



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 29 OF 2016

SILVERIO MBITI NJIRU.....1ST APPELLANT

AMOS NJAGI ENDASI.....2ND APPELLANT

AL HUSNAIN MOTORS LIMITED.....3RD APPELLANT

VERSUS

ELIZABETH SYOMBUA MUNYOKI.....RESPONDENT

J U D G M E N T

A. Introduction

1. This appeal is against the judgement and decree of the Honourable Resident Magistrate S.K. Mutai which was delivered on the 19th April 2016 in **Embu Case No. 237 of 2012**.
2. The respondent had sued the appellant for general and special damages arising from a road traffic accident in which the respondent sustained injuries.
3. The court awarded general damages of Kshs. 1,500,000/= and special damages of Kshs. 194,125/= together with the costs of the suit in favour of the plaintiff.
4. The appellant filed a memorandum of appeal dated the 5th May 2016 on the 30th April 2015 seeking to set aside or vary the judgement of the trial court.
5. The appeal is grounded on the following points: -
 - 1) *The learned trial magistrate erred in law and fact in wholly relying on the evidence adduced by the plaintiff/ respondent and disregarding the defendants'/appellants' submission on quantum.*
 - 2) *That learned trial magistrate erred in law and in fact in failing to properly assess the degree of injuries sustained by the plaintiff/respondent in line with the paramount provisions of Insurance Motor Vehicle Third Party Risks Act Cap 405 Laws of Kenya and the available judicial authorities on similar injuries. The act provides a guideline on how compensation of various natures of injuries is to be computed.*
 - 3) *That learned trial magistrate erred in law and in fact by applying the wrong principles and misapprehending the evidence and as a result arrived at a figure so inordinately high as to represent an entirely erroneous estimate.*
 - 4) *That learned trial magistrate erred in law and in fact in failing to weigh all the evidence placed before him before assessing damages and/or relying on insufficient evidence.*
 - 5) *That learned trial magistrate's decision was arrived at in a cursory and perfunctory manner in consideration of the irrelevant factors while leaving out relevant ones and the general damages awarded to the plaintiff/respondent are unjustified, excessive and oppressive.*
6. The parties herein agreed to dispose of the appeal by way of written submissions.

B. Appellant's Submissions

7. In their submissions, the appellants reiterated the principles that the court must bear in mind when assessing damages. He relied on the cases of **Kemfro Africa Ltd t/a Meru Express & Another vs A.M. Lubia & Another (No.2) (1987) KLR** as quoted in the case of **Elizabeth Bosibori & Another v Damaris Moraa NYAMACHE (2017) eKLR**.

8. The appellant further submitted on the principles that the court must bear in mind when assessing damages. He relied on the cases of **Sofia Yusuf Kanyare vs Ali Badi Sabre & Another Nairobi HCCC No. 478 of 2007, Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR** as well as that of **United India Insurance Co Ltd v East African Underwriters(Kenya) Ltd (1985) KLR**

C. Respondents Submissions

9. It was submitted on behalf of the respondent that the appellants' grounds of appeal revolve around the award of general damages that the appellant deemed excessive in light of the injuries suffered by the respondent.

10. It was further submitted by the Respondent that courts address themselves to issues of quantum by giving awards that are comparable to those given where almost similar injuries are involved factoring the effect of inflation.

11. To this end the respondent sought to rely on the cases of **Charles Mathenge Wahome v Mark Mboya Likanga & 2 others Nairobi Civil Case No. 87 of 2005** where the High Court awarded the plaintiff Kshs. 1.5 million for pain and suffering and loss of amenities for injuries to the right femur and a cut wound on the scalp.

12. Further the respondent relied on the case of **Mehari Transporters Ltd v Damus Muasya Maingi, Machakos Civil Appeal 190 of 2008** where the Judge upheld the trial court's decision to award Kshs. 1.5 million general damages for injuries that the respondent perceived as similar to his.

13. It was further submitted that ground 2 of the memorandum of appeal in regards to the trial court failing to access injuries of the respondent in line with the provisions of the Insurance Motor Vehicle Third Party Risks Act, was a brazen attempt by the appellant to mislead the court as no statute provided for this requirement. The respondent relied on the Court of Appeal case of **Simon Taveta v Mercy Mutitu Njeru (2014) eKLR**.

14. The respondent further submitted that the appellant had not demonstrated in what way the award by the trial court was inordinately high and further that the trial court analyzed the evidence presented and arrived at the award after taking due consideration of the same and as such there was no reason for the appellate court to disturb the same. The respondent relied on the unreported case of **Michael Njoroge v Peter Karanja Njoroge Muranga High Court Civil Appeal No. 69**

15. It was further submitted that the present appeal ought to fail on the basis that there was undue delay in prosecuting the case by the appellant. He relied on the provisions of Order 42 Rule 35 (2) as well as the case of **K. Ventures Limited v Peter Olumati (2018) eKLR**.

D. Issues for Determination

i. Whether the appeal should be dismissed under Order 42 Rule 35 (2)

ii. Whether the general damages award was inordinately high.

iii. Who is to bear the costs of this appeal.

E. Analysis & Determination

16. I will address myself first to the issue for determination as this has the effect of, concluding this appeal in the event that the court finds that the appeal ought to be dismissed.

17. The respondent in arguing this issue relied on **Order 42 Rule 35 (1) and (2) which** provides: -

(1) "Unless within three months after the giving of directions under rule 13, the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

18. The rule is clear that there are two situations where an application for dismissal can be made. The respondent can only apply if after directions have been given and the appellant has not taken action to set down the appeal for hearing. The second is where the registrar with notice to the parties shall place the appeal before the Judge for dismissal if one year after service of memorandum of appeal the appeal has not been set down for hearing.

19. In my view, the respondent is not in order to have brought the application under **Order 42 Rule 35 (2)**. Under this provision the respondent should have requested the Registrar to list the matter for dismissal.

20. In the case of **Elem Investment Ltd. -Vs- John Mokora Olwoma (2015) eKLR** Aburili J stated:

“a reading of the above provision shows that it is clear that an appeal can be dismissed for want of prosecution in two instances. Firstly, where there has been a failure to admit the appeal for hearing three months after directions have been given under Order 42 rule 13 Civil Procedure rules or secondly if after one year of service of memorandum of appeal the appeal has not been listed for hearing.

In these two scenarios, the procedure is different. In the first scenario, the respondent is given the option to either list the appeal for hearing or apply for its dismissal. Under that scenario however, the appeal can only be dismissed if it has been admitted and directions have been given”.....

21. The provision under which this appeal could be dismissed for want of prosecution is **Order 42 rule 35 (2)**. This provision could not be invoked by the respondent. The respondent did not write to request the registrar to list the appeal for dismissal. In fact, directions had already been issued that parties dispose the matter by way of written submissions. I am persuaded to adopt the finding by **Aburili J in Rosarie (EPZ) Limited -V- Stanlex Mbithi James (2015) eKLR** where he stated:

“Since under Order 42 rule 35 (1) the appeal cannot be dismissed before directions have been given the applicant should have taken advantage of Order 42 rule 35 (2) and cause the registrar to list the appeal for dismissal. If there had been such correspondence which the registrar ignored, I would have been inclined to the application. Since however, there is no evidence that the applicant had requested the registrar to list the matter in terms of Order 42 rule 35 (2) and the latter failed, I find it difficult to accede to the application.”

22. The upshot of the above is that the respondent submission for dismissal of this appeal should fail. I will now consider this appeal on its merits.

23. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

24. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

25. Having the aforesaid holding in mind and having looked at the appellant’s grounds of appeal and the parties’ respective written submissions, it is clear to the court that the only issue for consideration and determination was whether or not the quantum that was awarded by the learned trial magistrate was so manifestly excessive and/ or inordinately high in the circumstances requiring interference by this court.

