



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 4 OF 2019

ELIZABETH WAMBOI GICHONI.....APPELLANT

VERSUS

VIRGINIA ACHIENG ACHOLA.....RESPONDENT

(Being an appeal from the Judgment and decree of Ukwala PMCC No. 25 of 2018 dated 16.1.2019 before Hon. C.I. AGUTU – SRM)

JUDGMENT

1. This appeal is against quantum of damages only as the question of liability was settled by consent of parties in the trial court in the ratio of 75:25 in favour of the Respondent who was the Plaintiff, against the appellant herein who was the defendant.

2. It is not therefore in dispute that the Respondent Virginia Achieng Achola was involved in the material accident on 10.2.2018 along Kisumu-Busia Road at Nzoia River involving motor vehicle Registration No. KCF 322B Toyota Voxy. It is also not in doubt that the Respondent was injured.

3. In her plaint dated 19.3.2018, the Plaintiff pleaded that as a result of the said accident, she suffered the following injuries:

- a. Head injury with loss of consciousness.**
- b. Multiple cut wounds on the scalp.**
- c. Cut wound on the right scapula.**
- d. Blunt injury to the right shoulder and right back.**
- e. Bruises on the right iliac crest (pelvis).**
- f. Blunt injury to the right knee.**

4. The above injuries are as per the Medical Report of Dr. Joseph C. Sokobe dated 20.2.2018. In preparing the Medical Report, the Doctor make reference to Treatment notes from Ambira Sub-County Hospital and Busia County Referral Hospital.

5. In the said Medical Report which was prepared only 10 days after the material accident, the Respondent was said to have been healed and was treated with analgesics, antibiotics, cleaning, stitching and dressing of the wounds and conservative head injury management. She complained of occasional headache. She was, on examination, found to have vital signs within the normal limits. She had healed scars on the occipital scalp, right scapula region and right iliac crest region. X-rays revealed no fracture of the skull, lumbar spine and right knee.

6. The Respondent adopted her witness statement and testified on 26.9.2018 which was about 7 months from the date of accident to the effect that following the accident, she sustained the following injuries:

- **Three cracks on the head leaving keloids, cut wounds on the lower hip leaving 2 large keloids,**
- **Very deep wound on the lower shoulder leaving large keloid, cut wound on the right leg leaving defamtion. That**

she lost consciousness and had been left with deafness in the left ear. She produced treatment cards from Ambira Sub-County Hospital and a discharge summary from Busia County Referral Hospital as exhibits.

7. She also produced a P.3 form filled at Busia County Referral Hospital as an exhibit. Regarding the injuries and degree thereof, on being cross-examined by Ms. Baraza Advocate, the Respondent stated that the wounds in the head are deep cuts. That the flesh on her back came back (sic) and that she received deep cuts on her shoulder leaving ugly keloids. She stated that the ear problem emerged later.

8. The respondent testified that she had no further documents to show that she sustained injuries in the ear. She stated that she also suffered right leg injuries and that she had not healed completely as she still received medication at the time of hearing of her case, but she was not able to proof continuous treatment notes

9. The Respondent and the Appellant then closed their respective cases. No other medical report was produced to challenge the injuries enumerated in the plaint and as testified as per the medical report dated 20.4.2018 by Dr. Sokobe, or to show that the Respondent continued with further medication upon being discharged from Hospital.

10. In her judgment delivered on 16.1.2019, Hon. C.I. Agutu, SRM relied on two authorities **HCCA 23/2015, and Kakamega HCCA 125/2011 (with no full citations or comparable injuries stated)** and awarded the Respondent KShs.300,000/= general damages.

11. In the written submissions, the appellant's Counsel had proposed KShs.100,000/= general damages whereas the Respondent's Counsel had suggested KShs.380,000/= general damages. The trial court only relied on the authorities submitted by the Respondent's Counsel in making an award and in one sentence commented that **"The authorities cited by the defence is a bit on the lower side."**

12. It is the above judgment which gave rise to this appeal dated 21.1.2019, challenging the question of damages awarded to the Respondent contending that the same were manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent.

13. The Appellant also complains that the judgment and award for general damages was made without considering the applicable principles as established by precedent that comparable injuries sought to attract comparable damages and that by doing so, reached a figure of damages that was inordinately high, arbitrary and totally unsupportable by any authority or precedent.

14. Further that the trial magistrate erred in law and in fact in failing to correctly appreciate the Plaintiff's injuries and in misapprehending the same and thus arriving at an erroneous award of damages.

16. It was further contended that the trial magistrate totally ignored and/or paid lip service to the appellant's submissions and authorities cited.

16. The appellant also complained that the estimate of general damages is erroneous, oppressive and punitive and finally that the learned trial magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages.

17. The appellant therefore urged this court to set aside or vary decree, set aside the quantum of damages and substitute it with a suitable award.

18. The appeal was canvassed by way of written submissions. The Appellant's Counsel filed submission dated 25.7.2019 reproducing the authorities cited in the lower Court and urging the court to set aside the award of KShs.300,000/= and substitute it with an award of KShs.100,000.

