



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 133 OF 2013

BENARD MUTISO MUTISYA.....RESPONDENT

VERSUS

JOSEPH WAMBURU TUMBU.....APPELLANT

*(Appeal from the Judgement and order of the Resident Magistrate - Mr. M.A.O. Opanga in RMCC No. 39 of 2012 - Benard Mutiso Mutisya Vs Joseph Wamburu Tumbu on 29/11/2012)*

JUDGEMENT

BACKGROUND

1. By a Plaint dated 28<sup>th</sup> March 2012 the Respondent sued the Appellant for general and special damages of Kshs.79,364/- arising out of a road traffic accident on or about 25<sup>th</sup> day of May 2011 between motor vehicles registration number KAR 549B driven by the Plaintiff and number KXZ 781 driven by the Respondent's driver and or agents along Mwala-Kabaa road as a result of which the appellant sustained injuries as follows:-

- 1) *Bruises on the left side of the body,*
- 2) *Fracture of the right humerus*
- 3) *Injury on the right arm and clavicle.*

2. The Appellant blamed the Respondent for the cause of the said accident and subsequent injuries which was pleaded to had been caused by the negligence on the part of the Respondent's driver and or agent particulars of which were set out in the Plaint.

3. By a Defence dated 30<sup>th</sup> April 2012 the Respondent denied causing the said accident and denied the particulars of negligence set out in the Plaint and in the alternative pleaded that the said accident was wholly caused by the negligence of the Appellant which were set out in the defence.

4. After the close of the pleadings, the matter proceeded by way of written submissions after the parties by consent apportioned liability in the ratio of 80:20 in favour of the Respondent with special damages being agreed at Kshs.59,164/= at the end of which the trial court assessed general damages in favour of the Respondent at Kshs.600,000/= subject to 20% contribution on the ground that:

***“The Plaintiff (Respondent) in this case in my view suffered more serious injuries. The defence doctor admitted in his report that 4% permanent incapacitation is expected. The Plaintiff also requires future surgery to remove implant.”***

5. Being dissatisfied with the trial court's finding on quantum the Appellant filed this appeal and raised the following grounds of appeal having been granted leave to file appeal out of time:-

- 1) *The learned Resident Magistrate erred in law and fact by making an award on general damages which was manifestly excessive given the injuries sustained by the Plaintiff and the relevant case law produced by the Defendant.*
- 2) *The learned Resident Magistrate erred in law and fact by applying wrong principles of law in assessing general damages hence arriving at manifestly excessive damages.*
- 3) *The learned Resident Magistrate erred in law and fact by ignoring the Appellant's submissions in his judgement without proper reason to do so.*

4) *The learned Resident Magistrate erred in law and fact by awarding excessive special damages that had not been proved.*

## **SUBMISSIONS**

6. Directions were given that the appeal be determined by way of written submissions which have been filed and on behalf of the appellant it was submitted that the trial court made an award which was excessive considering the injuries sustained by the Respondent. It was submitted that an appellate court will not interfere with the judgement of the trial court on quantum unless the award is excessively high or the trial court took to consideration matters it ought not to have considered in support of which the case of **MAYFLOWER LTD. v DORIS NYACHERA NYACHAMBA [2010] eKLR**.

7. It was therefore submitted that based on the injuries sustained by the Respondent which were termed as skeletal and soft tissue, in assessment of general damages comparable awards should as far as possible be compensated by comparable award and therefore an award of Kshs.200,000/- was proposed based upon the following High Court cases:-

**1) LUKE OSORO & ANOTHER v DANIEL CHERUIYOT [2008] eKLR – where an award of Kshs.250,000/= was issued to an appellant who had suffered fractures of the right humerus and soft tissue injuries.**

**2) EAST CHOICE CO. LTD. & ANOTHER v HELLEN NUNGARI NGURE [2011] eKLR, where an award of Kshs.180,000/= was given.**

8. On behalf of the Respondent it was submitted that the award of Kshs.600,000/= was not manifestly excessive so as to make the decision erroneous. It was submitted that the appellate court in deciding whether to disturb an award of quantum of damages by the trial court 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 as per the authority of **KEMFRO AFRICA LTD. v LUBAI & ANOTHER [1987] 30**.

9. It was submitted that the trial magistrate applied right principles of comparable decisions of similar injuries and therefore arrived a fair and just decisions on general damages. In support of the award he appealed against reliance was placed on the following decisions:-

**1) AGILITY LOGISTICS LTD. v JOHN WAMBUA MUSAU [2017] eKLR – where on appeal the general damages in respect of left stomach dislocation fracture among other injuries was awarded Kshs.500,000/-.**

**2) MISHECK MUSILI MUTISO v MAHMOUD OSMAN MOMBASA LINER [2004] eKLR, where the Plaintiff who sustained fracture of humerus, fracture 5th metatarsal bone (left foot), severe crush injuries of right foot with deep wounds, extensive wounds on the back and head and contusion of head and chest was awarded Kshs.960,000/= in general damages.**

**3) KENYA POWER AND LIGHTING CO. LTD v NEHEMIAH WACHIRA [2014] eKLR where on appeal the Respondent was awarded Kshs.500,000/= in general damages.**

## **ISSUES FOR DETERMINATION**

10. Upon exercising my role as a first appellate court which is required to re-asses and re-evaluate the evidence on record so as to arrive to an independent decision though taking into account the fact that I did not have the advantage of seeing and hearing witnesses as per the holding in **SUMARIA & ANOTHER v ALLIED INDUSTRIES LTD [2007] KLR1** and **EAST AFRICA PORTLAND CEMENT CO. LTD. v TILIKIA KELOL [2016] eKLR** and upon perusing the written submissions as analyzed herein, I have come to the conclusion that the following issues are isolated for determination:-

**a. What are the principles for an award of damages?**

**b. Whether the quantum awarded to the Respondent was manifestly high to warrant disturbance by the court.**

11. The general principle is that the purpose of an award of damages is to compensate the injured party for loss rather than to punish the wrong doer. Damages should place the claimant in the same position as if the tort had not been committed. The courts must award a reasonable sum as damages unless there is a public policy consideration which prevents such a Plaintiff from claiming damages which must not be too high or too low with regard to the circumstances of each case and must never be awarded for sentimental value what I would call 'love and affection'.

12. As stated herein damages are in their fundamental character, compensatory not punishment with the primary function being to place the Plaintiff in as good a position so far as money can do it as if the matter complained of had not occurred. Plaintiff must not receive more nor should he receive less than is appropriate and commensurate with the loss.

13. In assessing damages courts must be guided by decided cases on the basis that like injuries as much as possible should receive like awards. This principle was stated in the case of **KIGARAARI v AYA [1982-88] 1KLR 768**, thus:-

**“Damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance cover or increased fees.”**

14. This court is alive to the fact that whereas the courts should try as much as possible to award the claimant reasonable sums in

compensation, an award which is manifestly high upon an erroneous belief that the sums so awarded will be paid by the insurance companies is not beneficial to the Kenyan economy as shown by the history of the insurance companies which have gone under due to unimaginable level of high awards in damages.

15. Whereas the assessment of damages is principally the duty of the trial court, the appellate court will in exceptional circumstances engage in the activity of assessment of damages as was stated by Greer J. in **FLINT v LOVELL [1935] 1KB 3.54**

***“An appellate court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because it thinks that had it tried the case in the first instance it would have given a greater or lesser sum. In order to justify reversing the trial judge on the question of amount of damages, it will generally be necessary that the appellate court should be convinced either:-***

***(a) That the trial judge acted upon some wrong principle of law, or***

***(b) That the amount awarded was so extremely high or very small as to make it, in the judgement of the appellate court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”***

16. The above principle remains good law and has been applied in Kenya in the case of **KEMFRO AFRICA LTD. t/a “MERU EXPRESS SERVICES [1976]” & ANOTHER v LUBIA & another** supra, and with this in mind I proceed to look at the award issued to the Respondent by the trial court to subject the same to the above standard.

17. From the medical reports produced by consent the Respondent sustained the following injuries:-

***a) As per DR. CHARLES M. KASUKI medical report dated 21/5/2002:-***

***1. Chest injuries – bruises on the left side.***

***2. Right hand injuries – fracture right humerus.***

***At the time of examination he was in good condition with a surgical scar with stitch marks. He had restricted and painful full flexion-extension movement of the elbow joint and shoulder joint.***

***b) Dr. Wambugu P.M. dated 15/6/2012***

***1. Closed fracture right humerus***

***2. Laceration wound right anterior chest wall and right forearm with 4% degree of permanent incapacitation.***

18. I have looked at the injuries sustained by the Respondent and exercising my powers of the first appellant court looked at the submission by the Appellant before the trial court in the absence of the submissions by the Respondent which did not form part of the records of appeal and would proceed to assess general damages based on comparable cases for the purposes of determining and disposing of this appeal which is only on quantum which the Appellant feel is very excessive which the Respondent feel was adequate.

19. I have looked at the following cases:-

***a) SAID ABDULLAHI V GELIDO TINNA ADDO, NAIROBI HIGH COURT CIVIL APPEAL NO.147 OF 2013 [2016] eKLR where on appeal the Plaintiff who sustained similar injuries was awarded Kshs.300,000/= by J.K. Serگون J. on 22/4/2016.***

***b) ODINGA JACTONE OUMA V MOUREEN ACHIENG ODERA KISUMU HIGH COURT CIVIL APPEAL NO. 1 of 2014 [2016] eKLR where Majanja J. reduced an award of Kshs.400,000/= to Kshs.180,000/= on 3<sup>rd</sup> October 2016.***

***c) SIMON MUNGAI KARIUKI V FATMA HASSAN MALINDI HIGH COURT CIVIL APPEAL NO. 29/2015 [2017] eKLR, where Chitembwa J. confirmed an award of Kshs.230,000/=.***

20. Looking at these authorities against those submitted by the Appellant which are not of comparable injuries, I have come to the most logical conclusion that the award of Kshs.600,000/= as against the injuries sustained by the Respondent was excessive and therefore subject to be disturbed by this court which I hereby do.

21. Based on the cases cited herein I am of the considered opinion and hold that an award of Kshs.300,000/= would be adequate compensation to the Respondent and therefore allow the appeal and substitute the award of the lower court with an award of Kshs.300,000/= subject to the consented contribution.

22. The sum so awarded herein shall be subject to interest at court rates from the date of judgement of the trial court together with costs thereon. The Appellant having succeeded in this appeal is entitled to costs of appeal.

23. I therefore make the following orders:-

*a) The appeal is hereby allowed.*

*b) The judgment and order of the trial court is set aside and substituted with an award of Kshs.300,000/= (Kenya shillings three hundred thousand) subject to 20% contribution as consented together with costs and interest therein from the date of judgement.*

*c) The Appellant is entitled to costs of the appeal.*

**Dated and Signed at Nairobi this 30<sup>th</sup> day of October, 2018.**

.....

**J. WAKIAGA**

**JUDGE**

**Delivered in open court this 5<sup>th</sup> day of November, 2018 at Machakos by Justice G.V Odunga on behalf of Justice J. Wakiaga in the presence of:-**

.....

**G.V. ODUNGA**

**JUDGE**