



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 3 OF 2019

ELIZABETH WAMBOI GICHONI.....APPELLANT

VERSUS

BENARD OUMA OWUORRESPONDENT

(Being an appeal from the Judgment and decree of Ukwala PMCC No. 22 of 2018 dated 16.1.2019 before Hon. C.I. AGUTU – S.R.M.)

JUDGMENT

1. This appeal arises from the judgment and decree of Ukwala SRM Civil Suit No. 22 of 2018, made on 16.1.2019 by Hon. C.I. Agutu, Resident Magistrate. In the said suit, the Plaintiff was **Bernard Ouma Owuor**, the Respondent herein whereas the defendant was **Elizabeth Wamboi Gichoni**, the appellant herein.
2. The appeal is against quantum only as liability was agreed and a consent recorded by the trial Court apportioning between the Plaintiff and the Defendant in the ratios of 25:75 against the Defendant.
3. The said consent recorded on 26.9.2018 was adopted in two other files Civil Case No. 24 of 2018 and 25 of 2018 where the defendant was **Elizabeth Wamboi Gichoni**, the Appellant herein.
4. After the parties had recorded the aforesaid consent on liability, they left the question of quantum of damages to be determined by the court, upon the plaintiff testifying on 26.9.2018.
5. Revisiting the trial court record as required by section 78 of the Civil procedure Act and as espoused in **Sielle v Associated Motor Boat Company Limited, [1968] EA 123**, the Plaintiff, now Respondent testified on oath and stated that he was a motorcycle rider. He adopted his witness statement wherein he recalled that on 10th February 2018, at around 12.30 p.m., he was riding his motorcycle while carrying a lady pillion passenger and her child from Ugunja. Reaching to Got-Nanga along Kisumu-Busia Road, he was riding on the left side of the road facing Busia from Kisumu direction. Upon reaching Nzoia Bridge, a motor vehicle Registration number KCF 322B being driven from Kisumu to Busia direction knocked the plaintiff's motorcycle from behind and as a result, the plaintiff and his pillion passengers fell down and were seriously injured.
6. The Plaintiff was taken to Matibabu Foundation Health Care where he was treated and later taken to Ambira sub-county Hospital for further treatment. An X-ray was done to ascertain the injuries sustained and later he reported the accident to Ugunja Police Station where he was issued with a P3 form and the Police Abstract. The P3 form was filled at Ambira Sub-County Hospital. The Plaintiff also saw Dr. J.C. Sokobe who examined him and prepared a medical report on the injuries suffered following the said accident. The Plaintiff blamed the driver of the motor vehicle KCF 322B for driving carelessly and knocking the motor cycle from behind.
7. According to the Plaintiff, he sustained the injuries involving the head and back, he suffered deep cut wound leaving keloids, two deep lateral cuts on the neck leaving keloids, multiple bruises on the chest and chest injuries, cut wound on the buttocks. He had deep bruises on the left hand. That he lost consciousness. He produced as exhibits 1 (a) and 1 (b) being treatment notes from Ambira Sub-County Hospital and exhibit 2 as treatment notes from Matibabu. He also produced as Exhibit 3 a P3 form filled at Ambira Sub-County Hospital, a Police Abstract issued at Ugunja Traffic Sub-Base as exhibit 4, a Medical Report by Dr. Joseph Sokobe in Eldoret as Exhibit 59 and receipt for the fees paid as Exhibit 6. The Plaintiff prayed for general damages, special damages and costs of the suit.
8. On being cross-examined by the Defence Counsel, the Plaintiff stated that he had not healed fully and that he was still on medication but that he had no proof that he was receiving such medication. He complained of pain in his chest. At the close of the Plaintiff's case, the defence also closed its case without calling any witness. The Parties' advocates filed written submission.
9. By her brief judgment delivered on 10.1.2019, the trial magistrate awarded the plaintiff general damages of KShs.300,000/= for pain and suffering less 25% contribution and also awarded the plaintiff special damages of KShs.6,000/= as pleaded and proven together with costs of the suit and interest at court rates.

