



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 511 OF 2016

RELIABLE FREIGHT SERVICES LTD & ANORAPPELLANT

VERSUS

HENRY INGARU MULAMARESPONDENT

(Formerly PMCC Civil Case 8132 of 2013 Milimani Commercial Courts, Nairobi).

JUDGEMENT

INTRODUCTION

1. The Plaintiff/Respondent lodged a suit claiming special and general damages.
2. He claimed that on 27/07/2013 he was cycling along Uhuru Highway/Haile Selassie Avenue and about when the motor vehicle KBX 612Y was negligently driven that it hit him occasioning him severe bodily injuries thus suffering loss and damage.
3. The Defendant/Applicant filed defense denying liability.
4. However, when matter came for hearing the parties recorded consent at a ratio of 80%:20% in favor of the Respondent.
5. After hearing Respondent on quantum, the trial court awarded Plaintiff/Respondent Kshs.900,000/= plus interests and costs.
6. Being aggrieved by the Appellants lodged instant appeal setting out 6 grounds namely:-

1. ***THAT*** the Learned Magistrate erred in law and fact and ended up misdirecting herself in awarding exorbitant quantum of damages by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries sustained by the Plaintiff/Respondent herein.

2. ***THAT*** the Learned Magistrate erred in law and fact in making such a high award as to show that the Magistrate acted on a wrong principle of law by awarding general damages of Kshs.900,000/= without justification.

3. ***THAT*** the learned Magistrate's award on damages was so high and inconsistent in word and figures as to be entirely erroneous.

4. ***THAT*** the Learned Magistrate's award was made without considering the medical evidence, authorities and Respondent's submissions before the court and failed to appreciate the nature of injuries sustained by the Plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.

5. ***THAT*** the assessment and award of general damages is manifestly excessive and inordinately high so as to amount to a miscarriage of justice.

6. ***THAT*** the whole judgment on quantum was against the weight of evidence before the court.

7. The parties agreed to canvass appeal via submissions but only Appellant filed the same.

APPELLANT'S SUBMISSIONS

8. The Appellant submitted that, the trial court in its judgment did not indicate where the injuries enumerated thereat came from and there

was no mention of the two medical reports.

9. It is contended that, it is clear that the trial court failed to indicate what informed it of the seriousness of the injuries thereby arriving at an award which was too exorbitant.

10. It is argued that the contents of the said medical report clearly indicated that the injuries suffered by the Respondent had healed leaving a permanent incapacitation of only 15% and 6% respectively as per the medical reports by Doctors. C.O. Okere and W. M Wokabi dated 14th November 2013 and 21st August 2014.

11. The Appellant laments that, the trial Court failed to indicate the discrepancy in degree of incapacitation in the medical reports with the latter at 6% which clearly indicated that the injuries had healed thereby reducing the incapacitation to a greater extent making an award of general damages to the tune of Kshs.900,000/= to be exorbitant.

12. The Appellants submit that the oral testimony by the Respondent and documents relied at trial did not warrant the deduction and reasoning by the Trial Court that the injuries were serious which they submit misinformed the court to arrive at an exorbitant award.

13. The Appellant submits the authorities relied by the Respondent were not as inclusive and in correlation to Respondent's injuries hence the logic behind Respondent's submitting for an exorbitant award of Kshs.1,537,000/= which misdirected the Honourable Trial Court to award an exorbitant figure of Kshs.900,000/=.

14. The Appellant contends that, At page 66 and 67 ROA, it is clear that the Appellants had submitted for an award of Kshs.250,000/= and relied on three authorities.

15. In those cases, the claimants had suffered fractures of tibia and fibula, and left collar bone including other soft tissue injuries where award ranged from Ksh.200,000/= to Kshs.360,000/= depending on degree of permanent incapacitation.

16. Thus the court ought to have explained why authorities relied on by Appellants which were very relevant were ignored yet relied on respondents authorities which the Appellants submit led to the said exorbitant award which is being appealed from.

17. The Appellant submits that, there is no indication in the whole proceedings how the award of Kshs.900,000/= as general damages was arrived at, hence they submit that the trial court failed to appreciate the principles it had to put into consideration when assessing general damages.

18. It is submitted that, there is no explanation why the court arrived at the award being appealed when both parties had submitted for Kshs.1,537,000/= and Kshs.250,000/= respectively.