26. The principles on which an appellate court will disturb an award in damages are fairly well settled. The principle is that an appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages. In **Butt -vs- Khan Civil Appeal No. 40 of 1997**, the court stated 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 arrive at a figure which was either inordinately high or low.” See also **Kemfro Africa Ltd and Another vs A.M. Lubia & Another (1982-1988)**

27. With regard to particulars of injuries, the applicant particularized them as follows:

§ Bruises on the right side of the scalp

§ Soft tissue injury of the neck

§ Soft tissue injury of the chest

§ Blunt abdominal injury

§ Fracture of the left femur

28. Thus the plaintiffs claimed both general and special damages. The defendant on his part filed a written statement of defence denying liability and particulars of negligence attributed to him. In the alternative and without prejudice the defendant averred that if at all the plaintiffs were involved in the accident and were injured the same was wholly and or substantially contributed to by the plaintiff’s negligence.

29. The respondent was PW-1 and she gave evidence reiterating the contents of her plaint. PW-2 corroborated the evidence of the

respondent. The medical report by Dr. Karanja was admitted by consent on the 9/02/2016. The said medical report assessed the degree of permanent disability at 25%.

30. During trial, the defendants offered no evidence to challenge the plaintiff's suit hence the same was uncontroverted. This court fully associates itself with the holding of Warsame J (as he then was) in the case of Jotham Mugalo vs. Telkom (K) Ltd Kisumu HCCC No. 166 of 2001(unreported), when he stated as follows: -

“...The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

31. The parties agree that the extent to which an appellate court may interfere with an award of damages. It must be shown that the trial court, in awarding of the damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see Butt v Khan supra).

32. This appeal concerns the award of general damages. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR 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.”

33. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards which must be avoided, the court must ensure that awards make sense and result in fair compensation. In Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR the Court of Appeal while addressing itself to the issue of inflation stated;

“I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for the loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives.”

34. In the case of Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two devolving injuries of the right knee and the right ankle and concluded that she will need money to remove k-nails and screws.

35. In the case of Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR, the Court of Appeal referred to the cases of Antony Mwangi vs Martin Muiruri [2008] eKLR, where the plaintiff therein sustained a fracture of the femur and was awarded Ksh.400,000/= as general damages and the case of Joseph Suri Nyateng vs H.P. Mashru [1999] eKLR where the plaintiff therein sustained a fracture of the femur and a dislocation of the shoulder and was awarded Ksh.450,000/=.

36. In the case of Joseph Musee Mua vs Julius Mbogo Mugi & 3 others [2013] eKLR, the plaintiff therein suffered a fracture of left tibia and fibula, two (2) broken upper jaw teeth, chest and shoulder injuries. His nerves were also affected. He had shortening of the left leg and as a result, **he suffered 5 % disability**. The Court awarded Kshs1,300,000/= general damages.

37. Having had due regard to the aforesaid cases, the evidence of PW1, the respondent and the Medical report of Dr Karanja, it appeared to this court that the award of Kshs 1,500,000/= was not unreasonable in the circumstances of the case herein. According to the medical report, the respondent suffered 25% permanent disability. The awards in the forgoing cases were made several years before this award.

38. I hold the opinion that the award of Kshs. 1,500,000 awarded by the trial magistrate is reasonable taking into account the inflation as at the time of rendering judgement.

39. I reach a finding that the award was no inordinately high to justify interference by this court.

40. On the issue of costs its settled law that costs follow the event and hold the opinion that the award by the trial magistrate of costs to the respondent is upright. I further endorse the award of costs in this appeal to the respondent. This is supported by the case of ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHER [2014] eKLR where the court stated:

“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”

41. It is my find that this appeal has no merit and it is hereby dismissed.

42. The award of the lower court is hereby upheld.

43. The appellant to meet the costs of this appeal and of the court below.

44. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 3rd DAY OF DECEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr Mbogo for the Plaintiff