



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 76 OF 2016

REUBEN OKUKU.....APPELLANT

VERSUS

EMMAH NYAMOITA MOGENDI.....RESPONDENT

(Appeal from the Judgement and Decree of Hon. Naomi Wairimu (PM) Dated 28th day of September 2016, in the original OGEMBO PMCC NO. 194 OF 2014)

BETWEEN

EMMAH NYAMOITA MOGENDI.....PLAINTIFF

VERSUS

REUBEN OKUKU.....DEFENDANT

JUDGMENT

1. This appeal concerns an award of damages and has been filed by the Appellant on the following grounds:

1. *That the award of general damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.*
2. *That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision.*
3. *That the learned trial magistrate erred the same misapprehend the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice.*
4. *That the learned trial magistrate erred in law and in fact when the same relied on extraneous issues as a basis of his determination on liability.*

2. The events which gave rise to the claim are briefly these. The respondent on 22/07/2014 while a pillion passenger on a motor cycle registered as KMCQ 087 F sustained injuries as a result of a collision between the motor cycle and motor vehicle registered as KBV 092A belonging to the Appellant. Liability was conceded at 70:30 in favour of the respondent and the trial magistrate entered her judgement on 28/09/2016 awarding the Respondent Kshs 1,200,000 in general damages.

3. This Court is seized only with the issue of whether the general damages awarded by the trial magistrate court were excessive.

4. This is a first appeal and as is settled, I am expected, indeed required to re-evaluate the evidence on record before me, and draw my conclusions independently, but bearing in mind that I have neither seen nor heard the witness. See **Selle V. Associated Motor Boat Company Ltd** (1968) EA 123 at page 126.

5. Emmah Nyamoita Mogendi, (Pw1) gave evidence that she was a pillion passenger on motor cycle registration number KMCQ 087 F which on 22.07.2014 was involved in an accident with the lorry KBV 092A. Pw1 sustained injuries on her head, on her right hand and gave evidence that she suffered a fracture. She also sustained injuries on her right leg. She gave evidence that her hand could not do heavy work such as digging and was experiencing pain on her leg when it is cold. On cross examination she gave evidence that she did not have an abstract to show that the driver of the lorry was charged by the police, however the accident was not caused by the rider of the motor cycle. She also gave evidence that when the accident occurred the rider of the motor cycle was able to jump off the motor cycle. On re-examination

she stated that her fracture can be confirmed by the discharge report. She further gave evidence that she was not able to jump off the motor cycle as the rider did because she was pregnant at the time of the accident.

6. At the trial magistrate court, counsel for the respondent relied in the case of *Alphonse Muli Nzuki vs Brian Charles Ochuodho Mombasa HCCA No. 141 of 2011* in which the court upheld an award of Kshs 800,000/- was a sufficient award to the plaintiff. The counsel for the applicant submitted that the amount of Kshs 300,000/- would be sufficient to the respondent and cited *Stanely Mugambi & Another vs John Kiraithe (next of friend of Evelyn Makenya) Meru HCCA No. 127 of 2002*. In which the court awarded Kshs. 200,000/- to the plaintiffs. They also relied on the case of *Benson Mulwa Mulandi vs Machakos Ranching Co. Ltd (Machakos HCCC No. 302 of 1994)* where the court awarded Kshs 50,000/-.