19. There is no indication that the injuries suffered by Respondent as they had healed with 15% and 16% permanent incapacitation warranted the said award.

20. The award of kshs.900,000/= is inordinately high as Appellants have indicated to warrant it be disturbed by this Appellant court.

THE DUTY OF THE APPELLANT COURT

21. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR -VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

EVIDENCE

22. PW1 testified on how accident occurred and produced his documents. PEX 1 -11. He was not cross examined.

ISSUES, ANALYSIS AND DETERMINATION

23. After going through the evidence on record, I find the issues are:-

- 1) *Whether the award by the Trial court was so inordinately high that the Appellate court ought to disturb it?*
- 2) *If above in affirmative, what is the award?*
- 3) *What is the order as to costs?*

24. The only issue in the instant matter is on the quantum since liability had been agreed by the parties.

25. The Trial Court noted that the injuries sustained by the Appellant were fractures of left tibia and fibula and lacerations on the right buttock. The disability was assessed at 6%.

26. The court there just casually stated that;

“having regard to the injuries suffered by the plaintiff, the comparable awards vide submissions by parties and the authorities cited then awarded general damages as Kshs.900,000/= plus general damages pleaded and proved.”

27. The court did not specifically state the comparable award it was neither relying on nor the authority (ies) guiding her.

28. Of course, the mode of analysis by the Trial Court was to say the least waiting.

29. The role of the 1st Appellate Court in disturbing awards is to weigh whether same is inordinately high or inordinately low that it does not reflect the estimate of the injuries inflicted on the claimant.

30. The court in doing so is guided by comparable awards in similar injuries.

31. The claimant in the Lower Court cited the following authorities to support for award for general damages Kshs.1,537,000/= namely:-

1) MWAURA –VS- MWAURA & ANOTHER CIVIL APPEAL 58/2013 EMBU

Injuries – Multiple soft tissues.

- Blunt injury to head.
- Fracture radius/ulna (L).
- Compound fracture.
- (R)tibia/fibula awarded Kshs.2 million.

2) MAGO N. –VS- BONANZA RICE MILLERS CIVIL CASE 373/2008 NAIROBI

Injuries - Gunshots bullet lodged in body.

- Another shattered femur knee region and destroyed knee ligaments.
- Disability 35% award of Kshs.2million general damages.

3) MATHENGE -VS- FINA BANK LTD CIVIL CASE 87/2005 NAIROBI

Injuries - Cut wound scalp and fractured femur.

- Disability 25 award of Kshs.1.5 million.

32. The Defendant now Appellant cited the following authorities in support of an award of Kshs.250,000/= for general damages.

1. NAIROBI HCC 2068/2002 MAHMOUND –VS- ANN (2011) EKLR

Injuries - Fracture left tibia and fibula.

- Dislocation left ankle and fracture collar bone.

Award of Kshs.200, 000/=.

2. NAKURU HCCA APPEAL 39/2007 EGO –VS- KARANJA 2009 eKLR

Injuries - Fracture tibia and fibula.

Award Kshs.360, 000/= with degree of disability assessed at 6%.

3. NAIROBI HCC 335/2004 eKLR MICHENI –VS-MURANGO

Injuries - Fracture tibia and fibula.

Award kshs.100, 000/=.

33. The claimant authorities seem to indicate very serious injuries and high degree of disability between 25-35%.
34. The claimant himself sustained less serious injuries.
35. On the other hand, the Appellant cited authorities during trial are very old for over 14 years and the injuries less severe comparing to the injuries sustained by the claimant.
36. In the circumstances, the court finds that both sides did not properly guide the court with the authority cited.
37. The court thus doing the best it can assess the general damages at Kshs.600, 000/=.
38. The special damage agreed were Kshs.8, 500/=.
39. The costs of suit will include Kshs.11, 000/= for police and the doctor.
40. Thus the court makes the following orders:-

1. Appeal is allowed to the extent that:-

a) General damages Kshs.600,000/=

b) Special Kshs.8,500/=

Total Kshs.608, 500/=

Less 20% Kshs.121, 700/=

Balance Kshs.486, 800/=

c) ½ Costs of the appeal to the Appellant.

2. Interest on the award to ran from the date of the judgment of the Lower Court.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE