



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 453 OF 2016

IRENE KIENDE MURIITHI.....APPELLANT

VERSUS

KENSILVER EXPRESS LIMITED.....1ST RESPONDENT

SOLOMON KIRIINYA MUTHEE.....2ND RESPONDENT

(Being an appeal from the Judgment of Hon I G (Ms), Resident Magistrate (RM) at the Chief Magistrate's Court at Milimani in Civil Case No 1074 of 2013 delivered 10th June 2016)

JUDGMENT

INTRODUCTION

1. In his decision of 10th June 2016, the Learned Trial Magistrate, Hon I Gichohi (Ms) Resident Magistrate, delivered judgment in favour of the Appellant against the Respondent jointly and severally for Kshs 302,600/= made up as follows:-

General damages	Kshs 280,000.00
Special damages	<u>Kshs 76,000.00</u>
	Kshs 356,000.00
Less 15% contributory negligence	<u>Kshs 53,400.00</u>
	Kshs 302,600.00

Plus costs and interest thereon at court rates from the date of judgment.

Liability had been apportioned at 85%-15% in favour of the Appellant.

2. Being aggrieved with the said judgment, the Appellant filed its Memorandum of Appeal dated 6th July 2016 on even date. It relied on four (4) Grounds of Appeal. His Supplementary Record of Appeal was dated and filed on 2nd July 2018.

3. The Appellant's Written Submissions were dated 19th June 2018 and filed on 2nd July 2018 while those of the Respondent were dated 27th July 2018 and filed on 30th July 2018.

4. When the matter came before the court on 31st July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however,

keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

7. Having looked at the parties' Written Submissions, it appeared to this court that the only issue that was before this court was whether or not the Learned Trial Magistrate awarded the Appellant general damages that were so inordinately low so as to warrant interference by this court.

8. The Appellant pointed out that he had sought general damages in the sum of Kshs 1,000,000/= and hence the award of general damages in the sum of Kshs 280,000/= was inordinately low as the Learned Trial Magistrate failed to appreciate the injuries that she sustained and the period she was hospitalised following the said injuries.

9. She relied on the case of **Kisii HCCA No 179 of 2007 Mombasa Maize Millers Ltd vs Kasmir Onkendi Kebira, Machakos HCCC No 169 of 2000 Anne Murithii vs The Head Mistress Machakos Girls & 2 Others** and **Collins Omondi Muganda vs Oceanic Oil Ltd & Another [2017] eKLR** where the courts therein awarded Kshs 1,000,000/=: Kshs 900,000/= and Kshs 420,000/= general damages respectively for fractures of the femur amongst other injuries.

10. On their part, the Respondents urged this court not to disturb the award that was made by the Learned Trial Magistrate on the ground that the same was fair. They pointed out that the award of Kshs 280,000/= general damages was fair as they had submitted that Kshs 120,000/= general damages was adequate.

11. They submitted that before an appellate court could disturb an award, that had been made by a trial court, it had to be satisfied that the trial court had proceeded on the wrong principles that made it arrive at an amount that was so inordinately low or inordinately high that it must have been a wholly erroneous estimate of the damages.

12. In this regard, they relied on the cases of **Kemfro Africa Ltd vs Lubia & Another (No 2) 1987 KLR 30** and **Johnson Evan Gicheru vs Andrew Morton & Another EA No 314 of 2000** where the courts made similar observations on when an appellate court ought to disturb an award of the trial court.

13. Notably, the Appellant had submitted that an award of Kshs 1,000,000/= for general damages was fair while the Respondent argued that a sum of Kshs 280,000/= general damages was fair. To resolve this issue, this court had due regard to the precedents and inflationary trends with a view to arriving at a figure that could be deemed to have been reasonable compensation to the Appellant for the injuries that she sustained.

14. It is well settled in law that an appellate court will not disturb an award of general damages unless the same is so manifestly high or inordinately excessive or manifestly or inordinately low that a trial court had proceeded on the wrong principles or misapprehended the law, a principle that was dealt with in the case of **Margaret T. Nyaga vs Victoria Wambua Kioko [2004] eKLR** and the cases of **Kemfro Africa Ltd vs Lubia & Another** (Supra) that was relied upon by the Respondent.

15. It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through no matter how small an injury may appear to be. It would in fact be difficult to say with certainty that a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.

16. However, this assessment is not without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents.

17. The particulars in the Plaintiff show that the Plaintiff sustained a fracture of the femur and deep cut wounds and the IM nail would require surgical removal followed by rehabilitative physiotherapy at a cost of Kshs 150,000/=

18. In her evidence, the Appellant testified that she was admitted at Kenyatta National Hospital (KNH) for one (1) month and one (1) week. She was also admitted at St Teresa for one (1) week and two (2) days where she was operated on. She incurred Kshs 93,949.92 for medical expenses. She produced in evidence a Medical Report dated 21st November 2012 by Dr Moses Kinuthia and other documents in support of her case. She stated that she was a farmer but that she could not dig or carry heavy things after the accident.

19. The court perused the said Medical Report and noted from the doctor's prognosis that the Appellant was predisposed to post traumatic osteoarthritis of the left hip and knee joint. She was left with a surgical scar lateral aspect left thigh and there were several ugly scars on the medial aspect of the right knee and lateral aspect of the distal 1/3 of the right leg.

20. Accordingly, having considered the Written Submissions and the case law that the parties relied upon, this court came to the firm conclusion that bearing in mind the injuries the Appellant sustained, the period of hospitalisation, the predisposition to osteoarthritis and the inflationary trends, the Learned Trial Magistrate applied wrong principles and awarded inordinately low damages so as to give a completely

