the instant case. He submitted that it is clear from the evidence record that the learned magistrate did not misdirect himself in finding that the respondent had proved his case against appellants. He submitted that the appellants's appeal lacks merit and should be dismissed with costs.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to reevaluate 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 Hamed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

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 appellants and the respondent taking into account all the decisions relied on. In my view, the issues for determination in this appeal is whether the quantum of damages awarded by trial court properly assessed.

From evidence it is not in dispute that an accident occurred on the 30th August 2015 and the respondent sustained injuries. The particulars of injuries were set out as follow;

- a) Bruises on the face which was tender.
- b) Blunt trauma to the chest which was tender
- c) The right knee and right leg were swollen and tender with bruises

The issue of contention is the quantum of damages awarded with regard to injuries sustained. The appellant contention is that is that injuries sustained were soft tissue injuries and they are continuing to heal and therefore the award issued was too high while the respondent contention is that the damages awarded were properly assessed by the trial court.

To determine issue at hand it is imperative we refer to the nature of injuries sustained by the respondent. According to evidence on record PW2, a clinical officer produced treatment notes (plaintiff Exhibit 3a and 3b) and P3 form. Also Dr. Aluda's medical report was produced as plaintiff exhibit 6(a).

I wish to state that 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".

I have reviewed the entire record at trial and the judgment passed regarding assessment of damages. I find that from medical report dated 23/9/2015 prepared by Dr. S.I. Aluda and produced by Pw2 in court it indicated that the respondent herein sustained the following injuries: -

- d) Bruises on the face which was tender.
- e) Blunt trauma to the chest which was tender
- f) The right knee and right leg were swollen and tender with bruises
- g) Sustained a dislocation of right patella.

The doctor opinion was that the injuries sustained were soft tissue injuries and are continuing to heal but for pains which subside with the use of analgesics.

In the instant case after full hearing and consideration the trial court awarded the plaintiff Kshs.295,488/= as compensation for pain, suffering and loss of amenities including special damages.

I wish to state that on issue of quantum the principles upon which appellant court can consider in reversing the finding of an award of a lower court are well stated in ***Butler Vs. Butler CIVIL APPEAL NO.49 OF 1993***.The appellant must demonstrate that the court in exercising its discretion acted on wrong principles, failed to take into consideration matters which ought to have been considered or that the award is so excessive or low as would reflect on erroneous application of the principles of assessment of damages. On issue of special damages the trial court awarded special damages on what was proved.

I hereby have reviewed the entire record before trial court and the judgment passed regarding assessment of damages and I have failed to find any error that would invite this courts interference with the discretion as exercised by trial magistrate. I find no reason to interfere with the award and therefore I uphold the award by the trial magistrate. The upshot of the foregoing is that I find that the appeal lacks merit and is hereby dismissed.

No order as to costs.

It is so decided.

Dated and Delivered at BUNGOMA this 13th day of November, 2019.

S.N.RIECHI

JUDGE