



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL NO. 68 OF 2015

BETWEEN

EASY COACH BUS LIMITED APPELLANT

AND

MARY ADHIAMBO OHURU RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.B.M.Kimtai, SRM dated 9th July 2015 at the Senior Principal Magistrates Court at Nyando in Civil Case No. 403 of 2013)

JUDGMENT

1. This appeal concerns the quantum of damages awarded by the trial court. The respondent was injured in accident that occurred on 23rd July 2013 along the Kisumu- Nairobi road past Ahero Bridge while she was riding as a pillion passenger on a motorbike when the appellant's bus registration number KBR 512S was driven in a negligent manner thereby colliding with the motorbike. The respondent sued the appellant for damages and in due course the issue of liability was resolved by consent in the ratio 75:25 against the appellant. After assessing damages, the trial court awarded the respondent Kshs. 1,200,000/- as general damages subject to the agreed contribution.
2. In the memorandum of appeal dated 20th July 2015, the appellant challenges the award of general damages by the trial court on the following grounds;
 - (i) THAT the learned trial magistrate erred and misdirected himself as to the exact nature of the respondent's injuries and therefore erred in law in his assessment of damages awardable to the respondent which was manifestly excessive.
 - (ii) THAT the learned trial magistrate erred in assessing damages and failed to apply the principles applicable in award of damages and comparable awards made in analogous cases.
3. Mr Wekhomba, counsel for the appellant, reiterated the grounds of appeal. He further submitted that the trial court did not appreciate and establish the nature and extent of the respondent's injuries from the evidence presented. He pointed to the fact that the evidence was inconsistent and the trial magistrate failed to analyse the evidence and come to the correct conclusion as to the nature of those injuries. In his view, therefore, the resulting award was inordinately high and an award of Kshs. 150,000/- as general damages would be reasonable in the circumstances.
4. Mr Ouma, counsel for the respondent, supported the trial court judgment and submitted that the trial magistrate appreciated the evidence, took into account all the injuries sustained and relied on the cases

cited by the parties to come up with award that was reasonable in the circumstances. He added that the respondent had not established any basis for this appeal and that it should be dismissed.

5. *The appellant's complaint is grounded on the argument that the trial magistrate did not appreciate the nature and extent of the respondent's injuries hence it is necessary to outline the evidence as it was presented before the subordinate court.* The respondent pleaded that she sustained the following injuries in the plaint;

- a) Normal heard structure (sic).
- b) Bruises on the left temporal region.
- c) Fracture of the right posterior 6th, 7th and 9th ribs.
- d) Mid line incisor scar
- e) Haemothorax/Haemoperitoneal
- f) Raptured liver
- g) Right lower scapula blade fracture
- h) Bruises on the right upper limb

6. The respondent testified and produced several medical reports. She told the court that on the date of the accident, 23rd July 2013, she was first taken to Ahero Hospital and later transferred to Jaramogi Odinga Oginga Teaching and Referral Hospital ("JOOTRH"). She was discharged on 4th August 2013. She testified that she sustained a cut on the liver, 4 fractured ribs, fracture of scapula, crack on the collar bone, injuries and bruises on the right hand. She explained that her lung had a problem and that she had a cut on the head.

7. The Hospital Summary Discharge Summary was produced by Dr Okhola Okang Ibrahim (PW 2), a medical officer, who testified that he had worked with Dr Kamau, who had prepared the Discharge Summary, at JOOTRH. The Discharge Summary showed that the respondent was admitted on 23rd July 2013 and discharged on 4th August 2013. The initial diagnosis showed that the respondent had a mild head injury, shock and anaemia. Upon admission, it was noted that she had a gone into shock and convulsions and had lost a lot of blood which was transfused when she was taken to theatre for explorative laparotomy done and a cut on the liver found. Upon discharge, it was noted that her condition had improved and she could walk by being supported. She was directed to attend a facility for removal of stitches after 3 days of discharge.

8. PW 2 also testified that he examined the respondent on 12th August 2013 and prepared a medical report, the P3 Form. He testified that the respondent looked sick when he examined her. She had bruises on her left temporal region of the thorax and abdomen. She also had fractures of the right posterior 6th, 7th, 8th and 8th rib had a mid-line incursion scar. She also had a haemothorax and haemoperitoneal rupture liver. She also had a right lower scapula blade fracture and bruises on the right upper limb. He concluded that the injuries were inflicted by a blunt object and assessed the injury as grievous harm. Thereafter he prescribed analgesics and antibiotics.

9. Dr David Onyango Olima (PW 3), a surgeon examined the respondent on 28th August 2013. He also told the court that he reviewed the hospital discharge summary and x-rays submitted to him. He noted that the respondent had rib fractures but that these were not recorded in the hospital discharge summary. The respondent was complaining of pain in the shoulder which was a result of the fracture of the scapula.

10. Dr Jaran Ochieng K'Ouko (PW 4), a doctor practising in Kisumu, testified that he provides X-ray

services and on 10th August 2013 and 26th August 2013, he examined the respondent. On 10th August 2013, he noted that the lungs were normal and that she had fractured of the 6th, 7th, 8th and 9th ribs. There was also a fracture of scapula neck and the left haemothorax was normal. On 26th August 2016, he noted that there was fracture of the right lower scapula blade.

11. In the judgment, the trial magistrate, after setting out the injuries in the various reports concluded that:

It is clear from the pleadings that the plaintiff was admitted for a period close to 2 weeks. I have considered the authorities cited by the plaintiff's counsel. In fact the defendant acknowledged that the plaintiff sustained injuries on the liver and fractured ribs and so considering the magnitude of the injuries ... I find that an award of Shs. 1,200,000 would be adequate, reasonable and fair compensation for the plaintiff.

12. The thrust of the appellant's submissions before this court is that the learned trial did not analyse the respondent's documents closely and disregarded the contradictory evidence and the discrepancies highlighted by the various medical reports hence reached a wrong conclusion as to the nature and extent of the respondent's injuries. I agree with counsel for appellant that the learned trial magistrate's consideration of the totality of the evidence was perfunctory. Since this court is the first appellate court, it is entitled to reconsider and evaluate the evidence and come to its independent conclusion bearing in mind that it did not hear or see the witnesses (see **Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**).

13. As a consent was recorded on liability there is no doubt that the respondent was involved in the accident. She was admitted to JOOTRH on 23rd July 2013 and discharged on 4th August 2013. The Hospital Discharge Summary issued by JOOTRH recorded that she had she a mild head injury, shock and anaemia. On 10th August 2013, PW 4 detected fractures of the 6th, 7th, 8th and 9th ribs and a scapula fracture. The subsequent examination by PW 2 on 12th August 2013 showed that she had suffered fractures of the 6th, 7th, 8th and 9th ribs and a fracture of the haemothorax. On 28th August 2013, PW 3 confirmed the fractures, noted a puncture in the right lung with haemothorax and a rapture liver in addition to other soft tissue injuries.

14. Considering the inconsistency between the initial hospital discharge and the subsequent report, the appellant posed the question how the staff a JOOTRH would not have detected the severe injuries sustained by the plaintiff while she was in hospital for a period of 11 days? Rib fractures, a puncture of the lung and haemothorax are a serious detectable injury and despite extensive submissions on this point, the trial magistrate did not attempt to answer this question.

15. In a case of negligence, the plaintiff is obliged to prove causation on the balance of probabilities. In **Clerk and Lindsell on Tort (20th Edition)** at Page55 states that:

The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains.

The Hospital Discharge Summary issued to the respondent by JOOTRH after 11 days of hospital admission delineates the injuries sustained by the respondent immediately after the accident for which she was treated and her condition upon discharge. The other evidence disclosed that more serious injuries emerged after her discharge. Although PW 2, PW 3 and PW 4 examined her and confirmed that she sustained additional injuries, none of them could explain how she came to have more serious injuries after she was discharged and how these injuries could not have been detected at JOOTRH. The only reasonable conclusion to be drawn from the totality of the evidence is that the subsequent injuries, more particularly the fractures on the ribs and scapula, the puncture of the lungs and other soft tissue injuries, could not have been a result of the road accident. Apart from the failure to analyse the evidence, I also note that the trial magistrate's mischaracterisation of the appellant's submission as acknowledging that the respondent, "sustained injuries on the liver on the liver and fracture ribs" was wholly erroneous and unsupported by

either the appellant's line of defence and submissions.

16. This being an appeal on the issue of quantum of damages, it worth reciting the general principles upon which this Court, as an appellate court, will interfere with an award of damages. The Court of Appeal in ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*** 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 was either inordinately high or low

17. As I have demonstrated above, the assessment of damages was based on a misapprehension of the evidence which resulted in a figure that was inordinately high warranting this court to intervene. After considering all the evidence, I have discounted the injuries that were discovered after she had been discharged from the hospital. I find that the injuries she sustained were likely those recorded in the Hospital Discharge Summary. I find and hold that the respondent sustained the following injuries as a result of the accident; mild head injury and shock and anaemia and a hand injury. She also suffered a cut on the liver which was detected by the laparotomy.

18. Following the findings, I have made, the cases cited by the respondent are not of much assistance as they involve more serious injuries. The appellant suggested a sum of Kshs. 150,000/- based on the case of ***Kenya Marine Contractors (EPZ)Ltd v Mbiti Mwinga MSA HCCC No. 70 of 2010 [2012]eKLR*** where the appellate court concluded that the plaintiff did not suffer broken ribs but sustained a blunt injury on the chest. General damages were assessed at Kshs. 70,000/- in 2012. This case is somewhat dated and had slightly less serious injuries. Bearing in mind the duty of the court to ensure that awards are fair and consistent and the necessity to factor inflation, I think the recent case ***Angeline Akinyi Odhiambo v Teresia Mbaiko Kanyo and Another KSM HCCA No. 123 of 2013 [2016]eKLR*** is apposite. The claimant sustained a ruptured liver and injuries to the left ear, right hand with cuts, chest, right shoulder, back and waist. The learned magistrate awarded Kshs. 200,000/- as general damages which award was upheld on appeal in 2016.

19. As result of the findings I have outlined, I set aside the award of general damages and substitute the same with an award of Kshs. 300,000/-. This amount shall accrue interest at court rates from the date of judgment in the lower court.

20. The appellant shall have costs of this appeal assessed at Kshs. 75,000/- in accordance with Schedule VI Part 1 para B of the applicable ***Advocates Remuneration Order***.

DATED and DELIVERED at KISUMU this 13th day of February 2017.

D.S. MAJANJA

JUDGE

Mr Wekhomba instructed by Murimi Ndumia Mbago and Muchela Advocates for the appellants.

Mr Ouma instructed by Ouma Njoga and Company Advocates for the respondent.