



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 92 OF 2015

FRANCIS KMANI WAWERU.....1ST APPELLANT

FRANCIS MAINA..... 2ND APPELLANT

VERSUS

EUNICE CHEROP KIPROTICH.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable C. Obulutsa Senior Principal Magistrate in CMCC NO. 690 of 2009 delivered on 31st July, 2015).

JUDGMENT

1. Francis Kimani Waweru and Francis Maina hereinafter referred to as the Appellants are aggrieved by the judgment of the Senior Principal Magistrate in which the magistrate gave judgment in favor of the Respondent Eunice Cherop Kiprotich hereinafter referred to as the Respondent for Kshs.645,543.00.

2. The appellant having been dissatisfied with the said judgment preferred an appeal before this court on grounds: -

- i) THAT the Learned trial Magistrate erred in law and in fact in finding that the plaintiff was entitled to damages that were too high in view of the injuries sustained by her.
- ii) THAT the Learned trial Magistrate erred in law and in fact in failing to consider the defendants' submission on quantum.
- iii). THAT the Learned trial Magistrate erred in law and in fact in failing to consider conventional awards for general damages in cases of similar injuries.
- iv). THAT the Learned trial Magistrate erred in law and in fact by making an award for general damages which is not supported by facts or law.
- v). THAT the Learned trial Magistrate erred in law and in fact in calculation of general damages which were inordinately high and failing to consider conventional awards for general damages in cases of similar injuries and circumstances.

3. The appellants pray for the appeal to be allowed with costs, the judgment on quantum and special damages be discharged and set aside with costs to the appellant and the court re-assess the award of general damages and special damages to commensurate with the respondent's injuries.

4. The appellants submitted that in the plaint, the plaintiff sustained a fracture of the neck, fracture of the left tibia, deep cut wound on the left leg and soft tissue injuries of the chest. This is contrary to what the plaintiff stated in examination in chief.

5. Dr. Wellington Kiamba report stated that the plaintiff had sustained a deep cut wound on the left leg but this injury was not reflected on the initial treatment notes. The respondent's both oral evidence, pleadings and initial treatment notes were contradictory on the exact injuries sustained by the plaintiff.

6. The court having relied on non-existent injuries as submitted, the award was definitely excessive and unjustified. Further, that although courts are vested with discretionary powers to award damages, the damages must be within the set limits and similar injuries should attract similar awards.

7. The plaintiff sustained a fracture of the neck and fracture of left tibia and was awarded Kshs. 600,000/=, the award herein was not only

excessive but also based upon an erroneous estimate given the nature of injuries sustained.

8. The appellant referred to *Justice Majanja's decision in Harun Muyoma Boge vs. Daniel Otieno Agulo(2015)eKLR where the plaintiff sustained blunt chest injuries, cut wound on the right wrist, deep cut wound on the right foot, fracture of the right tibia and fibula and soft tissue injuries. The plaintiff herein had also 5% disability. The court awarded Kshs. 300,000.*

9. Lastly, that judgments ought to be fair, just and reasonable. It should not be seen to enrich the aggrieved party nor punish the unsuccessful party.

10. The Respondent's in their submissions stated that the trial court considered the submissions on record and exercised its discretion in making judgment on quantum.

11. Secondly, that the medical documents and the plaintiff's testimony in court confirmed that the Respondent sustained a fracture of the left tibia among other injuries.

12. The appellants did not call any witness to controvert the respondent's injuries nor did they produce any medical report challenging the respondent's injuries hence the above ground should be dismissed with costs to the Respondent.

13. On quantum, the respondent sustained fracture of the left tibia, deep cut wound on the left leg and soft tissue injuries of the chest and therefore the award of Kshs.645,543.00. is sufficient.

14. The Respondent referred to the case of *Savco Stores Ltd vs David Mwangi Kamotho (2008)eKLR where the plaintiff who sustained fracture of the left tibia and other soft tissue injuries was awarded Kshs. 800,000 as general damages for pain, suffering and loss of amenities.*

15. Lastly, the damages awarded by the trial court were reasonable in light of the injuries sustained and therefore should not be disturbed as there is no misdirection on the part of the trial court on assessment of damages.

16. This appeal is limited to the issue of the quantum of damages awarded by the subordinate court. The parties agreed to canvass the appeal by way of written submissions.

17. As a first appellate Court, my duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

18. The duty of the court in a first appeal as aforementioned was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

19. The main issue for determination is whether the award was erroneous and manifestly high. The appellant submitted that the initial treatment notes produced; the respondent testimony in chief and the medical report, do not tally with the pleadings regarding the injuries the respondent sustained.

20. According to the initial treatment notes and the P3 form, the respondent sustained a fracture of the left tibia, deep cut wound on the left leg and soft injury to the chest.

21. In ***Kenya Power Lighting Company Ltd & Another –Vs- Zakayo Saitoti Naingola & Another (2008) eKLR***; the Plaintiff who sustained a fracture of the left femur mid shaft, blunt injuries to the lower jaw and left shoulder was awarded Kshs.300,000/= in general damages.

22. In ***Zacharia Mwangi Njeru –Vs- Joseph Wachira Kanoga (2014) eKLR*** a Plaintiff who suffered a fracture of tibia/tibula was awarded ksh.400,000/= in general damages.

23. In ***Clement Gitau -Vs- GKK (2016) eKLR***, the Plaintiff sustained a fracture of the tibia/fibula and bruises on the neck. An award of Kshs. 600,000/= was upheld on appeal.

24. From the foregoing, I do find that an award of 645,543/= is within an acceptable range and need not be disturbed. The appeal lacks merit and is herein dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 16th day of December, 2019

In the absence of:

Mr. Nyambane for the appellant

Mr. Gekonga for the respondents

Ms Abigael – Court assistant