REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCA NO. 126 OF 2017

MUGECHA ELIUD *a.k.a*

ELIUD NJENGA MUGESHA.....DEFENDANT/APPELLANT

-VERSUS-

NDAVI NZIU a.k.a

JEREMIAH NDAVI NZIU.....PLAINTIFF/RESPONDENT

-VERSUS-

(Being an Appeal from the Judgment of Hon. P.M. Wambugu (SRM)in the

Senior Resident Magistrate's Court at Kilungu Civil Case No.9 of 2016,

delivered on 31st January 2017).

JUDGEMENT

INTRODUCTION

1. The Respondent filed a suit in the lower Court seeking general damages, special damages, future medical expenses, cost of the suit and interest for injuries sustained from a road traffic accident on 03/06/2015 along the Nairobi-Mombasa road.

2. The Appellant filed his defence on 20/04/2016 and the matter was eventually slated for hearing. When the matter came up for hearing on 08/11/2016, the parties recorded a consent on liability in the ratio of 80:20 in favour of the respondent. Further, they agreed to submit on quantum and attach all the supporting documents.

3. Judgment was eventually delivered and the respondent was given a total award of Kshs 1,244,100/= being Kshs 1,120,000/= general damages *(after contribution)*, Kshs 100,000/= for future medical expenses and Kshs 24,100/= for special damages.

4. Being aggrieved by the award, the appellant filed this appeal and listed 8 grounds as follows;

1. *The learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs 1,244,100/= by failing to appreciate and be guided by the prevailing range of comparable awards granted that the injuries sustained by the plaintiff were soft tissue.*

2. *The learned magistrate erred in law in making such a high award as to show that he acted on a wrong principle of law.*

3. *The learned magistrate's award on damages was so high as to be entirely erroneous.*

4. *The learned magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.*

5. That the assessment and award of general damages is manifestly excessive and inordinately high as to amount to a miscarriage of justice.

6. That the award on quantum was made without considering the appellant's submissions and authorities.

7. That the learned magistrate erred in law and fact by awarding special damages that were not specifically pleaded and proved.

8. That the whole judgment on quantum was against the weight of evidence before the Court.

5. The appeal was canvassed by way of written submissions.

THE SUBMISSIONS

6. The Appellant submits that the damages awarded were not commensurate with the injuries suffered by the respondent. He contends that the injuries enumerated by the Trial Magistrate in his judgment were not accurate in light of the two medical reports which were produced as evidence and as such, the trial magistrate failed to take into account a relevant factor when assessing the damages.

7. Further, it was his submission that the medical report by the respondent's Doctor indicated the healing of the said injuries was anticipated without permanent incapacitation.

8. It was also his submission that his Doctor recommended a re-assessment of the injuries after 6-8 months to check on the healing.

9. The Appellant further submits that, there is no indication of how the award of Kshs 1,400,000/= as general damages was arrived at and that the Court failed to consider that the Plaintiff's injuries had healed with no permanent incapacitation.

10. The Appellant submits that the trial Court should not have taken into consideration any future medical expenses because they were not specifically pleaded as special damages. They relied on **Civil Appeal No. 26 of 2013; Simon Taveta –Vs- Mercy Mutitu Njeru** where the Court of Appeal stated as follows;

> ***"And as regards future medication (physiotherapy), the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded if evidence thereon is to be led and the Court is to make an award in respect thereof. That follows from the general principle that all loses other than those which the law does not contemplate as arising naturally from the infringement of a person's legal rights should be pleaded."***

11. The Appellant contends that the medical report by Dr. Wambugu does not indicate any figure for future medical expenses and as such, there was no basis for making an award under that head.

12. In opposing the appeal, the respondent submits that the injuries pleaded are supported by the medical report, the P3 and treatment notes. Further, it is submitted that when the consent was recorded to admit the documents without calling their makers, it was presumed that the appellant had admitted the injuries sustained as well as the Doctor's opinion on the estimated cost of the metal implant removal.

