



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 68 OF 2015

JOHN WANDETO.....1ST APPELLANT

WELLS FARGO LIMITED.....2ND APPELLANT

- V E R S U S -

VIRGINIA NJERI GATONYE.....RESPONDENT

(Being an appeal from the judgement of the Chief Magistrate's Court at Milimani by the Hon. M. Chesang (Mrs) dated 22nd January 2015 in CMCC no. 5709 of 2012)

JUDGEMENT

1) Virginia Njeri Gatonye, the respondent herein, was involved in a road traffic accident on 1.10.2011 while crossing Mombasa Road near Belle View and as a result she sustained the following injuries:

- *Fracture of the right radius*
- *Fracture of the right ulna*
- *Compound fracture of the right tibia*
- *Compound fracture of the right fibula*
- *Dental oral injuries with loss of 2 incisors and*
- *Broken left foot.*

2) The respondent then filed a compensatory suit claiming damages for the aforesaid injuries against **John Ndeto** and **Wells Fargo** the 1st and 2nd appellant respectively before the Chief Magistrate's Court, Milimani. At the trial, the parties recorded a consent order to have 20% liability apportioned against the respondent while the appellants were to shoulder 80% liability. Hon. M. Chesang, learned Resident Magistrate heard the suit and in the end she awarded the respondent a sum of ksh.1,500,000/= as general damages for pain and suffering and ksh.34,300/= as special damages.

3) The appellants' being dissatisfied with the award on quantum preferred this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in law and fact in awarding the respondent the sum of shs.1,500,000.00 as general damages, as the said award is manifestly excessive in the circumstances, considering the injuries sustained.

ii. THAT the learned magistrate erred in law and in fact by awarding special damages that were not strictly proven.

iii. THAT the learned magistrate erred in law and in fact in failing to consider the defence evidence on record.

iv. THAT the learned magistrate erred in law and in fact in failing to consider awards in cases similar to this suit.

v. THAT the learned magistrate erred in law and in fact in failing to put into consideration the submissions of the defendants.

vi. THAT the learned magistrate erred in law and in fact by failing to consider the authorities relied on by the defendants in their

submissions.

4) When the appeal came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submission. I have re-evaluated the evidence that was before the trial court. I have also considered the medical reports prepared by Dr. Wokabi and Dr. Byakika and it is apparent that the respondent sustained the following injuries:

- *Fracture of the right radius*
- *Fracture of the right ulna*
- *Fracture of the right tibia*
- *Fracture of the right fibula*
- *Dental oral injuries*

5) It is also not in dispute that the learned Resident Magistrate awarded the respondent for the aforesaid injuries a sum of Ksh.1.5m.

6) It is the submission of the appellant that the trial magistrate erred when she made an inordinately high award. It was pointed out that the trial magistrate did not take into account the appellant's evidence and submission. It is further the submission of the appellant that the trial magistrate refused to take into account comparable cases. It is argued that had the trial magistrate considered the appellants' submission an award of ksh.600,000/= would have been awarded as the appropriate amount for such injuries.

7) The respondent is of the submission that the trial court committed no error in making the award. She pointed out that the trial court took into account the injuries and awards in comparable cases.

8) The recorded proceedings show that the learned Resident Magistrate took into account the nature of injuries, comparable awards and the submissions of both sides before arriving at her decision to award kshs.1,500,000 for general damages. The record shows that the respondent had cited the following cases in support of her prayer to be paid ksh.1,800,000 as general damages:

- i. **Jacinta Wanjiku =vs= Samson Mwangi (2006) eKLR** where the claimant was awarded ksh.1,800,000/=.
- ii. **Anthony Maina =vs= Samuel Njenga (2006) eKLR**, where the claimant was awarded ksh.1,200,000/=
- iii. **James Githiri =vs= Nduati Njuguna Ngugi (2012) eKLR** in an award of ksh.1,800,000/= was made in the year 2012.

9) The appellants submitted before the trial court that the respondent should be awarded ksh.600,000/= for general damages. The appellants cited following authorities:

- i. **Ahmed Mohamed =vs= Abdulhafidh M. Banragah (2002) eKLR** where this court made an award of ksh.750,000/= in 2004.
- ii. **Ismael Kaguongo =vs= Nicholas Njoroge Kangi (2004) eKLR** in which the claimant was awarded ksh.500,000/=.
- iii. **David Sang =vs= Richard Langat & Another (2006) eKLR** where the claimant was awarded ksh.550,000/=.

10) Having reconsidered material placed before the trial court on this head, I am satisfied that the trial magistrate took into account the relevant authorities and arrived at a fair assessment of damages on general damages. The authorities cited by the respondent were more relevant and of recent times than those cited by the appellants. I find no merit in the appeal against the award on this head.

11) The other award which is a subject of the appeal is the award on special damages. The respondent sought for ksh. 34,300/= as special damages. In her judgment, the learned Resident Magistrate awarded the respondent the aforesaid amount as prayed and proved. It is the appellants' submission that the aforesaid claim was never proved therefore it should not have been awarded.

12) The respondent is of the view that the claim for special damages was strictly proved. I have on my part re-evaluated the evidence tendered by the respondent to establish the claim for special damage. It is clear from the record that the respondent produced receipts from Kenyatta National Hospital, receipts for transport,

purchase of crutches and medical reports.

13) I am satisfied the award on special damages was pleaded and specifically proved.

14) In the end, I find no merit in this appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 7th day of December, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents