



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

HIGH COURT CIVIL APPEAL NO.112,113 &114 OF 2015 CONSOLIDATED

G4S SECURITY SERVICE (K) LTD.....APPELLANT

VERSUS

JACKLINE NAGOME BARARE.....RESPONDENT

[From the original civil suit No.10,11 & 12 of 2014 in the Senior Resident Magistrate Court at Keroka]

J U D G M E N T

Jackline Magome Barare, Sylvanus Obaya and Anna Nyanduko Nyanchoka (the respondents) in this appeal were the plaintiffs in **Keroka SRMCC 10, 11, & 12 of 2014** respectively in which they sued the appellant G4s security services for both special and general damages for injuries sustained as a result of a road traffic accident which is said to have occurred on the 16th November, 2013 along the Sotik, Keroka Road. Apparently, the defendants motor vehicle registration No.KBF 106H was so negligibly/carelessly driven from behind it knocked motor vehicle KBK 923V from which the respondents were lawfully travelling in. As a result, the plaintiffs sustained severe injuries and suffered loss and damage. According to the plaintiffs, the accident was wholly caused by the negligence of the defendant's driver.

In their complaints the respondents have particularized the particulars of negligence in the part of the defendants driver, servants or agent as follows:

- (a) Driving too fast at a speed which was excessive in the circumstances.**
- (b) Failing to keep any or any proper lookout or to have any different regard for the passengers and other road users.**
- (c) Failing to exercise or maintain any effective control of the said motor vehicle.**
- (d) Driving a defective motor vehicle**
- (e) Failing to take special care**
- (f) Failing to stop, to slow down, to swerve, or in any other way to manage or control the said motor vehicle as to control the said motor vehicle as to prevent the said accident.**

With regard to particulars of injuries Anna particularized as follows:

- Blunt injury to the head**

- **Blunt injury to the right shoulder joint**
- **Blunt injury to the right hip joint**
- **Blunt injury to the right foreleg**

With regard to particulars of injuries Sylvanus particularized as follows:

- **Blunt injury to the back**
- **Blunt injury to the anterior chest wall**
- **Blunt swollen injury to the left foreleg**
- **Bruises to the left foreleg**

With regard to particulars of injuries Jackline particularized as follows:

- **Bruises to the face**
- **Bruises to the left forearm**
- **Bruises to the right forearm**
- **Deep laceration wound to the left anterior back.**
- **Bruises to the right foreleg.**

Thus the respondents claimed both general and special damages. The defendants on their part filed a written statement of defence denying liability and the particulars of negligence attributed to the 2nd defendant. 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 contributed to by the plaintiff's driver and the plaintiff's negligence.

The defendants particularized particulars of negligence of the plaintiff's driver as follows:

- (a) **Driving at an excessive speed in the circumstances.**
- (b) **Failing to have any sufficient regard to other road users.**
- (c) **Failing to notice motor vehicle registration number KBF 106 Nissan Pick-Up**
- (d) **Driving in a zig zag manner on the road when she new or ought to have known that that was dangerous to do so.**
- (e) **Overtaking when it was unsafe to do so the particulars of negligence on Annah Sylvanus and Jackline were particularized as follows:**
 - (a) **Exposing herself/himself to a risk of injury or damage which she/he knew or ought to have known.**
 - (b) **Jumping out of the said motor vehicle**
 - (c) **Disturbing the driver**
 - (d) **Failing to belt up while travelling in registration number KBK 923K.**
 - (e) **Deliberately causing the accident.**

During trial in **Civil suit No.10 of 2015** Anna Nyanduko Nyanchoka told the court that on 16th November 2013 she was travelling a motor vehicle when at about 7.00a.m. on reaching Metamaywa she heard a loud bang from behind the motor vehicle she was travelling in.