13. Further, the Respondent submits that the authorities relied upon by the appellant in the Trial Court are not comparable at all in that, none of the plaintiffs in the cited authorities had a metal implant. That in our case, the respondent had a more severe fracture which was characterized by Dr. Wambugu as 'comminuted with bone loss'.

14. On the issue of the future medical expenses, it was his submission that the same was specifically pleaded and prayed for.

DUTY OF COURT

15. It is now settled that the duty of a first Appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

16. I have looked at the record of appeal, the grounds of appeal as well as the rival submissions and the only issue for determination is whether the damages awarded should be disturbed by this Court.

WHETHER THE DAMAGES AWARDED SHOULD BE DISTURBED

17. Award of damages is largely a question of discretion and the principles which should guide an Appellate Court in deciding whether to interfere with such an award are well settled. The Appellate Court should be satisfied that in assessing the damages, the Trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

18. The injuries indicated in the judgment were pleaded by the Respondent and were also indicated in Dr. Mutunga's medical report dated 17/12/2015. They are as follows;

a) Blunt injury to the abdomen

b) Fracture right femur distally

c) Blunt injury right arm

d) Blunt injury right leg

e) Blunt injury right knee.

19. On the other hand, Dr. Wambugu *(appellant's Doctor)* in his medical report dated 16/08/2016, opined that the Respondent sustained the following injuries;

a) Compound communited fracture right femur supracondylar region with intra-articular involvement and bone loss.

b) Laceration wounds right shoulder region.

20. The record shows that the two medical reports were admitted into evidence by consent and there was no demonstration or indication that one would be superior to the other. It was therefore in order for the Trial Magistrate to refer to both of them in arriving at his decision.

21. Most importantly, a look at the Appellant's submissions before the Trial Court reveals that he acknowledged the injuries pleaded by the plaintiff. He stated as follows;

"Both medical reports and other medical documents confirmed the plaintiff's injuries as…(enumerates them as per plaint)"

22. The judgment by the Trial Court clearly indicated that the injuries sustained by the respondent were as per the medical reports provided.

23. It is therefore idle and mischievous for the Appellant to turn around on appeal and claim that the Trial Court did not indicate where it got the enumerated injuries from. Accordingly, there is really no dispute as to the nature of injuries sustained by the Respondent.

24. It is evident from the judgment that the Trial Magistrate was alive to the requirement that 'comparable injuries should attract comparable awards'. The Respondent relied on **Nairobi HCCC No. 2079 of 1998** where Kshs 2,000,000/= was awarded as general damages. I have looked at the authority and it is my considered view that the injuries therein were more serious hence not comparable.

25. I have also looked at the Respondent's authorities and as rightly submitted by the Appellant, none of the Plaintiffs therein had metal implants. Again, it is my view that they are not comparable. According to the Trial Magistrate, the Appellant's proposal was too low and that of the Respondent was too high, a clear indication that the authorities placed before him were of little assistance. At this juncture, let me just say that, it may not be codified anywhere but parties have a duty to assist the Court by providing helpful authorities.

26. When Dr. Wambugu examined the respondent on 16/08/2016, the fracture had not healed. That was approximately three months after the accident. According to his medical report, the fracture was managed by open reduction and internal fixation using metal implants. His opinion was that final assessment for residual permanent incapacitation would only be possible once bone union had occurred.

27. He recommended that the Respondent be reviewed after another 6-8 months which essentially means that by the time the judgment was delivered on 31/01/ 2017; the Respondent had not even gone back for the recommended review. Accordingly, the submissions by the appellant that *"the injuries had healed with no permanent incapacitation"* are contrary to the Doctor's opinion and have no basis.

28. I will now turn to several authorities which will offer guidance on whether the damages awarded were inordinately high.

29. In **Kajiado HCCA No. 39 of 2015; Salome Mantai & Anor –Vs- Lucia Wanjiru Mwangi (2016) eKLR**, the Respondent sustained the following injuries; fracture 1/3 of the humerus drop, fracture right clavicle, scapula comminuted fracture and haeomo pneumo thorax. The doctor's prognosis after 7 months was that the fracture had not resolved and estimated that the implant would be removed at a cost of Kshs 100,000/=. An award of Kshs 1,500,000/= was reduced to Kshs 700,000/=.

30. In **Nairobi HCCA No, 574 of 2011; Sammy Ngugi Mugo –vs- Mombasa Salt Lakes Ltd & Anor (2014) eKLR** the Appellant sustained a comminuted fracture of the left arm. He underwent surgery and screws and plates were implanted. He required further surgery to remove the metals. The doctor estimated that they would be removed at a cost of Kshs 140,000/=. The Court awarded general damages of Kshs 450,000/= as well as future medical expenses of 140,000/=.

31. In **Chuka HCCA No 19 of 2015; James Muriithi Ireri –vs- Cyprian Mugendi Igonya & 2 others (2016)eKLR** the Appellant had suffered a compound communited fracture of the left tibia and fibula bone, soft tissue injuries over the left forearm, upper back and face. The fracture had healed with slight mal-alignment and that he would require removal of the plate at Kshs.50,000/-. An award of Kshs 400,000/= for general damages was maintained on appeal. The cost of future medical expenses was also allowed.

32. In light of comparable authorities, the damages awarded by the trial Court were inordinately high and that warrants interference by this Court. It is my considered view that Kshs 700,000/= as general damages will be adequate compensation in the circumstances.

33. With regard to future medical expenses, paragraph 6 of the plaint states as follows;

"The plaintiff avers that he requires to undergo a future operation to remove a metal plate in situ at a cost of Kshs 150,000/= which he also prays from the defendant as cost of future medication."

34. Further, prayer (b) in the plaint is *"costs of future medical operation/mediation"*. There was consensus between the two doctors that indeed the respondent had a metal implant.

35. Doctor Mutunga estimated that it would be removed at a cost of Kshs 150,000/=.

36. Again, it really is idle for the Appellant to claim that future medical expenses were not specifically pleaded yet the plaint is clear for all and sundry? The amount need not be under the heading 'special damages'. As long as it is communicated in such a way that the other party and the Court understand that there is an anticipatory loss being claimed, it's location in the plaint is a non-issue.

37. The award of Kshs 100,000/= for future medical expenses was erroneous in my view because there was no contrary medical evidence to challenge Dr, Mutunga's prognosis. It should be set aside and be substituted with an award of Kshs 150,000/=.

38. With regard to special damages, the pleaded amount was Kshs 24,100/=. In awarding the amount, the Trial Magistrate stated as follows; *"The plaintiff produced receipts of Kshs 24,100/="*. I have seen a bundle of receipts on record and although some are not legible, I have no reason to doubt the accuracy of the calculation done by the Trial Magistrate.

39. Accordingly, that award should not be disturbed. It was however erroneous for the Trial Magistrate not to subject the special damages to the agreed contribution of 20%.

40. For avoidance of doubt, the award is thus adjusted as follows;

General damages: 700,000/=

Special damages: 24,100/=

Total 724,100/=

Less 20% contribution: 144,820/=

579,280/=

Add FME: 150,000/=

Grand total 729,280/=

CONCLUSION

41. The court thus makes a finding that the appeal has merit and is hereby allowed on the following terms:-

i. For avoidance of doubt, the award is thus adjusted as follows;

General damages: 700,000/=

Special damages: 24,100/=

Total 724,100/=

Less 20% contribution: 144,820/=

Sub-total 579,280/=

Add future medical expenses 150,000/=

Grand total 729,280/=

ii. The Appellant is awarded half costs in the appeal.

SIGNED DATED AND DELIVERED THIS 20TH DAY OF SEPTEMBER, 2018, IN OPEN COURT.

.....

C. KARIUKI

JUDGE