



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**HIGH COURT CIVIL APPEAL NO. 27 OF 2017**

**LAMU BUS SERVICES.....1<sup>ST</sup> APPELLANT**

**BOARD OF GOVERNORS,**

**LORETO CONVENT PRIMARY SCHOOL.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CAREN ADHIAMBO OKELLO.....RESPONDENT**

**(Being an appeal from the original judgement and decree dated 14/11/2013 in the Principal Magistrate's Court at Narok, in Civil Suit No. 86/2011, Caren Adhiambo Okello v. Lamu Bus Services and Another)**

**JUDGEMENT**

1. The appellants have appealed against the quantum of damages in the sum of Ksh.215,970/=, which were awarded to the respondent/plaintiff.
2. The appellants have raised 4 grounds in their memorandum of appeal to this court. Additionally, their counsel has filed written submissions in support of the appeal.
3. The respondent has opposed the appeal and has supported the judgement and decree of the trial court. Her counsel has filed written submissions in opposition to the appeal.
4. In grounds 1 and 2, counsel for the appellants has faulted the trial court both in law and fact for failing to consider their submission on quantum of damages. In this regard, the trial court took into account the evidence of the defence. The defence called Dr. Leah Wainaina (DW 1). DW 1 testified on behalf of Dr. Isaac Leole, who had terminated his services with Direct Line Insurance Company. It was her evidence that the respondent was examined by Dr. Isaac Leole. She therefore produced the report of Dr. Leole in evidence as Dex 1 dated 15/3/2011. The report shows that the appellant sustained blunt trauma to the left shoulder. She also sustained a cut wound on the left chin. It was her evidence that an x-ray was called for, as the appellant did not have an x-ray report. It was also her evidence that the injuries sustained by the appellant had healed by the time of the examination.
5. Furthermore, she testified that later the appellant came with x-rays which they sent to their experts. The expert found that the appellant had no fractures. The expert also found no abnormalities as per the report dated 30/7/2013. She also testified that the appellant suffered soft tissue injuries, which had healed without leaving any permanent disabilities.
6. While under cross - examination, she testified that the radiological report was not signed. In re-examination, she testified that the medical treatment notes of Narok District Hospital where the appellant was first treated showed that the appellant suffered soft tissue injuries. Similarly, the treatment notes of Rachuonyo district hospital where the appellant was also treated showed that the appellant suffered soft tissue injuries. Finally, she testified that the treatment notes, showed that she suffered a dislocation.
7. The trial court in its judgement considered the medical evidence of DW 1 including the defence exhibit 1 and the evidence of Dr. Omuyoma (PW 2) together with the treatment notes from both Narok and Rachuonyo District Hospitals. The court then proceeded to consider the medical reports which were produced as exhibits both for the defence and the plaintiff. The court proceeded to pronounce itself as follows:

*“having considered the plaintiff's case, the documents produced as exhibits, the defence case and exhibits produced and the submissions filed by both parties, I do find that the plaintiff has proved her case on a balance of probabilities and judgement is entered as follows:*

1. General damages for pain and suffering Kshs.200,000/=

2. Special damages Kshs.15,970/-

Total Ksh.215,970/=.”

8. In view of the foregoing findings of fact, I find that the trial court fully considered the submission of counsel for the appellants and made the above awards for damages. I therefore find that these grounds are without merit and are hereby dismissed.

9. In ground 3, the appellants have faulted the trial court both in law and fact for awarding general damages for injuries that were not sustained by the respondent. In this regard, the discharge summary from Narok District Hospital showed that the appellant suffered soft tissue injuries. There is no indication in those notes that the appellant sustained a fracture. Furthermore, the evidence of Dr. Omuyoma (PW 2) in his report dated 19/1/2011 showed that the appellant suffered soft tissue injuries on the left shoulder and a deep cut wound on the left chin.

10. The medical examination report popularly known as the P3 form showed that the appellant suffered soft tissue injuries including a dislocation on the left shoulder and a cut wound in the lower limbs.

11. In his second report, Dr. Omuyoma (PW 2) found that the appellant had suffered the following injuries:

1. A dislocation of the left shoulder joint
2. A deep cut wound on the left chin
3. A deep cut wound on the left thigh
4. Blunt injury to the left thigh

PW 2 found that movements of the left shoulder joint were slightly restricted. He also found from the x-ray report in respect of the left shoulder joint that there was a dislocation of that left joint. He further found a 3 cm long scar on the left chin and in his opinion, the appellant sustained injuries which he classified as harm. In the circumstances, I find that the trial court awarded damages for injuries that were sustained by the appellant. This is clear from the judgement. I therefore find no merit in this ground of appeal and is hereby dismissed.

12. In ground 4, the appellants have faulted the trial court both in law and fact for failing to consider conventional awards for general damages in comparable and similar cases. In this regard, counsel for the appellant cited the case of *Denishire Muteti Wambua v. Kenya Power and Lighting Co. Ltd [2013] eKLR*, in which that court held that in the assessment of damages, comparable injuries should as far as possible be compensated by comparable awards while keeping in mind the correct level of awards in similar cases. Counsel also cited the case of *Kaimosi Tea v. Thomas Busolo [2011] eKLR*, in which the court awarded general damages in the sum of Shs.60,000/= for soft tissue injuries namely a painful wound on the left leg which had healed. Counsel further also cited the case of *Sokoro Saw Mills Limited v. Grace Nduta Ndungu [2006] eKLR*, in which the Court of Appeal reduced an award of Shs.80,000/= to Shs.30,000/= as general damages for similar injuries.

13. Furthermore, counsel for the appellants cited the case of *Peter Kahungu & Another v. Sarah Norah Ongaro [2004] eKLR*, in which the High Court reduced an award of Shs.150,000/= to Sh.80,000/= for more serious injuries than in the instant appeal.

14. Finally, counsel for the appellants has cited the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Another[1968] EA 123*, in which the Court of Appeal set out the principles to be applied by an appeal court in re-assessing the evidence produced in the trial court. According to that case, it is the duty of an appeal court to evaluate and re-examine the evidence adduced at the trial court in order to reach conclusive findings of fact, while bearing in mind that the appeal court did not see or hear the live testimony of the witnesses.

15. I have reassessed the medical evidence of Dr. Omuyoma (PW2) and Dr. Leah Wainaina (DW1) and I find that the respondent suffered soft tissue injuries including a dislocation of the left shoulder joint. I do not find that the appellant sustained a fracture of that joint. The evidence of Dr. Leah Wainaina clearly indicates that the radiological report was not signed and is therefore inadmissible in evidence. It therefore follows that there was no evidence showing that there was a fracture of the left shoulder joint.

16. I have considered the authorities cited by counsel for the appellants in respect of awards for general damages. I find that those authorities were in respect of injuries that were not as serious as the ones sustained by the appellant. I also find that some of those authorities were decided 6 years before the judgement in the instant appeal was delivered.

17. I bear in mind that the award of general damages is in the discretion of the trial court. I also bear in mind that an appeal court may only interfere with the awards of the trial court in the following circumstances:

1. Where the award is based on no evidence
2. Where the trial court proceeded on a wrong principle
3. Where the trial court has failed to take into account a relevant factor.

4. Where a trial court has taken into account an irrelevant factor

5. Where the trial court has made an award that is so inordinately high or low as to amount to an erroneous estimate.

18. After taking into account the above principles into consideration, I find that the instant award is inordinately high as to amount to an erroneous estimate. In the circumstances, I hereby set aside the judgement and decree of the trial court and in its place I hereby enter judgement for the respondent in the sum of Shs.130,000/- general damages together with interest at court rates. The appellants will have a half of the costs of this appeal, since they have succeeded and failed in other grounds.

Judgement delivered in open court this 4<sup>th</sup> day of April 2018 in the absence of both parties and their counsel.

**J. M. Bwonwonga**

**Judge**

**4/4/2018**