REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 63 OF 2017

OURU SUPER STORES .....APPELLANT

VERSUS

GEOFFREY GICHANA ONCHWARI..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Naomi Wairimu (P.M.) dated and delivered on the 26th day of July 2017 in Ogembo PMCC No. 94 of 2016)

JUDGMENT

1. The appellant herein being dissatisfied with the judgment of the Principal Magistrate in Ogembo in PMCC No. 94 of 2016 delivered on 26th day of July 2017 and has appealed against the quantum of general damages which was assessed at Kshs. 800,000/=. The parties consensually apportioned liability at 80:20 in favour of the respondent. The trial court awarded special damages of Kshs. 6,500/=, bringing the net total to Kshs. 645,200/= plus costs and interest.

2. The grounds of appeal are as follows;

a. That the award of general damages awarded to the respondent was manifestly and inordinately excessive in the circumstance;

b. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching an erroneous decision;

c. That the learned trial magistrate erred when the same misapprehended the principle applicable in the assessment of damages in personal injuries claims thus occasioning the miscarriage of justice; and

d. The learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.

3. When the appeal came up for hearing on 7th August 2018, Mr. Otieno, counsel for the appellant submitted that the trial magistrate erred in assessing general damages at Kshs. 800,000/= which was excessive and not commensurate to the injuries sustained by the respondent. Counsel argued that the trial magistrate misinterpreted the medical evidence and thereby arrived at an erroneous decision. It was submitted that the trial court had not considered the extent and intensity of the injuries suffered and their subsequent effect on the respondent. That it is crucial to consider the time taken to heal in making an award. In this instance, the respondent had only been admitted for 3 days. There was no evidence of him undergoing further treatment and the doctor had indicated that the respondent was healing well. Since the injuries were of a less extent and intensity he urged this court to review the award downwards.

4. Mr. Nyangosi, counsel for the respondent, argued that the award made by the trial court was not excessive as the medical evidence adduced confirmed that the respondent had suffered 2 serious fractures and soft tissue injuries. As for the number of days the respondent had been admitted to hospital, counsel pointed out that for fractures once the Plaster of Paris was applied and medication prescribed, as had been done in this case, the patient could heal from home. He stated that the principles of upsetting an award of damages had not been met and urged this court to dismiss the appeal with costs.

5. At the hearing of this matter before the trial court, both parties relied on the medical report prepared by one Dr. Ogando Zoga. The medical report listed the respondent's recurrent complaints of severe pains to his left limbs and chest. In concluding that permanent disability was anticipated, the report enumerated the injuries sustained by the respondent as;

a. Facial bruises,

b. Tenderness on the anterior chest wall,

c. Fracture of the left humerus bone mid 1/3; and

d. Fracture of the left tibia/fibula.

6. The respondent gave a history of the accident and produced a copy of discharge summary report from Ram Hospital, P3 Form, police abstract and medical report. The injuries listed in the discharge summary report were similar to those in the medical reports. He testified that he could not till land or walk long distances due to the pain he still experienced. Both parties closed their cases after the respondent's testimony. The appellant did not lead any evidence, and it is taken that the injuries or their extent was not in dispute.

7. There is only one issue arising for determination in this appeal that is whether the trial court erred by making an award of general damages that was manifestly and inordinately excessive. The Court of Appeal in the case of ***Kemfro Africa Limited t/a Meru Express Services (1976) & Another -vs- Lubia & Anor. (No. 2) [1985] eKLR*** outlined the principles to be considered before reviewing an award of damages thus;

> *"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 of the damage. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles."*

8. I have also considered the authorities cited by the parties in this appeal, all of which stress that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind that no two cases are exactly alike *(**Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]; Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR**).*

9. Courts are also to factor in the economic state of the country and the fact that money cannot offer full compensation for non-pecuniary injuries. Hence the need to ensure that awards are conventional and result in fair compensation. *(**Ugenya Bus Service v Gachoki NKU CC Civil Appeal No. 66 of 1981 [1982] eKLR**)*

10. In computing the amount of general damages payable to the respondent, the trial court considered the evidence on record, submissions filed by the parties together with the authorities cited.

11. In his submissions, the appellant was of the view that an award of Kshs. 350,000/= would suffice. It cited the case of ***Stanley Mugambi & Anor vs John Kiraithe (next friend of Evalyne Makenya) Meru HCCA No. 127 of 2002)*** where the court awarded Kshs. 200,000/= for a fracture on the right hand and injuries to the fingers and back. It also relied on the case of ***Jane Wangui Kamau & 2 Others vs Alice Atandi Mungamangi & Anor (Nakuru HCCC No. 136 of 2003)*** where the 2nd plaintiff who had sustained head injuries, a fracture of the right hand with disability assessed at 20% was awarded general damages of Kshs. 350,000/=.

12. Conversely, the respondent asked the trial court to assess general damages at Kshs.1, 500,000/=. He relied on the case o**f *Roy Mackenzie v Cartrack Kenya Limited & Anor. [2012]*** and the case of ***Thomas Muendo Kimilu v Anne Maina & 2 Ors. Civil Case 6 of 2007*****.** In the former, the court awarded the plaintiff general damages of Kshs. 700,000/= for serious injuries sustained on the left shoulder which left his arm immobile. In the latter, the court awarded general damages of Kshs. 700,000/= for fracture of the right tibia/fibula; fracture of the left humerus and multiple bruises and lacerations**.**

13. It is my considered opinion that the injuries in the authorities cited by the appellant before the trial court were slightly less severe as compared to those suffered by the respondent herein. They were also more than a decade old and as such were not an indication of the prevailing level of awards proportionate to the injuries at the time. Assessment of quantum of damages is a matter for the discretion of the court. The trial court appears to have been swayed by the authorities cited by the respondent which were more recent and the injuries suffered more similar to those suffered by the respondent.

14. In the case of ***Clement Gitau v GKK [2016] eKLR Civil Appeal No. 522 of 2012*** the High Court upheld an award of Kshs. 600,000/= for fracture of the tibia, fibula and bruises on the neck. In the case of ***Zacharia Mwangi Njeru vs Joseph Wachira Kanoga [2014] eKLR*** the plaintiff suffered a fracture of the tibia/fibula and was awarded Kshs. 400,000/=. I do not consider the award of Kshs 800,000/= excessive for the respondent's injuries. I find that the trial court exercised its discretion judiciously. The parties did not address the amount of special damages awarded; I will not disturb the same. For the reasons already stated, I hereby find the appeal unmerited and dismiss the same with costs to the respondent.

Dated, Signed and delivered this 21st day of November 2018.

R. E. OUGO

JUDGE

In the presence;

Mr. Nyagwencha h/b Mr. O.M. Otieno For Appellant

Respondent Absent

Ms. Rael Court/ clerk