



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO 24 OF 2013

ANTONY LUSWETI WANYONYI.....APPELLANT

VERSUS

TRANS EAST LTD.....1ST RESPONDENT

BENARD NGORI.....2ND RESPONDENT

(An Appeal from the judgment and decree in Original Bungoma Chief Magistrate's Court

Civil Case No. 348 of 2011 delivered on 17th day of April 2013 by B.A. Atiang (PM)

JUDGMENT

This is an appeal is on quantum of awarded damages. The grounds being that the trial magistrate awarded damages that were not commensurate with the injuries suffered by the Appellant and that the award of Kshs.173,000 general damages was so inordinately low and amounted to miscarriage of justice and that the evidence on quantum was not properly appraised, the authorities of the appellant were disregarded, and irrelevant factors were considered in awarding the general damages.

Pw1 No. 85011 PCL Everline Cheronno the investigating officer testified that on 31.3.11 at 5.30 pm along Bungoma/Kanduyi road there was an accident. Benard Ngori the driver of motor vehicle registration No. KBF 236 AZD 0693 was charged. He was carelessly driving the vehicle.

Pw2 Antony Lusweti Wanyonyi, the Appellant/plaintiff testified that on 31.3.2011 he was driving a school bus. He was from work and was going to Kanduyi when he got in the middle store he was hit while besides the road by motor vehicle registration 236 ZD 0693 and he injured his leg, neck, shoulder, back and hand joint. His leg got broken as well and was treated at Bungoma District Hospital and was admitted for 3 days. He produced documents in support of his case being a police abstract (Exh.1), patient record book (Exh.2), P3 form (Exh.3), receipt issued by Dr. Mulianga for Kshs.3,000/= (Exh.4), two receipts issued by Bungoma District Hospital (Exh. a and b), copy for record dated 24.5.11 (Exh.6a), copy of records dated 9.5.11 (Exh.6b), medical report prepared by Dr. Mulianga (Exh.7a).

Pw3 James Swaleh testified that on 31st march 2011 he was hit by motor vehicle registration number KBF 236AZD 0693 while walking towards Kanduyi. Pw3 told court that he saw the motor vehicle hit pw1 while he was besides the road.

The defence did not call any evidence save a certificate of examination and test of vehicle.

The trial court after considering the evidence entered judgment for the plaintiff against the defendants jointly and severally for Kshs.173,300/= on 17th April, 2013.

This being the first appellate court it will reevaluate the entire evidence and the award of court and come up with its own independent findings on the issues raised in this appeal.

The appellant filed submissions that supported his appeal on quantum. He relied on the case of **MWINYI AHMED MWINYI vs LIARAT A. KHAN MSA. H.C.C.C NO. 689 OF 1991** where court awarded Kshs.184,000/= in 1994 where the plaintiff suffered fracture of the left fibula and soft tissue injuries. In the case of **BLUE CAT PORT SERVICES vs BENSON NYAGAH NJUE APPEAL NO. 2 OF 2013** where the plaintiff suffered fracture of the left tibia/fibula and the court awarded Kshs.490,000/= on 13/9/2011 and upon appeal the appeal was dismissed and the award upheld. **MONICAH KASLONDU MATULE vs SHEIKH MOHAMMED ALI & ANOTHER NAIROBI H.C.C.C NO. 4163 OF 1993** case where court awarded 350,000 for general damages where the plaintiff had suffered similar injuries in 1993.

The respondents in their submissions submitted that in order to appreciate how the trial court arrived at this award it is important to consider the evidence. That the Appellant claimed that he was injured on his leg, neck, shoulder, back and hand joint and stated that his left leg was broken. That he treated in Bungoma District hospital and was admitted for 3 days. However despite these claims he failed to produce a discharge summary to prove this or any medical documents to show that he was admitted. They submitted that it is trite law that claims must be backed by evidence and that court should also consider that grant of general damages is discretionary.

Respondents further submitted that in assessing quantum, court of appeal should consider facts of the case, and that comparable injuries should attract comparable awards and they quoted the case of **Butler vs Butler Civil Appeal No. 49 of 1993** which sets out the test that should be applied in interfering with an award of damages.

The appellant in his evidence stated that he suffered the following injuries: injuries on the leg, neck, shoulder, back and hand joint and his left leg got broken. That he was treated and admitted for 3 days. The medical evidence indicated that Xray showed fracture of the left fibula. The treatment notes show he was admitted from 31/3/2011 to 1/4/2011.

The trial magistrate in arriving at the award stated:

“From the pleadings and medical records the plaintiff sustained the following injuries

a. Soft tissue injuries

b. Fracture of the left fibula

c. Psychological trauma.

The plaintiff's counsel opined Kshs.800,000 as general damages and the defendant counsel suggested Kshs.130,000. I have gone through the cited authorities viz-a-viz the plaintiff and it is my humble view that Ksh.165,000/= will adequately compensate the plaintiff”

From the records I can establish that indeed the appellant was admitted for 3 days vide the Treatment Notes Exh.2 that states that the appellant was admitted on 31/3/2011 and discharged on 1/4/2011. It was therefore an oversight from the trial magistrate to state that no treatment notes were produced to prove admission. Going by the cited cases of the appellant and considering the case of **MWINYI AHMED MWINYI vs LIARAT A. KHAN MSA. H.C.C.C NO. 689 OF 1991** where court awarded the plaintiff in the year 1994. 180,000 for fracture of the left fibula and soft tissue injuries I find that an award of Kshs.173,000 in the year 2013 was inordinately low and not comparable to awards in where similar injuries were sustained.

I therefore set aside the award of Kshs.173,000/= general damages and substitute thereof an award of Kshs.250,000/= general damages. The Appeal is hereby allowed in quantum with costs.

Dated and Signed at Bungoma this 15th day of October, 2018.

S.N. RIECHI

JUDGE