



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

CIVIL APPEAL NUMBER 35 OF 2015

BETWEEN

ERICK MUTHAMIA.....1ST APPELLANT

MIBREO CO. LTD.....2ND APPELLANT

AND

AK suing on behalf of IM.....RESPONDENT

(Being an appeal from the Judgment delivered by the Hon. Oscar Wanyaga, Senior Resident Magistrate at Maua on 21st September, 2015 in Maua Chief Magistrate's Court Civil Case No. 277 of 2014)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

The Appeal

1. This appeal is against quantum of damages awarded to the respondent on 21st day of September, 2015 in the following terms:-

a. General damages of Kshs 250,000/=.

b. Special damages of Kshs 24,918/=.

c. Costs of the suit are awarded to the Plaintiff.

d. Award and costs to be subjected to 10% deduction in accordance to the agreed liability ratio of 90:10 in favour of the Plaintiff.

e. The award and costs will attract interest at court rates from the date of the Judgment.

2. The appellants therefore pray that the appeal be allowed with costs and that the Learned Trial Court's judgment delivered on 21st September, 2015 by Hon. Oscar Wanyaga, Resident Magistrate be set aside and the award made herein be re-assessed and the respondents be condemned with costs of this appeal.

3. To support the appeal, the appellants allege that the amount awarded as general damages is too high in view of the soft tissue injuries suffered by the respondent, and further that the evidence on record does not support these damages. The appellants also contend that the Learned Trial Magistrate failed to consider the appellants submissions on quantum as well as the provisions of the amended Cap 405 Insurance (Motor Vehicle Third Party Risks) Act. It is also the appellants' case that the Learned Trial Magistrate fell into error when he failed to consider conventional records in cases of similar nature.

4. This is a first appeal and as such this court is under a duty to satisfy itself that the evidence adduced, the law and the submissions made by parties during the hearing support the trial court's findings, only remembering two points. One is that this court has no opportunity of seeing and hearing the witnesses who testified during the trial and secondly that the award of damages is a matter of discretion of the trial court, so that unless it is obviously clear that the damages awarded are either too high or too low in the circumstances, the same would not be interfered with.

5. In **Tolley -vs- Tolley (1976-80) I KLR 549**, the Court of Appeal for East Africa sitting at Nairobi held that **“On an appeal against award of maintenance, the appellate court will not hesitate to interfere with the exercise of discretion in a lower court and will substitute what it regards as the appropriate figure even if this only represents a very small variation in the amount; in so doing however its starting point is the original award and it does not view the question *de novo*.”** Although the above case was a maintenance cause the principle of whether or not an appellate court should interfere with an award remains the same. The interference can only come about if the award is either too high or too low in the circumstances of the case.

Background

6. The respondent herein filed the original suit on behalf of her minor son vide a plaint dated 2nd December, 2014. The respondent sought both general and special damages and costs of the suit arising out of a road traffic accident which occurred on or about 21st June, 2013. On the said date, the respondent's 7 year old son IM, was said to be lawfully and carefully walking along the Meru-Maua road at Maili Tatu when the 1st appellant, who was an employee of the 2nd appellant so carelessly and negligently managed and/or controlled motor vehicle registration number KAW 790K Toyota matatu. That he caused the same to knock down the minor causing him injuries as follows:-

a. Swollen right parietal region.

b. Injuries at the periorbital area.

c. Injuries at the ears and nostrils.

d. Injuries at the elbows and shoulders.

e. Injures at the left hand middle finger.

f. Multiple bruises on the lower limbs.

g. Fracture of the skull.

7. The respondent thus sought general damages in respect of the above and also sought special damages as pleaded at paragraph 5 of the plaint as follows:-

- Medical report Kshs 5,000/=
- Demand notice Kshs 5,000/=
- Medical bills Kshs 19,918/=

8. Though the appellants filed their separate defences denying liability on 30th March, 2015 and 10th April, 2015 respectively, on 20th July, 2015 the parties entered into a consent on liability at the ratio of 90:10% in favour of the respondent. The parties also agreed that all documents sought to be relied upon by the parties were to be deemed to be produced by their makers and the appellants were to further file a second medical report with the submissions. The appellants duly filed their written submissions with relevant authorities. However, on perusal of the entire record I have not been able to see the appellant's second medical report, so the only medical report, which was admitted by consent, is the one filed by the respondent.

Submissions

9. This appeal was canvassed by way of written submissions filed by the parties on 3rd July, 2018 and 26th July, 2018 respectively though it is to be noted that the respondents' submissions filed on 26th July, 2018 are titled **“The Appellant's Submissions”** drawn by M/S N. Mutembei & Kimathi Advocates. The appellant's submissions filed on 3rd July, 2018 are drawn by M/S Kairu & McCourt Advocates. The rival submissions address the issues raised in the memorandum of appeal. The arguments are supported by a plethora of case law which I have had the opportunity to carefully peruse. Both counsel are commended for their efforts in this regard.

Analysis and Determination

10. As stated at the commencement of this appeal, the only issue for determination is whether the award made by the Learned Trial Magistrate was excessive in the circumstances of this case. The respondent contends that the award was not excessive in the circumstances and during the trial reliance was placed on **Nairobi HCCC No. 1224 of 1999 – Gilbert Nicholas Otieno –vs- Oil Crop Development Co. Ltd & another** where the following guiding principles for the making of awards in traffic accident cases were outlined:-

i. An award of damages is a matter of the courts discretion of the court seized of the matter.

ii. This discretion is to be exercised judicially and with a reason.

iii. The discretion to so award damages is unfettered with the only fetter being:-

a. The award should not be inordinately too high or too low.

b. It should be commensurate to the injuries suffered.

c. It is not meant to enrich the claimant but to restore him to the position in which he was before the injuries were suffered.

iv. Awards on past decisions are mere guides and each case has to depend on its own merits and facts.

v. Where past awards are taken into account as guides, then the date when they were decided should be considered taking into account either the depreciating or appreciating value of the purchasing power of the Kenyan shilling as the case may be. The injuries to be compensated are those noted in the medical documents tendered by the plaintiffs.

11. Applying the above principles to the present case and from the rival submissions on record, the authorities relied upon, as well as the reasoning of the Learned Trial Magistrate I am of the considered view that this appeal against the award of damages lacks merit. I noted earlier in this Judgment that the only medical report available to the Trial Court was the one prepared by Dr. Njeru C.M. dated 7th November, 2013 in which it is stated that the injuries sustained by the respondent were as follows:-

- *Reported history of loss of consciousness, blood was noted oozing from the ears and nostrils. Glasgow coma scale was 15/15. No lateralizing signs noted.*
- *Swollen right frontal parietal region. Cut wound noted on the right parietal region 3 cm long, 1 cm deep. Other two small cuts noted on the same side. Right periorbital area swollen and painful.*
- *Bruises noted on the bilateral elbows and shoulders.*
- *On the left hand middle finger, nail was removed.*
- *Multiple bruises on the lower limbs.*

12. An x-ray carried out showed a linear fracture on the right frontal bone. In Dr. Njeru's opinion, "**M suffered serious head injuries, fortunately has healed significantly and is currently doing well at school. Mental status examination is normal. However, he suffers occasional transient bizarre behaviours described as shaking of the head.**" It is also clear from Dr. Njeru's report, which was admitted by consent and to which there was no rebuttal, that the respondent could not go for CT scan due to financial constraints.

13. In a well-reasoned judgment the trial court considered various decided cases as well as the submissions and carefully distinguished the authorities relied upon by the parties and concluded that this was a peculiar case and had to be decided on its own merits circumstances and facts. I have myself gone through the evidence on record, the submissions by counsel and the law and I have reached the conclusions that the injuries suffered by the respondent were not as minor as the appellants would want this court to believe. I also find that the extent of the injuries may have been somewhat exaggerated, but there is no doubt in my mind that the respondent suffered a fracture of the skull and other noticeable injuries. He suffered a brain concussion and that is why he lost consciousness.

14. In light of above findings I conclude that the appellants have not demonstrated to the satisfaction of this court that there is any need to interfere with the award made by the trial court in this case. In the absence of any contrary report as to the injuries suffered by the respondent I find the award made by the Learned Trial Court as very modest. Even with the authorities cited by counsel for the appellants, I must point out that unlike in those cases, there was no second medical report in the instant case to rebut Dr. Njeru's findings dated 7th November, 2013. In any event, I am convinced that the purchasing power of the Kenya shillings has been so drastically eroded between 2013 and the date of judgment in this case on 21st September, 2015, that if the award were to be reduced such a reduced amount would not restore the respondent to the position in which he was before the injuries were suffered.

Conclusion

15. In light of all that I have stated above, the appellants' appeal be and is hereby dismissed in its entirety. Costs of the appeal shall be borne by the appellants.

It is so ordered.

Judgment written and signed in Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 21st day of November, 2018

F. GIKONYO

JUDGE