10. The defendants thereafter immediately sought for Stay of Execution of decree and by Consent of both Parties' recorded by the trial court on 19.2.2019, decree of the trial court was stayed pending hearing and determination of this appeal on condition that the decretal sum of KShs.229,500 and costs of KShs 82,880 all totalling KShs.312,380 is deposited in a joint interest earning account to be operated by both Parties' advocates on record that is Omondi Francis and Peter Karanja within 45 days of the said date of 19.2.2019.

11. The appellant herein filed his appeal on 28.1.2019 vide his Memorandum of Appeal dated 21st January, 2019 challenging the Judgment/Decree dated 16.1.2019 contending that:

- 1. The trial magistrate erred in law and fact in making the award of general damages which was manifestly excessive in the circumstances as to amount to erroneous estimate of the loss suffered by the Respondents;**
- 2. The learned trial Magistrate erred in law and fact in entering Judgment for general damages without considering the applicable principles as estimated by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unsupportable by any authority or precedent;**
- 3. The learned 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;**
- 4. The learned trial Magistrate totally ignored and/or paid his service to the appellant's submissions and authorities therein cited;**
- 5. The estimate of general damages is erroneous, oppressive and punitive;**
- 6. The learned Magistrate failed to take into account all relevant consideration, and principles in assessing the quantum of general damages.**

12. The appellant urged the Court to set aside or vary the judgment and decree, set aside, vary and substitute quantum of damages with a suitable award and allow her appeal with costs.

13. In support of the above grounds of appeal, the appellant's Counsel filed written submissions. The Respondent's Counsel too filed written submissions opposing the appeal, urging this Court to dismiss the Appellant's appeal with costs. Both Counsel relied on a myriad of authorities to support their respective clients' positions.

14. According to the Appellant's Counsel's submissions filed on 26.7.2019, the trial Court erred in principle in failing to adhere to the principles applicable to the assessment of damages; applied wrong principles, and came to the wrong decision. Counsel referred this Court to various decisions on this Court's jurisdiction to interfere with an award of damages, as settled. Relying on **Simon Taveta v Mercy Mutitu Njeri [2014] eKLR following Kemfro Africa Ltd v Lubia [1987] KLR 27** it was submitted that an Appellate Court must be satisfied that the trial Court in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that the amount is inordinately low or high to be an erroneous estimate.

15. On the principles applicable in assessing damages that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases, reliance was placed on **Morris Mugambi and Another v Isaiah Gituru NRB Court of Appeal CA No.138 of 2012.**

16. In this appeal, the appellant's Counsel submitted that the trial Court ignored the above principle and that she ignored the authorities submitted and instead relied on two authorities submitted by the Respondent's Counsel thus **Migori HCCA 23 of 2015 Francis Ochieng and Another v Alice Kajimbo and Kakamega HCCA 125 of 2011- Bildad Onditi and Another v Rashid M. Rateng.**

17. Counsel submitted that the injuries sustained by the Plaintiffs in the two authorities above had no similarities with those sustained by the Plaintiff/Respondent in the instant appeal.

18. According to the Appellant's Counsel, the injuries sustained in the 8 decisions cited in his submissions were more relevant to those sustained by the respondent following the road traffic accident. I shall refer to those authorities later in my determination.

19. Counsel therefore urged the Court to take into account the said authorities and set aside the award of KShs.300,000/= general damages and substitute it with an award of KShs.100,000, maintaining that the authorities he cited were recent and decided between 2013 and 2018 hence inflation was not a by consideration. He also prayed for costs of the appeal.

20. In opposing the appeal, Counsel for the Respondent filed written submissions on 4.9.2019, setting out the injuries suffered by his client as per the evidence adduced on record, supported by the Medical Report prepared by Dr. Sokobe.