19. The Respondent's Counsel filed written submissions dated 28.8.2019 urging this court to uphold the judgment and award made by the trial Court.

DETERMINATION

20. I have considered the grounds of appeal, the judgment of the trial Court on quantum of damages for the pleaded and proved injuries sustained by the Respondent. I have also considered the rival written submissions citing case law on the subject.

21. This being a first appellate Court, the Law is now settled that an appellate Court will only disturb an award of damages where it is satisfied that the trial court proceeded on wrong premises in its assessment or that the award is too low or too high as to amount to an erroneous estimate.

22. In addition, awarding damages is in the discretion of the trial court and therefore an appellate court should be slow in interfering with discretion unless it is shown that the discretion was wrongly exercised. See **Kemfro Africa Ltd v Lubia [1987] KLR 27**. Further this court had no opportunity to hear and see the Respondent as she testified on her injuries.

23. Lastly, in matters general damages, the practice which is now settled is that comparable injuries should be compensated by comparable awards. See **Morris Mugambi and Another v Isaiah Gituru Nairobi Court of Appeal 138 of 2002, Simon Taveta v Mercy Mutitu Njeru [2014] eKLR Court of Appeal 26 of 2013 adopting Arrow Car Ltd v Bimomo [2004] 2 KLR 101 and Deshire v KPLC Ltd [2013]eKLR**.

24. In opposing this appeal, the Respondent's Counsel maintained that the trial Court was right in making the award of KShs.300,000 general

Damages because the Court is obliged to consider the physical distress caused to the plaintiff, both pre-trial and in the failure (sic) as a result of the injury.

25. Counsel submitted that this includes pain caused by the injury itself and the treatment intended to alleviate the awareness of and embarrassment at the disability of disfigured or suffering caused by anxiety that the plaintiff's condition may deteriorate. He also submitted that loss of amenities is awarded when the plaintiff's ability to enjoy certain aspects of life as a result of the accident are diminished. He relied on **Halsbury's Law of England 4th Edition Volume 12 (1) P. 348.**

26. According to Counsel for the respondent, pre-trial, the Respondent had gone through anguish for a fairly long period of time that she lost consciousness and complained of loss of hearing on the left ear, deep cut wound on the head and shoulder which left very ugly keloids. Further, that she complained of recurrent and incessant pain.

27. He submitted that the award of KShs.300,000/= was within the range of what the High Court had awarded in comparable injuries hence this court should not substitute a figure of its own for that awarded by the trial Court.

28. The above submissions were fortified by the 4 decisions, two of whom the trial court relied on wholly to make the contested award.

29. Examining the above submissions, on their face value, they are very valid. Regrettably, this court on perusal of the judgment of the trial Court has found that besides making an award of KShs.300,000/= and relying on **Migori HCCA 23/2015 and Kakamega HCCC 125/2011**, the trial court never laid any basis for making such an award. She simply remarked that the Appellant's authorities cited "**were a bit on the lower side.**" In addition, the trial magistrate never laid out the comparable injuries to those of the Respondent to persuade this Court that she was alive to the principles settled in awarding damages.

30. The Respondent's Medical Report was clear that the Respondent sustained severe soft tissue injuries from which she was recovering well and this was only 10 days after the accident. Further the complaint she had then was occasional headache and the healed scars on the occipital scalp, right scapula, and right iliac regions. There was no mention by the Doctor Sokobe that the Respondent was left with ugly, embarrassing keloids in the injured areas.

31. The Respondent also admitted that she had no evidence that she was continuing with any other treatment after being discharged from hospital. She did not even have evidence of treatment for the ear problem which may have developed after leaving hospital. The medical report does not mention any injury to the ear or the injury being as a result of the accident. The Respondent never sustained any fractures and was left with no permanent disability. If that were the case, the Respondent could have obtained a second Medical Report to indicate that her condition had worsened since she was examined on 20.2.2012 after leaving hospital, for the court to appreciate the after-effects of the accident.

32. As matters stand, the trial court, in my humble view, failed to lay a basis for awarding KShs.300,000/= and that failure calls for interference by this court. For that reason, I find and hold that the trial court erred in law and fact in failing to consider relevant consideration and principles applicable in awarding general damages for personal injuries.

33. The medical report dated 20.2.2018 lists injuries which I have reproduced above, sustained by the Respondent. Those injuries are described as severe soft tissue injuries amounting to grievous harm as assessed in the P3 form dated 14.2.2018 only four days after the accident.

34. According to the medical report and the Respondent's testimony, she suffered unconsciousness-head concussion and deep cut wounds in the areas mentioned. The initial treatment noted obtained at Ambira Sub-County Hospital on 10.2.2018 shows that the Respondent was received as an inpatient No. 1392/2018 and treated for cut wounds to the occipital, she was in pain and able to walk with difficulty. She bled severely from the occipital region. She also had bruises on the shoulder and pain in the right knee.

35. The Clinical Summary from Busia County Referral Hospital dated 14.2.2018 show deep cut head injury, frictional burn on the right scapula region and injuries (bruises) on the back and left iliac region. X-rays revealed no fracture on the skull and knee.

36. The cut wound on the head and scapular areas were stitched. Thus from the medical report, P3 form and treatment notes, the Respondent suffered pain from the severe soft tissue injuries sustained but by the time she was discharged from Hospital at Busia County Referral, she was already healing from the bruises on the right iliac crest (back) and apart from the stitched wound on the head and right scapular region, she had no other complication.

37. As earlier stated, the Respondent never demonstrated that she went back to hospital even for a follow up or check up after being discharged.

38. The Respondent's Counsel, like the trial Court, merely stated that the injuries sustained by the plaintiff in the cited decisions were by and large comparable to the ones sustained by the Respondent herein. There was no attempt to place those injuries on record, side by side with the ones sustained by the Respondent, for comparison purposes.

39. It is for this above reason that I find and hold that the trial court took into account irrelevant factors or left out relevant factors when assessing damages and as a result, made an award which, in my humble view is not comparable to other awards where the injuries are similar. Accordingly I find and hold that the trial magistrate made an award that was inordinately and manifestly high as to represent an entirely erroneously estimate and warrants interference by this court.

40. I now proceed to analyze the following decisions, while appreciating that no two injuries can be exactly the same, In **Autosol K. Ltd &**

Another v Martin Gitau Kinyanjui [2019] eKLR cited by the Respondent's Counsel as **Machakos HCCA 28/2014, Odunga – J.**, in awarding KShs.300,000 general damages, reducing it from KShs.500,000 award by the trial Court, was dealing with injuries involving:

- **Cut wound on the head and chin,**
- **Dislocation on the elbow.**
- **Bleeding from the brain according to CT scan.**
- **Scar on the left side of the head.**

41. Unlike in the above case, however, the Plaintiff in this case did not suffer from dislocation or bleeding from the brain. In my view, the high award in the above case which involved soft tissue injuries was influenced by the injury involving bleeding in the brain and dislocation of the elbow.

42. In **Kakamega HCCA 125 125/2011 Bildad Onditi and Another v Rashid Ramadhan, S.J. Chitembwe – J.**, enhanced an award of General damages of Kshs 100,000/= awarded by the trial court to KShs.350,000/= on account that the injuries were serious namely:

a. Deep cut wound scalp.

b. Contusion head.

43. The medical Report for the plaintiff in the above case showed that the Plaintiff sustained deep cuts on the scalp which were stitched. He also had concussion (*disturbance of the brain*); and that the plaintiff had as a result developed memory impairment, poor attention and concentration, loss of interest in previous activities, poor appetite and sleep disturbance. He would also need long term medication and counselling to enable him lead an independent life.

44. No doubt, the above injuries were more serious than the ones suffered by the plaintiff in this case as there was no negative prognosis. The Plaintiff was only said to have recurrent headaches and even then, there was no evidence that she had even visited any medical facility since February 2018 when she was examined by Dr. Sokobe.

45. Comparing the above injuries to those sustained by the Respondent and those listed in the authority of **Godwin Ireri v Franklin Gitonga Meru HCCA 47/2015 [2018] eKLR where Majanja – J.** set aside an award of KShs.300,000 and substituted it with KShs.90,000 in my humble view, the injuries therein were comparable to the ones sustained by the plaintiff in this case award was made in May 2018. In the said case, the Plaintiff sustained:

- 2 cut wounds on the head the occipital region, bruises on the left ankle and bruises on the right knee. Swelling on the dorsum of the left foot. He was admitted in hospital for 4 days, reviewed after 3 weeks for stitches to be removed, at the time of examination he complained of numbness on the left leg, the scar had healed and the numbness on the leg was expected to subside and that he had healed well.

42. On the basis of the above authority of Godwin Ireri v Franklin Gitonga Meru HCCA 47/2015, I allow this appeal and set aside the award of KShs.300,000 general damages and substitute it with an award of KShs.150,000 less 25/100 contribution leaving a balance of KShs.112,500,00. This award attracts interest at court rates from the date of judgment in the lower court until payment in full. The Respondent will also have special damages of KShs.11,510 as pleaded and proved. Interest on special damages at court rates will accrue from the date of filing of suit in the lower court.

43. Costs are in the discretion of the court and to the successful party in any event. This appeal was against quantum only. The Respondent was awarded costs of the suit in the lower court. Costs in the High Court are off cause much higher than those chargeable in the lower Court. Considering the amount of damages awarded to the Respondent which is a reduction by half of what the trial court awarded, if I was to award the appellant full costs of this appeal, the Respondent would be left with nothing yet she is the injured person. **Balancing the scales of justice, I would award the appellant costs of KShs.15,000/= to be deducted from the award herein.** As the sums awarded by the lower Court were preserved in a fixed interest earning account, the appellant has not suffered any loss that may have been occasioned by inflation.

44. Orders accordingly.

Dated, Signed and Delivered at Siaya this 2nd day of December, 2019.

R. E. ABURILI

JUDGE

Judgment delivered in open court in the absence of the parties or their advocates but who were present on 2/10/2019 when judgment date was set.

CA: Modestar and Brenda