



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 31 OF 2016

From the judgment of Hon C.A Mayamba (SRM) delivered on 1st July 2016, in Githongo SRMCC No. 25 of 2015.

(CORAM: GIKONYO J)

JOSPHAT MUTEMBEI.....APPELLANT

-Versus-

PHINEAS MUTEITHIA.....1ST RESPONDENT

JUDGMENT

[1] This Appeal arises from the judgment of Hon C.A Mayamba (SRM) delivered on 1st July 2016, in Githongo Senior Resident Magistrate Court Civil Suit No. 25 of 2015, in which the Learned Trial Magistrate awarded the Respondent a sum of Kshs 800,000 in general damages for pain and suffering and loss of amenities arising from injuries sustained in a road traffic accident that occurred on 10th March 2014.

[2] Being aggrieved by the said judgment, the Appellant filed this appeal and preferred the following grounds set out in the memorandum of appeal filed in court on 9th June 2017;

a) The Learned Trial Magistrate erred in law and fact in awarding excessive damages in favour of the plaintiff without any legal and/or evidential justification.

b) The Learned Magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deriving an erroneous finding/conclusion.

c) The Learned Magistrate erred in law and fact in falling to appreciate as follows:

(i) That the evidence adduced in support of the plaintiff's case was incongruous with the pleadings.

(ii) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining damages awarded.

d) The Learned Magistrate erred in law and fact in failing to appreciate the impeccable defence of the 1st defendant and thereby arriving at a wrong and erroneous conclusion condemning the 1st defendant to damages of Kshs 800,000 on the alleged injuries which could not attract such an excessive award.

e) The Learned Trial Magistrate erred in law and fact in awarding excessive damages without regard to the 1st defendant's submissions.

f) The Learned Magistrate erred in law and fact in awarding Kshs 10,650 special damages without any justification.

g) The Learned Magistrate erred in law and fact by awarding excessive damages beyond the scope of evidence and or legal entitlement.

h) The Learned Magistrate erred in law and fact in entering judgment in favour of the plaintiff against the 1st defendant in spite of the plaintiff's miserable failure to establish his case more especially on damages.

[3] When the matter came up for hearing on 13th July 2017, it was agreed that the Appeal be disposed of by way of written submissions. This

Appeal is only on the issue of assessment of damages, the parties having agreed to apportion liability in the ratio of 80:20 in favour of the Respondent.

Submissions by the Appellant

[4] Briefly, it was submitted for the Appellant that the sum of Kshs 800,000 awarded by the trial court as general damages for pain and suffering was inordinately high considering the nature of injuries sustained by the Respondent, Further argument was that the Learned Trial Magistrate erred in relying on the case of **MOHAMMED MAHMOUD JABANE vs. HIGHSTONE BUTTY TONGOI OLENJA KISUMU HCCA NO.2 OF 1986** as the plaintiff in that case had sustained far more serious injuries. Consequently, the Appellant urged the court to allow the appeal and assess general damages for pain and suffering afresh

Submissions by the Respondent

[5] The Respondent submitted that the Learned Trial Magistrate while considering the amount of damages payable to the Respondent considered the injuries reflected in the medical report. To them, it was a conventional principle of law that in claims for general damages for personal injury claims, courts strive to maintain uniformity by ensuring that similar or comparable injuries attract similar or comparable awards in damages. The Respondent had relied on previously decided cases in which the claimants had similar injuries. Consequently, the Respondent submitted that the appeal lacks merit and urged the court to dismiss the same with costs to the Respondents.

ANALYSIS, FINDINGS AND DECISION

[6] I have carefully considered this appeal, the submissions by the parties and the authorities relied upon by the parties. This being the first appeal, the court should evaluate the evidence and come to its own conclusions except it is reminded that it neither saw nor heard the witnesses give their testimonies. See *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Kiruga v Kiruga & Another* [1988] KLR 348. In this exercise, the court is not beholden or compelled to adopt any particular style. However, it must avoid merely rehashing of evidence as was recorded. Instead, it should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Then express court's overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

[7] As alluded to earlier, this Appeal is only on quantum of damages as liability was apportioned by consent of parties at 80:20 in favour of the Respondent. According to a medical report by Dr. Nicholas Koome who examined the Respondent, the Respondent suffered the following injuries; brain contusion, fractured skull, soft tissue injury to the mandible, broken upper incisor teeth and multiple cut wounds on the left hand. The Learned Trial Magistrate guided by the authority of **MOHAMMED JABANE vs. HIGHSTONE TONGOI OLENJA CIVIL APPEAL NO. 2 OF 1996** (supra) awarded the Respondent Kshs 800,000 in general damages for pain and suffering, after noting that the injuries sustained by the Respondent were life threatening as they involved a skull which could lead to serious health complications.

Test of law

[8] The principles in which an appellate court will interfere with an award of damages were clearly set out by the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI vs. A.M. LUBIA AND OLIVE LUBIA**, *inter alia* that:

“ the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be wholly erroneous estimate of the damages.

[9] Similarly, in **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1** it was stated thus;

“ a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle” - see EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982 – 1988) 1 KAR, 278.

[10] In **KAKAMEGA HCCA 21/2008 WEST KENYA SUGAR LTD vs. SABION NDULA KAYUGIRA**, an award of Kshs 500,000/= was made for a depressed skull with multiple soft tissue injuries. Likewise, in **MOMBASA HCCA NO. 39 OF 1998 (UR) ELPHAS WANIRA MAKIN vs. EXCELLENT SECURITY SERVICES LTD.** Onyancha J awarded the Appellant general damages of Kshs 500,000/= for a depressed skull fracture.

[11] In assessing damages, courts should be guided by comparable awards in decided cases. Except, however, it must be noted that injuries will not be exactly the same in two cases. It must also take into account the age of the case relied upon and the inflationary trends. The trial magistrate was truly alive to these considerations in this case. Therefore, he did not apply wrong principles. He also was guided by comparable awards in decided cases in making the award. The injuries suffered were also severe. Thus, the amount awarded is not inordinately high or an erroneous estimate of damages. This court finds no reason to interfere with the award made by the trial court for General damages.

[12] On special damages, and contrary to the Appellants submissions, the Learned Trial Magistrate awarded Kshs 2,000 being the only figure that he found to have been specifically pleaded and proved as by law required. I find no reason to disturb the award as given by the Learned Trial Magistrate.

[13] For those reasons, this appeal is without merit and is hereby dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Meru this 7th day of May 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for respondent

Mr. Wamache advocate for Mr. Moses for Appellant

F. GIKONYO

JUDGE