



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 26 OF 2013

KARA ROADWAYS LTD.....APPELLANT

VERSUS

BERNARD MUSEMBI KIKUVI.....RESPONDENT

(Being an appeal from the judgement of Honourable M.K. Mwangi (Senior Principal Magistrate delivered on 17th January, 2013 in the Chief Magistrate's Court at Machakos in CMCC No.416 of 2012 Bernard Musembi Kikuvi =Vs= Kara Roadways Ltd)

JUDGEMENT

1. The Appeal herein arises from the judgment of Hon. Mwangi delivered on the 17th day of January, 2013 in Machakos CMCC No. 416 of 2012 wherein the Respondent was awarded general damages in the sum of Kshs.180,000/=.

2. The Appellant being aggrieved by the said judgement, lodged the following grounds of appeal:-

(a) That the learned magistrate erred in law and in fact in making an award of Kshs. 180,000/= in respect of injuries suffered by the Respondent namely:-

(i) Blunt injury to the chest

(ii) Blunt injury to the back

(iii) Blunt head injury

(iv) Blunt injury to the left ribs

(b) That the learned magistrate erred in fact and law in failing to appreciate the plaintiff's medical report, the general nature of injuries suffered and the Appellant's written submissions which would have led to a lesser award.

(c) That the award given by the learned magistrate was excessive considering the nature of the injury suffered by the Respondent.

3. As this is a first appeal, this court is obligated to re-evaluate the evidence afresh and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testifying but to make an allowance for that (see **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123**).

The Respondent and Appellant had entered into a consent on liability in the ratio of 10% to 90% in favour of the Respondent as against the Appellant. Thereafter evidence was received on the remaining issue of assessment on the quantum of damages.

Dr. John Mutunga (PW.1) testified and stated that he examined the Respondent and confirmed the injuries namely blunt injury to the chest, blunt injury to the back, blunt head injury and blunt injury to the left ribs. He formed the opinion that the injuries were soft tissue in nature. He produced the treatment notes, the P.3 form and medical report as exhibits.

Bernard Musembi Kikuvi (PW.2) was the Respondent. His evidence was that he had been a passenger in motor vehicle registration number KBP 246A heading from Nairobi to Machakos when on reaching Vista area an oncoming vehicle had its container derailed and which hit their vehicle and he sustained injuries. He stated that the lorry was over speeding and that the vehicle in which he travelled was ripped off. He confirmed that he got injuries on the head, chest, ribs and the back. He stated that he was rushed to Machakos General Hospital where he was treated and discharged. He produced police abstract, receipts and prayed for compensation. On cross – examination he stated that the left rib cage still pains and he experiences back pains during the cold weather.

The Appellant did not tender any evidence and thus the trial court proceeded to award the sums of Kshs.180,000/= as general damages plus Kshs.3,300/= as special damages. The Respondent was also awarded costs of the suit.

4. Parties agreed to canvass the appeal by way of written submissions. It was submitted for the Appellant that the award of damages by the trial court was excessive as the learned magistrate did not exercise discretion properly in that he took into account an irrelevant factor and left out the relevant one and thus arrived at an inordinately high award which is a wholly erroneous estimate of the damages. It was further submitted that the injuries sustained by Respondent were of soft tissue in nature and could not have attracted an award of more than Kshs.80,000/=as proposed by the Appellant. As far as the Appellant is concerned such injuries ordinarily attract an award ranging between Kshs.50,000/= to Kshs.200,000/=.

It was submitted for the Respondent that the trial magistrate followed properly principles of law in arriving at the award and took into account the authorities presented to him and also the submissions by both Advocates and therefore the award should be upheld. The case of **JOSEPH NJOROGE KARIUKI =VS= MARY NYAMBURA – MACHAKOS HCCA NO. 42 OF 2009**

5. I have considered the submissions of both learned counsels for the parties herein. I have also considered the evidence adduced before the trial court as well as the exhibits produced. I find the following issues necessary for determination namely:-

(i) Whether the award of damages by the trial court was manifestly excessive.

(ii) Whether the trial court's award of damages should be set aside.

6. As regards the first issue, it is noted that the trial court awarded the sum of Kshs.180,000/= as general damages for pain, suffering and loss of amenities. It is trite law that the award of damages is always an exercise of discretion by a trial court. However, the Appellate courts at times may be compelled to interfere with award of damages by trial courts if certain factors are shown namely that the sum was inordinately high or low; that the trial Judge/Magistrate proceeded on wrong principles and lastly that the trial court misapprehended the evidence. In the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE (1976) & ANOTHER =VS= LUBIA & ANOTHER [1985] eKLR** the Court of Appeal held as follows:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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, the amount is so inordinately low or so inordinately high; that it must be a wholly erroneous estimate for the damage.”

This court has now been urged by the Appellant to interfere with the trial court's award of Kshs.180,000/=. According to the medical report by Dr. John Mutunga (PW.1) the Respondent sustained blunt injury to the chest; blunt injury to the back; blunt head injury and blunt injury to the left ribs and that the same were soft tissue in nature. The learned counsels for the parties presented submissions and authorities. Counsel for the Respondent had proposed a sum of Kshs. 250,000/= whereas the Appellant's Counsel had proposed a sum of Kshs.80,000/= as general damages. The trial magistrate took into account the said submissions and he felt that an award of Kshs.180,000/= was appropriate. I am unable to see any error in the approach adopted by the learned trial magistrate in assessing the damages as aforesaid since it appears that he was persuaded by the decision cited by the Respondents counsel namely **JOHN MUHINDI KINGORI VS CHARLES MAINA & ANOTHER – NBI HCCC No. 3698 OF 1990** where the Plaintiff therein had sustained cut wound on the scalp, soft tissue injury to the right shoulder, soft tissue injury to the hip and right ankle. These injuries were more or less similar to those of the Respondent and that an award therein had been assessed at Kshs.150,000/= which was in July, 1992. As the trial court's judgement was made in 2013. I find the award of Kshs. 180,000/= was reasonable in the circumstances. I find that the trial magistrate did not take in account of irrelevant factors and or left out relevant matters in arriving at his decision. The award is also not inordinately high as to amount to a wholly erroneous estimate. I find the judgement had taken into account the relevant authorities presented before him in arriving at his assessment. Hence the award was not at all manifestly excessive as the issue of inflation must have informed the mind of the learned trial magistrate.

7. As regards the second issue and in view of the foregoing observations, I find that the award by the trial court should not be interfered with as the same was not excessive as claimed by the Appellant. It was within the limits of the awards for those kind of injuries at the time. In any case the Appellant's Counsel confirmed that such injuries attract awards ranging between Kshs.50,000/= to Kshs.200,000/=.

8. In the result, it is the finding of this court that the Appellant's Appeal is devoid of merit. The same is dismissed with costs to the Respondent.

Orders accordingly.

Dated and Delivered at MACHAKOS this 16th day of October, 2018.

D.K. KEMEI

JUDGE