



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 1 OF 2016

JULIUS NDWIGA..... APPELLANT

V E R S U S

DAMARIS MWENDE KASEMBI.....RESPONDENT

J U D G M E N T

1. The appellant was dissatisfied with the judgment of Embu Chief Magistrate delivered on 14/12/2015. The parties recorded consent judgment on liability with the respondent getting 90% while the defendant was to contribute 10%. An award of Kshs.285,000/= for both general and special damages was made in favour of the respondent.

2. The grounds relied on in this appeal are that the award was inordinately high and that the guidelines in the Insurance Motor Vehicle (3rd party risks) Amendment Act was not complied with in making the award. Secondly, the appellant contends that conventional awards were not considered in the judgment. The appellant urges the appellate court to set aside the award and assess the damages.

3. The principles guiding court in interfering with an award of damages were set out in the case of **NAKURU HCCA No. 323 of 2010 KENYA POWER & LIGHTING CO. LTD VS NEHEMIAH WACHIRA [2014] eKLR** where it was held:-

The principles that allow an appellate court to interfere with an award are laid down in the renowned case of ARROW CAR LITED VS BIMOMO & 2 OTHERS, Civil Appeal No. 344 of 2001 and have since become trite as it can be observed in all subsequent authorities in similar cases. The Court of Appeal set down the principles that need to be observed which are inter alia;

(a) an irrelevant factor was taken into account or;

(b) A relevant factor was left out or;

(c) The amount awarded as damages is so inordinately low or manifestly excessive that it amounts to a wholly erroneous estimate....”

4. The appellant agreed with the above principle when it cited the case of **GEORGE KINYANJUI T/A CLIMAX COACHES & ANOTHER VS HASSAN MUSA AGOI [2016] eKLR** where the same principle was cited.

5. The appellant cited the case of **DENSHIRE MUTETI WAMBUA VS KENYA POWER & LIGHTING CO. LTD [2013] eKLR** where it was held that the general method of approach in assessing damages is that comparable awards keeping in mind the correct level of award in similar cases.

6. In his argument that reducing the award was necessary, the appellant cited the case of **PAUL KIPSANG KOECH & ANOTHER VS TITUTUS OSULE OSORE [2013] eKLR** where Gikonyo, J. found that assessment was done erroneously in principle and reduced the damages from Kshs.300,000/= to Kshs.200,000/=.

7. Similarly in the case of **JOHN MUTJISYA VS NTHAMBI PAUL MUTISYA [2006] eKLR** where the respondent had suffered loss of the permanent upper left incisor tooth, had blunt abdominal pain with trauma to the liver and gall bladder as well as a laceration wound on perinea region and bruises on lower limbs. The appellate court reduced the award from Kshs.340,000/= to Kshs.200,000/=.

8. The appellant argued that the honourable magistrate in this case relied on the wrong principles and arrived at an inordinately high award of Kshs.300,000/=. General damages of Kshs.100,000/= to Kshs.200,000/= were proposed by the appellant as fair and reasonable.

9. The respondent opposed the appeal. In its contention that this court should not interfere with the award of damages for it was not inordinately high as alleged. The respondent argued that the damages were reasonable and that all the relevant factors were taken into

consideration.

10. The respondent contended that the three grounds of appeal are related and dwelt on the Insurance Motor Vehicle (3rd party risks) Amendment Act No. 50 of 2013. In this regard, the respondent said that the said amendment was declared unconstitutional in the case of **LSK VS ATTORNEY GENERAL & 3 OTHERS [2016] eKLR**.

11. In the prayer for reducing the award the respondent cited two cases arguing that the court relied on two cases with similar injuries and arrived at a reasonable award which was not inordinately high in any way. She urged the court to uphold the award and dismiss the appeal.

12. It is the decision of **LSK VS AG & 3 OTHERS (supra)** the late honourable Judge Onguto, J.L. that Sections (a), 3(b) and 6 of the Insurances (Motor Vehicle Third Party Risks) Amendment Act, 2013 1A and B of Sections 10 of Cap. 405 were declared unconstitutional, null and void. The honourable magistrate would not have been expected to use the said amendments to Cap. 405 after the court declared them null and void. The discretion of assessing general damages lies with the court and cannot be removed. I agree with the argument by the respondent's counsel that even if the amended sections were not declared unconstitutional, null and void, the court was possessed of its discretionary power to assess damages.

13. The other two grounds of appeal fault the learned magistrate for committing an error in principle for failing to apply the said amendment sections. It is correct to say that the three grounds of appeal revolve around the amendments to Cap 405 which no longer exist and which never affected the discretion of the court to award damages even before they were quashed. The sections were only applicable in declaratory suits.

14. I have looked at the judgment of the honourable magistrate and note that he referred to two cases with comparable injuries and made a comparable award. The damages of Kshs.300,000/= are not in my considered opinion inordinately high.

15. The respondent lost the right pre-molar tooth on the lower jaw, had a laceration on the knee and had pain on the anterior chest wall.

16. In making the award the magistrate took into consideration factors of inflation and all other relevant factors.

17. It is my considered view that this appeal is indeed hopeless and vexatious and a waste of the precious time of this court. The appellant has not proved even a single ground of the appeal.

18. Consequently, I find that the appeal lacks merit and I dismiss it with costs.

19. The appellant will pay the costs of this appeal and of the court below.

20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Ngige for Mr. Muthee for Appellant

Mr. Ogweni for Respondent