



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 153 OF 2016

(FORMERLY MURANG'A CIVIL APPEAL NO. 16 OF 2014)

PETER KIOKO.....1ST APPELLANT

JAMILA E. ACHIENG.....2ND APPELLANT

VERSUS

HELLEN MUTHEE MUEMA.....RESPONDENT

(Being an appeal from the Judgment of Hon. J.W. Onchuru Principal Magistrate delivered on 23/12/2013 in Thika CMCC No. 791 of 2010)

J U D G M E N T

1. By a Plaintiff dated 21/07/2010, the Respondent herein had sued the Appellants in the court below, claiming compensation for injuries she sustained on 5th May, 2008 while travelling in the Appellant's vehicle KAP 715Q. She averred that Appellant's driver so negligently drove the motor vehicle registration number **KAP 715Q** that he caused the door of the said motor vehicle to open up. That the Respondent fell from the vehicle and as a result sustained serious bodily injuries.

2. The Appellants filed their Defence denying any liability for the accident. In particular, the Appellants denied ownership of motor vehicle registration number **KAP 715Q**.

3. The matter proceeded to a full hearing. At the conclusion of the trial, the trial Magistrate found the Appellants 100% liable for the accident. On quantum, the trial Magistrate having assessed the general damages entered judgment as follows:

| | |
|-------------------------------------|-----------------|
| a. Blunt head injury | Kshs. 60,000/= |
| b. Crush injury of the left big toe | Kshs. 300,000/= |
| Sub Total | Kshs. 360,000/= |
| Less 10 % (contribution) | Kshs. 324,000/= |
| Special damages | Kshs. 27,545/= |
| Total | Kshs. 351,545/= |

Costs were awarded to the Respondent.

4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present appeal. Their Memorandum of Appeal, has listed seven grounds of appeal as follows:

"a) The Learned Trial Magistrate erred in fact and in law in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law.

b) The Learned Magistrate erred in fact and in law in finding that the plaintiff was entitled to general damages inordinately too

high in the circumstances.

c) The Learned Magistrate erred in fact and in law in finding on the medical evidence led by the defence on the injury sustained by the plaintiff.

d) The Learned Magistrate erred in fact and in law in finding the entire unconvincing and failing to consider the defendant's submissions.

e) The Learned Magistrate erred in awarding damages under separate heads of the injuries.

f) The Learned Magistrate erred in fact and in law in finding that the plaintiff/respondent had proved his case on a balance of probabilities in view of the evidence on record.

g) The Learned Magistrate's finding on liability and quantum are not supported by facts or law."

5. The Respondent's case, as it emerged at the trial was that on 5/5/2008 she was a paying passenger aboard motor vehicle registration number **KAP 715Q**. At Gatwanyaga, the said vehicle veered off the road violently and as a result the door opened and consequently she was thrown out. She sustained cut injuries on the left big toe. She was treated at Thika District Hospital and later at Central Memorial hospital where her toe was amputated due to an infection. She produced the treatment notes, payment receipts, police abstract, P3 Form and a medical report by Dr. Kasuki. She sought an award of general damages for pain and suffering, special damages and costs of the suit.

6. Dr. Sophia Opiyo (DW1) testified for the Appellants. She produced a medical report on behalf of Dr. Theuri who was outside the country at the material time. According to the report, the doctor had concluded that the injury to the left toe did not limit the Respondent's daily activities.

7. The court directed that the appeal be disposed of by way of written submissions. The appellants submitted that the main issue for determination is the quantum of damages. It was submitted that the Respondent only sustained a crush injury of the left big toe and there was no mention of a blunt head injury for which the trial court awarded Kshs. 60,000/= in damages. Counsel submitted that the evidence adduced pointed to a crush injury of the left toe without permanent incapacity and therefore, an award of Kshs. 360,000/= was inordinately high. Reliance was placed on the case of **Denshire Muteti Wambua vs. Kenya Power & Lighting Company Limited (2013) eKLR** where it was held that comparable injury should be compensated with by comparable awards.

8. The case of **George Kinyanjui t/a Climax Coaches & Anor vs Hassan Musa Agoi(2016) eKLR** was also cited to the effect that an appellate court will not interfere with the quantum of damages unless the award is so inordinately low or high or is founded on wrong principles. It was further submitted that the award for a blunt head injury was erroneous as no evidence was adduced to prove the same. Counsel relied on the case of **James Gakinya Karienyne & Anor (suing as the Legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji (2015) eKLR** in that regard. In the Appellant's view the award of Kshs. 300,000/= was inordinately high.

9. The Appellants cited the case of **Tawkal Bus Services Limited vs Nyabwana Shali Mombasa Civil Appeal No. 25 of 1989** where the respondent who had sustained a crush injury to the left big toe which was subsequently amputated, was awarded Kshs.55,000/=. Counsel submitted that even with inflation over the years, an award of Ksh. 300,000/= was too high. An award of Kshs. 80,000/= to Kshs.100,000/= was submitted to be appropriate.

