



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL NO. 164 OF 2009

PHILIP MUSYOKA MUTUA.....APPELLANT

VERSUS

MERCY NGINA SYOVO.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Senior Magistrate's Court

at Machakos before Hon. Munguti, SRM, delivered on the 27th day of August 2009

in Machakos CMCC NO. 116 of 2007)

JUDGMENT

Introduction

1. This is an appeal from the judgment of the lower court. The parties had entered into an agreement on liability and filed a consent in the ratio of 90:10 in favour of the plaintiff as against the defendant. The only issue for determination before this court is on quantum. The trial court awarded general damages of Ksh.180,000/= for Pain and Suffering.

2. The appellant filed its Memorandum of Appeal on 25.09.2009 citing the following specific grounds:

1. The learned trial magistrate erred in assessing general damages for pain and suffering at Ksh.180,000/= and failed to apply the principles applicable to the award of damages and comparable awards made for similar injuries.

2. The award of general damages is inordinately high and not all commensurate with the injuries sustained by the Plaintiff/Respondent.

3. The said award is out of keeping with other Kenyan awards for comparable suffering.

4. The learned trial magistrate in failing to consider the submissions and authorities submitted on behalf of the Appellant.

Reasons wherefore: the Appellant prays that:

1. This appeal be allowed with costs

2. The judgment and decree of the Senior Resident Magistrate's Court made on the 27.08.2009 in Machakos Civil case number 1160 of 2007 – Mercy Ngina Syovo v. John Kamau Ngugi & Philip Musyoka Mutua against the Appellant be set aside and/or reviewed.

3. The respondent in her plaint dated 30.11.07 at paragraph 7 had stated as follows:

“7. As a result of the accident the plaintiff sustained severe and extensive bodily injuries and has suffered loss and damage.

Particulars of injuries

1. Blunt injury to the head

2. Blunt injury to both shoulders

3. Blunt injury to the ribs

4. Blunt injury to the back

5. Deep cut wounds both ankle joints

6. Cut wound on the right knee.

Particulars of special damages

a) Police Abstract.....ksh200

b) P3 form filling.....ksh1500

c) Medical report.....ksh2000

Evidence

4. The respondent produced a medical report by Dr. Ndambuki, a P3 form filled at Machakos General Hospital and an initial treatment document from Machakos General Hospital.

Submissions

5. Parties agreed to canvass the appeal by way of written submissions

Appellant's Submissions

6. The appellant urged that the treatment notes dated 25.09.2007, 4 days after the accident did not detect any blunt injuries to the head, both shoulders, back or ribs, yet the medical report by Dr. Ndambuki and P3 form had all these injuries. The court was urged to disregard these documents, since the trial court had also stated they had been exaggerated but went ahead to award a sum of ksh180,000/=.

7. This court was urged further to consider the guiding principles of law on awards in general damages as set out in ***Thika Nurseries Limited v. Mutua Mutuku*** (2007) eKLR as; An award of damages should be commensurate to the injuries suffered; An award of damages should not be inordinately too high or too low; Awards in decided cases are mere guides and each case depends on its own circumstances.

8. The appellant urged the court to rely on ***James Kevogio Mole & Anor v. K.B.S Ltd***, HCC No. 2163 of 1991 where the plaintiff sustained a cut wound on left eyebrow, soft tissue injury to chest, deep abrasion over left hand and soft tissue injury to the right flank, where a sum of ksh.30,850/= was awarded in general damages; and in ***Elisaphan Ndito Kaveri v. Charles Maina Kimani*** [2009] eKLR where the plaintiff had sustained soft tissue injuries and a sum of ksh.40,000/= was awarded.

9. Finally, the court was urged to set aside the judgment of the trial court on quantum and allow the appeal with costs.

Respondent's Submission

10. The respondent urged that the award by the trial court was in tandem with the injuries sustained taking into account the inflation rate. It was their submission that the injuries in Dr. Ndambuki's report was consistent with those in the P3 form and the respondent had been examined immediately after the accident whereas Dr. Wambugu examined the respondent a year later, and the trial magistrate's assertion that Dr. Ndumbuki's medical report was exaggerated was faulty and unreasonable.

11. The court was referred to the authorities filed in the trial court ***Wairimu Njui v. Baker & Anor***, Nrb HCCC NO. 2116 of 1980 where the plaintiff had sustained head injury and soft tissue injuries to the trunk and right foot and a sum of ksh.220,000/= was awarded, and in ***Gitonga Njeu Thara v. Albert Gitaari Mugeru***, Nrb HCCC NO. 4987 of 1992 where the plaintiff sustained a multiple soft tissue injuries of a scalp wound and conclusions to the back, chest, left shoulder and left hand and a sum of ksh180,000/= was awarded.

12. Further, the current decided cases in ***H. Young Construction Co. Ltd v. Richard Kyule Ndolo***, MKS HCCA NO. 173/09 where the respondent had sustained blunt injuries to the ankle and a sum of ksh.250,000/= was awarded and in ***Samuel Muthama v. Kenneth Maundu Muindi***, MKS HCCA 102 of 2008 where the respondent had sustained a sum of ksh380,000/= for blunt injuries to the head, chest and cut wounds.

13. Finally the court was urged to dismiss the appeal for lack of merit with costs.

Issues for determination

14. The court has referred to the record of appeal, the submissions and authorities and has framed the following issue for determination.

A. Whether the award of Ksh.180,000/= was inordinately high compensation for the injuries sustained to justify interference by an appellate court.

Determination

15. The appellant and respondent did not avail any witness since they had agreed to produce the documents to be relied on by consent attaching them to their submissions.