7. During the hearing of the appeal before this Court, counsel for the Appellant, Mr. Otieno, consolidated the four grounds of the appeal to one, that being that quantum of damages were excessive *vis-a-vis* the injuries sustained by the respondent. He submitted that the trial magistrate proceeded with the assumption that the Respondent had suffered a fracture, while an evaluation of the evidence before the trial magistrate demonstrates that there was no such fracture suffered by the Respondent. Counsel relied on the case of *Mwavita Jonathan v Silvia Oununga (2017) eKLR* in which the respondent sustained a fracture at the hip joint while the other injuries were soft tissue injuries and was awarded Kshs 400,000/-. In *Rachael Mihaki Kiragu v Karimi Simon Mwihaki & Another (2015) eKLR* in which the Appellant/Plaintiff was awarded Kshs 450,000 having sustained a fracture on the left ankle with a de-gloving injury, cut wound on the scalp and deep cut wound on the right knee. The applicant also relied on the case of *Ngugi Elizabeth & Another v Naom Mbeke Kimeu Mutie (2017) eKLR* in which the Respondent suffered fractures of the 2nd toe of the left foot, 3rd toe of the right foot and a fracture of the tibia of the left foot. The court awarded general damages at Kshs 800,000/-.

8. Counsel for the Respondent, Mr. Nyangosi, for the Respondent submitted that the award was not excessive. He submitted that the Respondent's injury was a fracture of the acromioclavicular joint. He further submitted that the only way injuries can be disputed is by way of a second medical report/ by an expert's opinion and that none were tabled by the Appellant.

9. It is trite law that the burden of an action on a balance of probabilities rests with the plaintiff/respondent. I therefore examined the discharge summary, medical report by Dr. Ezekiel Ogando Zoga as well as the P3 form which was also completed by the same doctor, so as ascertain whether the award by the trial magistrate was based on a fracture sustained by the respondent. The discharge summary issued by Tabaka Mission Hospital indicate injuries that were sustained by the respondent, severe head injuries and deep cut wound on the right lower limb. The report by Dr Ezekiel Ogando has outlined in the patient history section more serious injuries, more specifically, that a fracture of the acromioclavicular joint. The fracture referred to in the medical report has been listed under the patient's history and the conclusion by Dr Ezekiel Ogando does not indicate that the patient suffered a fracture. Dr. Ezekiel Ogando concludes that the respondent sustained severe head injuries, deep de-gloving injury of the right knee, multiple soft tissue scars and assessed disability at 40%.

10. It is apparent that the learned trial magistrate based her finding on quantum, on the report by Dr. Ezekiel Ogando as well as the discharge summary. I find that the conclusion by Dr. Ezekiel Ogando was consistent with the injuries indicated on the discharge summary.

11. I will proceed to make a determination of whether the award of general damages by the trial court was excessive. In considering whether the general damages awarded by the trial magistrate is excessive this court must consider the guiding principles. This Court may only interfere with the exercise of discretion of the trial magistrate if it is satisfied that the magistrate materially misdirected himself and as a result arrived at a wrong decision, or that he was clearly wrong in the exercise of his discretion as a result of which there was misjustice. (See *Mbogo & Another V Shah (1968) EA 93*). The Court of Appeal in the case of *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] Eklr* observed that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”

12. Looking at the cases cited by the appellant and respondent before the trial court, it is clear that the respondent cited cases where the injuries were more serious compared to those sustained by the respondent. The appellant cited decisions made between 1994 and 2002. The Appellants relied on very old authorities which did not assist the trial court in establishing what the recent awards of courts are in awarding general damages. Bearing in mind the nature of injuries that were sustained by the Respondent the sum of Kshs 300,000/= as proposed by the appellant for general damages is clearly very low. In *Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR* the court stated that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

13. In the case of **Butt v Khan (1977) KAR 1** the court held that:

“An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.”

14. In considering the injuries sustained by the respondent, the cited cases by the parties and inflationary trends, I find that the award of Kshs 1,200,000/- by the trial magistrate is manifestly excessive. The upshot is that the appeal is allowed and the Court sets aside the assessment of damages by the trial magistrate court. In its place, the Court substitutes an assessment of quantum for general damages for **Kshs. 650,000/=**, special damages are not contested and will stand as before. I will not award costs on this appeal for equitable reasons and direct that each party to bear its own costs.

Dated, signed and delivered at Kisii this 21st day of November 2018.

R. E. OUGO

JUDGE

In the presence of;

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

Absent For the Respondent

Ms. Rael Court/ clerk