21. Counsel for the respondent submitted that in award of general damages, the Court is obliged to consider the physical distress caused to the Plaintiff, both pre-trial and in the future as a result of the injury. He submitted that this includes pain caused by the injury and the treatment intended to alleviate the awareness of and embarrassment at the disability or disfigurement or suffering caused by anxiety that the Plaintiff's condition may deteriorate.

22. Further submission was that loss of amenities are awardable when the Plaintiff's ability to enjoy certain aspects of life as a result of the accident are diminished. He relied on **Halsbury's Laws of England 4th Edition Volume 12 (1) Page 348.**

23. The Respondent's Counsel submitted that pretrial, the Respondent had gone through anguish for a fairly long period of time, referring to the injuries allegedly suffered by the Respondent terming them severe and submitting that Kshs. 300,000 awarded was not inordinately high as to warrant interference by this Court.

24. It was also submitted that it had not been demonstrated that the trial Magistrate took into account irrelevant factors in her assessment of damages. Counsel for the respondent maintained that the sum awarded was within the range of what the High Court had awarded in previous comparable injuries. He urged this Court not to substitute a figure of its own for that awarded by the trial Court. Counsel urged the Court uphold the same award, guided by decisions in 4 cases namely **Migori HCCA 23/2015 Francis Ochieng & Another v Alice Kajimbo; Kakamega HCCA 125/2011 Bildad Onditi & Another v Rashid M. Rateshi; Malindi HCCA 11/2015 James Mwaro Shadrack v Ali Zulekha and 3 Others; and Kisii HCCA 3/2009 Daniel Oira & Another v Esther Onkware.**

25. The Respondent's Counsel added that it is impossible to get similar injuries hence they need only be comparable injuries. He urged the court to exercise discretion judiciously having regard to prior decisions which are relevant to the case and the specific circumstances of each case, citing **Machakos HCCA 28/2014 Autosol (K) Ltd and Another v Martin Gitau Kinyanjui**, and urged this Court which had no capacity to see and hear the Plaintiff/Respondent testify not to interfere with the exercise of discretion of the trial Court in award of damages.

26. On failure to consider authorities submitted by the appellant, it was submitted that at page 46 of the record of Appeal, the trial Court found that the authorities cited by the appellant were on the lower side considering the general circumstances of the case and the injuries sustained by the Respondents.

27. Counsel for the respondent submitted that the authorities cited by the appellant's Counsel did not take into account the severe injuries sustained by the Respondent, notably brain concussion. This Court was urged to find the appeal herein devoid of merit and to dismiss it with costs.

DETERMINATION

28. I have carefully considered the evidence on quantum adduced before the trial court, the appellant's appeal as per the memorandum and grounds of appeal dated 21st January 2019, the submissions for and against this appeal and the authorities relied on by both parties' counsel.

29. In my humble view, the main issue for determination in this appeal against quantum alone is three pronged-whether the trial magistrate erred in principle in allegedly failing to adhere to the principles applicable to the assessment of damages; whether she applied wrong principles; and whether she came to a wrong decision.

30. What is undisputed is that the Respondent sustained injuries following the undisputed road traffic accident involving the appellant's motor vehicle Registration number KCF 322B and the Respondent Motor cyclist on 10th February, 2018. The Respondent pleaded at Paragraph 5 of the plaint dated 18th February, 2018 that as a result of the said accident, he sustained the following injuries:

- a) Mild head injury due to concussion.*
- b) Multiple cut wounds on the scalp.*
- c) Cut wound on the left lateral orbital region.*
- d) Blunt injury to the chest.*
- e) Multiple bruises on the left upper limb.*
- f) Bruises on the gluteal region*
- g) Blunt injury on both knees.*

31. The above injuries were derived from the medical report by Dr. J.C. Sokobe dated 20.2.2018 and the P3 form filled on 16.2.2018 at Ambira sub-county Hospital which showed that the degree of injuries sustained by the Respondent was maim. The treatment notes from Matibabu Foundation PEx2 showed that on X-ray, there was swelling of soft tissue with no obvious fracture seen on the skull and chest. As at the time the Respondent was being examined on 20.2.2018, it was about one month after the accident and therefore the injuries were stated to be fairly fresh and healing. The respondent complained of occasional headache, and had healed scars on the scalp, face and left upper limb.

