



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 400 OF 2012

(CORAM: F. GIKONYO J.)

SEVENTH DAY ADVENTIST CHURCH (E.A.) LIMITED.....APPELLANT

Versus

MARY WANGARI GIKAMU.....RESPONDENT

JUDGMENT

1. The Appellant herein was the Defendant in the trial Court whereas the Respondent was the plaintiff. The Respondent sued the Appellant seeking general Damages and special damages for injuries he sustained in a road accident that occurred on 21/07/2006 along Nyanyuki-Meru Road. He was a lawful passenger in the Appellants Motor vehicle that was involved in the accident
2. Parties recorded a consent on liability at the ratio 85%:15% in favour of the Respondent. The trial Court found that the Respondent had suffered cut wounds on the right leg, blunt injury to the head and soft tissue injuries which healed leaving scars and functional disability of 15 % of the right hand.
3. The court considered the functional disability of the right hand and the scars and awarded general damages at Kshs 250,000/=. It also awarded special damages at Kshs 3,000/=.
4. Aggrieved by the said decision the Appellant lodged this Appeal raising four grounds of Appeal i.e.
 - (i) **The learned trial Magistrate erred in fact and law in the way she weighed the evidence before the court to determine the issue of quantum.**
 - (ii) **The learned Trial magistrate erred in law and in fact by awarding a manifestly excessive quantum of kshs. 250,000/= as general damages for soft tissue injuries which had completely healed.**
 - (iii) **The learned trial magistrate erred in law and in fact by considering injuries which had not been proven by any documentary evidence.**
 - (iv) **The learned Magistrate erred in law and in fact by failing to substantially and adequately consider the appellants submissions.**
5. On 31/5/2019 the Court directed the parties to canvass the appeal by way of written submissions. Both parties have since filed their respective submissions.
6. The Appellant submitted that the trial Magistrate failed to consider that the Respondent had not proved that he suffered head injuries and therefore by considering these injuries the trial court arrived at a wrong determination on quantum. To them, an award of Kshs. 70,000/= should be fair compensation as General Damages.
7. The Respondent submitted that the trial magistrate arrived at the right determination on quantum. It was argued that it was up to the appellant to call for a second medical examination of the Respondent, hence they should not be allowed to benefit from their failure to do so.

ANALYSIS AND DETERMINATION

Issues

8. Arising from the memorandum of appeal and the written submissions of the parties are the following issues for determination by the court: -

a) **Whether the trial court acted on wrong principles of law in making the award of damages; and**

b) **If (a) above is answered in the affirmative, what is the fair compensation for the injuries suffered?**

9. I will perform the task of first appellate court; re-evaluate the evidence and make own determination of the issues at hand. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123.**

10. In light of the argument that the Respondent did not suffer head injury, I find it necessary to set out pertinent elements of the evidence of the Respondent at all the three stages; examination-in-chief, cross-examination and re-examination.

11. In her evidence-in-chief, the Respondent stated that, on 21/7/2002 she was traveling on motor vehicle KAU 325D and was involved in an accident at Submoja. She was injured at the hand and leg and was treated at Neema General Hospital (pexh 1), Nairobi University and Kenyatta National Hospital. She was examined by Dr. Ikonya who prepared a medical Report (Pexh3).

12. In cross-examination she testified that she was injured on the head and leg. After the accident he had a headache. And, that the treatment record does not show the head injury.

13. In re-examination she told the trial court she was not sure she was injured on the head when she was at the hospital and that it was the day after the accident that she had a headache.

14. Dr. Ikonya in his report came to the following conclusion;

“She suffered a lot of pain and blood loss from the injuries sustained. The injuries were multiple soft tissue injuries, which cause harm and have recovered leaving residual pains, which will subside with time. She suffered temporary incapacity for one month. The residual pains and stiffness of the joints of the right hand would cause functional disability of about 15 % but will improve with time and physiotherapy treatment.

15. The Respondent did not suffer head injuries. That notwithstanding, is there lawful justification to disturb the award by the trail court?

16. The test is as set out by the Court of Appeal in the case of **Butler vs Butler CA No 49 of 1983** that an appellate court will interfere with the discretion of the lower court if: -

(a) **The court acted on wrong principles;**

(b) **The award is so excessive or so little damages that no reasonable court would;**

(c) **The court has taken into consideration matters it ought not to have considered, or not taken into consideration matters it ought to have considered, and in the result, arrived at a wrong decision.”**

17. In assessing the 15% incapacity, **Dr. Ikonya** factored the injuries of the finger. The trial court also relied on this analysis to come to its determination. His assessment could only have been dislodged if there was an opinion of a second medical examiner or other medical evidence. No such other evidence was availed. There is also nothing that discredits this report. I will therefore base my assessment of damages on the report.

18. I will also be guided by some past cases. But as I have stated in other decisions, comparable past judicial decisions only act as a guide in assessment of damages for personal injuries. They are not a principle of law or a dogma to be applied with the force of judicial precedent. It is the comparable incidents of injuries out of the decided cases, which help the judge to make best judgment dictated by the facts of each case, say, the nature and extent of injuries, post-traumatic and other consequences of the injury, inflation and so forth and so forth. It is plain that no case is exactly similar to the other in personal injury claims. In **Woodtex (K) Limited v Moses Otiangala Solomon [2005] eKLR** the applicant had suffered an amputation of the finger and other injuries. Disability was assessed at 15%. The appellate court agreed with the trial Magistrates decision that an award of Kshs. 290,000/= in general damages was sufficient. The decision was made on 8th August 2005.

19. In **Francis Ochieng & another v Alice Kajimba [2015] eKLR** the appellant was injured on the neck and had cut wounds on the right hand and knee. The Court found that the he injuries sustained by the respondent were multiple soft tissue injuries without any fractures. In considering the inflationary trends it found that an award of Kshs. 350,000/- would be reasonable in the circumstances.

20. The doctor opined that: -

“She suffered a lot of pain and blood loss from the injuries sustained. The injuries were multiple soft tissue injuries, which cause harm and have recovered leaving residual pains, which will subside with time. She suffered temporary incapacity for one month. The residual pains and stiffness of the joints of the right hand would cause functional disability of about 15 % but will improve with time and physiotherapy treatment.

21. On the basis of the injuries suffered encapsulated in the above conclusion by the doctor herein, and in light of the above analysis of

decided cases, I do not think the trial court was out of order in the Assessment of General Damages in the sum of Kshs. 250,000. I therefore find that this appeal lacks merit and is dismissed.

22. Each party shall bear their own costs.

Dated and signed at Meru this 20th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 5th day December 2019

L. NJUGUNA

JUDGE