Duty of first appellate court to review evidence

16. This being a court of first appeal, it has a duty to re-evaluate, analyse and make its own independent conclusion. See ***Peters v. Sunday Post Ltd*** (1958) E.A. 424. This court can only interfere with an amount awarded by the trial court if it is either inordinately high or low.

17. The general out patient record had a history of the respondent being involved in a Road Traffic Accident on 25.9.2007 whereby he had sustained the following injuries:

1. *Injury to the lower limbs (ankle)*

2. *Injury to the right knee.*

18. The doctor had gone further and stated that the wounds on the ankle joints and right knee joint was cleaned and dressed. The P3 form and Dr. Ndambuki medical report filled on 24.10.07 showed the following injuries.

a. *Blunt injury to the head*

b. *Blunt injury to both shoulders*

c. *Blunt injury to the ribs*

d. *Deep cut wounds on both ankle joints*

e. *Cut on the right knee*

The injuries were approximately one month old from the date of injury.

19. Dr. Wambugu's medical report (the appellant's doctor) showed the following injuries:

1. *Abrasion wounds on both legs*

2. *Blunt trauma right trunk.*

He gave an opinion that the injuries were of soft tissue in nature.

20. The initial treatment document shows injuries, which this court would take to be the injuries sustained since the respondent was treated at Machakos Hospital immediately after the accident and therefore the doctor was well placed to examine and see the kind of injuries she had sustained.

21. The injuries stated in the P3 form and in the medical report by Dr. Ndambuki contain more injuries than those sustained by the respondent. Dr. Wambugu on the other hand examined the respondent on 12.08.2008, almost a year after the accident and prepared a medical report. He confirmed that the respondent had healed.

This court therefore finds that the only injuries sustained by the respondent were;

1. *Injury to the lower limbs*

2. *Injury to the right knee*

22. The appellant urged the court to rely on ***James Kevogio*** (supra) where a sum of Ksh 30,850/= was awarded for a cut wound on the left eyebrow. This soft tissue injury to chest, deep abrasion over left hand and injury to right flank is a 1991 case, the injuries were different from what the respondent had sustained and it was an old case. In ***Elizabeth Ndito*** (supra) the appellant had sustained an injury on the left side of the neck, left shoulder, back and knees. A sum of Ksh.40,000/= was awarded. This was a 2009 case.

23. The respondent in the lower court had relied on ***Wairimu Njui*** (supra) whose injuries were more severe: head injury and soft tissue injuries to the trunk and foot. The court had awarded Ksh.220,000/=. In ***Gitonga Njeu Thara*** (supra) a sum of Ksh.180,000/= was awarded. These injuries were more severe compared to the respondent's injuries. Further, this court was urged to refer to ***H.Young construction Co. Ltd*** (supra) where an award of Ksh.250,000/= was awarded for a degloving injury to the left leg with loss of skin over the calf muscles and

blunt injury to the left ankle joint. This injury is more severe than the respondent's in this case. Whereas in *Samuel Muthama* (supra) the respondent had suffered an injury to right eye, back, head, chest and he would suffer a 4% partial permanent incapacity, a sum of Ksh.380,000/= was upheld by the court unlike this present appeal where the respondent only suffered an injury to the lower limbs and right knee.

Principles for inference with award of damages

24. The principles upon which this court can interfere with an award made by the trial court was well settled in *Kemfro Africa Limited T/A "Meru Express Services 1976" & Gathogo Kanini v. A.M. Lubia & Olive Lubia* [1982 – 1988] 1 KAR 727, where Kneller J.A said:

"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 the judge in assessing the damage 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."

25. The trial court in his judgment had stated to have considered the authorities which had been cited by the parties and the passage of time and had awarded Ksh.180,000/=. However this court will need to interfere with this sum for the reason that the injuries were not severe. Just as the trial court had stated Dr. Ndambuki's report to have exaggerated injuries, the court hence relies on the first treatment document from Machakos Hospital dated 25.9.2007. The court is guided by the principle in *Kemfro Africa Limited* (supra) and finds that the amount awarded was inordinately high. This is so, because an award should be regarded as giving a reasonable compensation. In *Rahima Tayale & Ors v. Anna Mary Kinanu* Civil Appeal No. 29 of 1982 [1983] KLR 114; KAR 90 while relying on the cited case of *H. West and Son Ltd v. Shephard* [1964] AC 326, it was stated as follows;

"Money cannot renew a physical frame that has been battered and shattered. All that judge and Courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by awards. When all this is said it must still be that amounts which are awarded are to be a considerable extent conventional."

In view of the above, this court finds that the award which is adequate compensation for the injuries sustained is Ksh.120,000/=:, taking into account the inflationary trends.

26. On special damages only ksh.200/= as pleaded and proved is awarded. The rest of the special claim was not proved.

Orders

27. Accordingly, for the reasons set out above, the court makes the following orders:

1. The appeal is allowed. The trial court's award on damages is set aside and a sum of Ksh.120,000/= is awarded for pain and suffering subject to contribution on liability as agreed by the parties. The special damages are awarded as proved at Ksh.200/=:.
2. There shall, therefore, be judgment for the appellant/defendant against the respondent/plaintiff in the sum of Ksh.108, 200/= together with interest at the court rate of 14% p.a. from the date of judgment in the trial court until payment in full.
3. The respondent/plaintiff shall have the costs in the trial court and interest thereon.
4. Each party to bear its own costs of this appeal.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF DECEMBER 2018.

D.K. KEMEI

JUDGE

Appearances:-

M/S. Muri Mwaniki & Wamiti Advocates for the Appellant.

M/S. Anne M. Kiusya & Co. Advocates for the Respondents.