32. The Doctor concluded in his opinion and prognosis that the Respondent sustained moderately severe soft tissue injuries from ***which he had recovered.*** When the Respondent testified before the trial court on 26.9.2018, he replicated the injuries contained in the medical report. This was 7 months after the medical report was prepared for him and in addition, he complained that he had not fully healed and that he continued with medication but that he had no proof of that. He stated that he still had pain in his chest. No doubt, the Respondent sustained injuries as described in the medical Report and oral testimony but there was no evidence that as at the time of hearing of the suit nine months after the accident, the Respondent had any major issues described by his Counsel in the submission as severe.

33. If that were to be the case, that the respondent had issues nine months after the accident, nothing prevented him from seeking for further medical attention and adducing evidence of any recent medical attention. Not even a receipt for purchase of any medicine to treat the after accident effects was produced, leaving this court with a conclusion that the medical report by Dr. Sokobe that the Respondent had healed

from the moderate severe injuries true. With the above in mind, the question is whether the award of KShs.300,000/= general damages for pain, suffering and loss of amenities, was inordinately high and if so, whether this court should interfere with the said award.

34. In determining the above question, I must bear in mind the applicable principles that the award of general damages is in the absolute judicial discretion of the trial court and that the appellate court may only interfere with the awards of the trial court in the following circumstances:

a) *Where the award is based on no evidence;*

b) *Where the trial court proceeded on a wrong principle.*

c) *Where the trial court has failed to take into account a relevant factor.*

d) *Where the trial court has taken into account an irrelevant factor.*

e) *Where the trial court has made an award that is so inordinately high or low as to amount to an erroneous estimate. [see **Kemfro Africa Ltd v Lubia**] [1987] KLR 27 cited in **Simon Taveta v Mercy Mutitu Njeri (Supra)**.*

35. In assessing damages, the principle as correctly stated by the appellant's counsel is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.

36. The trial magistrate in her brief judgment observed that according to Dr. Sokobe's opinion and prognosis, the plaintiff sustained moderately severe soft tissue injuries from which he had now healed. She also considered the 2 authorities cited by the appellant's counsel, out of the 8 decisions, and found that the injuries suffered in the said cases were on the lower side compared to those sustained by the plaintiffs in the cases cited by the Respondent's Counsel and awarded him KShs.300,000/= general damages less 25% contribution.

37. In the lower court, the appellant's counsel had submitted and still maintains that an award of KShs.100,000 was sufficient compensation whereas the Respondents submitted praying for an award of KShs.350,000/= general damages.

38. Venturing into the decisions relied on by the trial court, in **Francis Ochieng and Another v Alice Kakimbo (Supra)** the plaintiff sustained injuries involving: Head injury with bilateral temporo-parietal scalp haematoma, back pain, bleeding from the left ear, sub conjunctival hemorrhage and pariorbital scicpnosis on both eyes. He was an inpatient for 7 days and experienced dizziness and was still undergoing treatment during the trial. She was awarded KShs.350,000/= general damages in 2015. In **Bildad Onditi and Another v Rashid M. Rateng (supra)** the plaintiff sustained injuries involving posterior dislocation of the right hip and soft tissue injuries. He was admitted in hospital for 9 days and complained of tenderness on the right hip area and restriction of movement. He was awarded KShs.350,000 in 2011.

39. On the part of the appellant, the authorities relied on revealed the following: In **Ndungu Dennis v Ann Wangari & Another, Kiambu HCCA 54/2016** decided in February 2018, the High Court awarded KShs.100,000/= general damages to the plaintiff who sustained injuries involving a blunt head injury, head concussion (brief consciousness), blunt injuries to the chest and both hands. The Medical report stated that he experienced back pains and chest pains on exertion.

40. In **Godwin Ireri v Francline Gitonga Meru HCCA 47/2015 [2018] eKLR** decided in May 2018 the Plaintiff was awarded KShs.90,000/= for injuries involving two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle and bruises on the right knee.

41. In **Mbati John & Another v China Zhogxing Construction Company Limited and Another [2016] eKLR** decided in February 2016, the plaintiff was awarded KShs 75,000/= for injuries involving blunt trauma to the occipital region of the head, bruises of the right shoulder girdle, blunt trauma to the anterior chest, cut wounds on the lumber region of the back and bruises of the knuckles of the left hand.

42. In **Mumias Sugar Company Limted v Julius Abuko Shibia [2015] eKLR Kakamega HCCA 112/2011**, an award of KShs.100,000 was made in favour of the plaintiff who suffered blunt injury to the neck, blunt injury to the occipital region of the head, blunt injury to the right shoulder, complaints of neck pain on and off with backache.

43. From the avalanche of authorities cited and which are recent, it is indeed impossible to find similar authorities where the plaintiffs sustained similar injuries. It is for that reason that the court must consider only comparable injuries and awards.

44. Comparing the authorities cited by the Respondents and those cited by the appellant's counsel, I am persuaded that those cited by the appellant's counsel compare well with the injuries sustained by the Respondent especially the 1st and 2nd authorities cited above. In the first authority, the plaintiff just like the Respondent in the instant case, sustained concussion while in the second decision, the Plaintiff sustained cuts on the forehead and scalp occipital region and bruises. In both, and nearly all the decisions cited by the appellant's counsel, the plaintiff sustained soft tissue injuries, unlike in the **Bildad Onditi (supra)** case where there was, among other injuries, dislocation of the right hip and admitted for 9 days in hospital admitted for 9 days in hospital. He still had restricted movement at the hearing. In the **Francis Ochieng (supra)** case, the plaintiff had blunt head injury with swellings, back pain, bleeding from the left ear, and pario batial sczymosis on both eyes. She was admitted in hospital for 7 days and experienced dizziness and was still on treatment at the trial.

45. The above injuries in my view, were more serious injuries than what the Respondent in this case suffered. Exhibit No. P.Ex1(a) the treatment notes from Ambira sub-County Hospital shows that the Respondent was treated as an outpatient on 10.2.2018 OP/No.1385/18 for multiple cut wounds on the head and Exhibits P.Ex2 from Matibabu Foundation shows X-rays results for skull and chest of 11.2.2018. There were no evidence of the Respondent being admitted in hospital as he was only stitched in the areas where he sustained cuts on the head and

received treatment for multiple bruises on the left palm, left elbow and gluteal area with tenderness in the knee joint.

46. For the above reasons, I am persuaded that the trial Court did not take into account the principles applicable in awarding general damages for personal injuries. She failed to take into account the more recent and more relevant authorities where the injuries compared well although no two cases can be similar.

47. Accordingly, I find the appeal challenging quantum of damages justified. The award of KShs.300, 000 general damages for injuries that had healed with no evidence of continuing medication or hospitalization of the plaintiff/respondent herein was not supported by evidence and comparable decided cases.

48. In the premises, I allow this appeal, set aside the award of Kshs 300,000 made by the trial court and substitute the same with an award of Kshs. 175,000/= less 25% contribution. This sum shall earn interest at court rates from the date of judgment in the lower court until payment in full. The award on special damages remain undisturbed.

49. I further order that the appellant shall have costs of Kshs. 15,000/= as this appeal was fast tracked by this Court to save parties from incurring heavy costs. Costs shall be deducted from the amount held in the joint account by the parties' advocates.

50. 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