10. The Respondent countered all the grounds as set out in the Memorandum of Appeal. It was her submission that the award of Kshs.360,000/= was reasonable given the seriousness of her injuries and is commensurate with court awards for similar injuries. She urged the court not to interfere with the lower court award. Reliance was placed on several cases including **Tarmal Wire Products Ltd vs Ramadhan Fondo Ndegwa (2014) eKLR** and **Spin Knit vs Johnstone Otara (2006)eKLR**

19. The court has considered the evidence adduced at the trial and submissions made on this appeal by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123, Williams Diamonds Limited v Brown (1970) EAI I.**

20. The Court of Appeal in **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278** stated that:

"A court of Appeal will not normally interfere with a finding of 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 altered on wrong principles in reaching the findings he did"

21. The point of contention in this appeal is the quantum of damages awarded in the lower court, viewed as inordinately high by the Appellants while the Respondent defends the awards. The court will be guided by the principles enunciated by the Court of Appeal in the case of **Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987)KLR 30.**

22. It was held in that case 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, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.” see also **Butt v Khan (1981)KLR 349** and **Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001; (2004)eKLR.**

23. In the latter case, the Court of Appeal asserted the discretionary nature of general damages awards and observed that “*an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance*”.

24. Concerning the award of KShs.60,000/= as general damages in respect of a blunt head injury, I concur, upon reviewing the evidence, with the Appellants’ assertion that though pleaded, the injury was not proved. Indeed by her own testimony and her doctor’s report, the Respondent did not refer to any head injury. The award made by the trial court in that regard was not based on evidence, is erroneous and cannot stand.

25. Regarding the injury to the left big toe, PW1 adduced evidence that the toe was amputated following an infection. This is confirmed by reports by Dr. Kasuki and Dr. Theuri. Dr. Theuri’s view was that the loss did not limit the Respondent’s “day to day activities” and that related soft tissue injuries had healed well, while Dr. Kasuki asserted that the amputation of the toe was a permanent disability. There is not much difference in the two reports regarding the Respondent’s injury and prognosis. In her submissions before the court below, the Respondent had proposed an award of KShs.330,000/= based on the decision in **Fondo Birya v Fehmi & Co. (1994) Ltd. Mombasa HCCC No. 109 of 1990.**

26. For their part the Appellants offered KShs.100,000/= in damages, relying *inter alia* on **Lily Becher Barclay v Kirima Kamau Nairobi HCCC No.2037 of 1988** and **Rivatex Limited v Philip Muchache Nyabayo [1999] e KLR.** On this appeal the Appellants have relied on the case of **Tawakal Bus Services Ltd V Nyabwana Shali Mombasa Civil Appeal No.25 of 1989** which was quoted in the Rivatex case.

27. The Respondent relied on several authorities on this appeal including **Tarmal Wire Products Ltd. v Ramadhani Fondo Ndegwa HCCA 243 of 2010** on the principles applicable to the consideration of the question of damages in the appellate court.

28. I have looked at the authorities relied on by the parties. The Plaintiff in **Tawakal Bus Services Ltd V Nyabwana Shali** had sustained a crush injury to the left big toe, which resulted in amputation was awarded KShs.55,000/= in general damages. The injuries are comparable to those sustained by the present Respondent even though the Tawakal case is rather dated. On the other hand, the Plaintiff in **Fondo Birya** sustained a crush injury of the right foot and not merely the left toe as the trial magistrate stated in her judgment. The crush injuries in **Birya Fondo** involved the entire right foot and resulted in the amputation of the 4th and 5th toes of the said foot. Equally the decision is an old one.

29. Although the Appellants’ submissions at the trial cannot be traced in the lower court file, it appears that the trial court in assessing damages in respect of the Respondent’s injuries failed to note that they were not exactly comparable to those of the Plaintiff in **Birya Fondo**, as the latter were more severe. The trial magistrate seemed to have erroneously applied the **Fondo Birya** case believing that the Plaintiff therein had sustained a crush injury to the left toe, as in this case.

30. Ideally, comparable injuries ought to attract comparable damages. In light of this erroneous application, and considering the authority in **Tawakal Bus Company** and the inflation factor, this court feels justified to interfere with the award of KShs.300,000/= as general damages for the crush injury to the left toe. The court reduces the said award from KShs.300,00 to KShs.200,000/=. In the result the lower court judgment and decree are hereby set aside and the court substitutes judgment therefor as follows:

Damages for pain and suffering in respect of crush

| | | |
|-----------------------|---|----------------|
| injury to left toe | - | KShs.200,000/= |
| Less 10% contribution | - | KShs.180,000/= |
| Special damages | - | KShs. 27,545/= |
| Net sum | - | KShs.207,545/= |

The parties will share equally the costs of this appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 12TH DAY OF OCTOBER, 2018

C. MEOLI

JUDGE

In the presence of:

Appellant – No appearance

Respondents – No appearance

Court Clerk - Kevin