As a result, the motor vehicle she was travelling in lost control and swayed off the road to a ditch. However, she could not remember the number plate of motor vehicle she was travelling in. After the vehicle swayed into a ditch, she suffered the following injuries:

- **Blunt head injury**
- **Blunt injury right shoulder**
- **Blunt injury right hip joint**
- **Blunt injury right foreleg**

She confirmed that she had healed but occasionally she got pains on her head. She then told the court that she reported the accident at Keroka Police Station and was issued with a P3 form which she produced as MFI-2. She was also treated at Keroka, District Hospital and she produced treatment notes which were marked as MFI-1. She also produced a police abstract which was marked as MFI-3. She also visited Dr. Ogando Zoga who prepared a medical report who prepared a medical report marked as MFI-4 and she produced a receipt which was marked as P. Exhibit 5. She blamed the driver of the motor vehicle that knocked them from behind for the accident.

PW2 was Joel Ongaro a clinical officer at Kijauri level 4 hospital. He recalled that on 9/1/2014 PW1 came to hospital alleging to have been involved in a road traffic accident on 16/11/2013 at around 7.00p.m. along Keroka-Sotik road. On examining her she had suffered the following injuries:-

- **Blunt injury to chest right side**
- **Blunt injury to shoulder joint**
- **Blunt injury to right foreleg**

He classified the above injuries as harm and produced PW1's P3 form as PEXH.1.

PW3 was Abraham Ndegwa No.232272 Base Commander Keroka Police Station. He confirmed that an accident had been reported at the police station on 16/11/2013 involving motor vehicle registration No.KBF 106H Nissan Pick-Up and KBK 923V Toyota matatu. He told the court that the vehicle were following each other from Sotik direction in the evening around 7.00p.m. and the weather was foggy and rainy. That on reaching Metamaywa, the driver of the defendants vehicle decided to overtake and on seeing an oncoming trailer the defendants driver applied brakes to avoid a head on and instead the plaintiff's motor vehicle was hit from behind. As a result, the plaintiff's motor vehicle fell into a ditch. He also confirmed that the passengers in the matatu got injured and hence issued police abstracts to the three respondents. He produced all the three abstracts for the three respondents as PEXH3.

By consent the evidence of PW3 was to apply in **Civil Suit 10 of 2014 and 12 of 2014.**

PW4 was Dr. Ogando Zoga who confirmed that he examined PW1 who had sustained the following injuries:-

- **Trauma to head**
- **Blunt trauma to right shoulder**
- **Blunt trauma to right foreleg**
- **Blunt trauma to right hip**

He confirmed that the injuries were soft tissue injuries which had healed well. He produced his medical reports which he charged Kshs.5, 000 as P.Exh.4. He also produced a receipt of the said charges as P.EXH.5.

In civil suit No.11 of 2014 PW1 was Sylvanus Obaya. He told the court that on 16/11/2013 he was travelling from Litein in motor vehicle KBK 923V. That on reaching Metamaywa the motor vehicle was knocked from behind by motor vehicle No.KBF 106H. As a result of the accident he sustained the following injuries:-

- **Blunt injury to the back**
- **Blunt injury to the anterior chest wall**
- **Injury to the right leg**

He was treated at Gucha District hospital and he produced his treatment notes which were marked as MFI-1. He also reported the accident at Keroka police station and was issued with copy of P3 form as P3 MFI -2. He was also issued with a police abstract which was marked as MFI-3. He also visited Dr. Ezekiel Ogado who wrote a medical report which was marked as MFI-4. He paid Kshs.5,000 and produced the receipt as P.EXB.5. He blamed the other motor vehicle that hit their motor vehicle from behind as the same did not keep distance from their motor vehicle hence it hit them from behind.

PW2 was Joel Ongaro a clinical officer at Kijauri Level 4 hospital. He told the court that he examined PW1 on 10/1/2014 who had sustained the following injuries:

- **Blunt to lumber region**
- **Blunt injury to chest**
- **Healed bruises to left foreleg**
- **Blunt injury to right foreleg**

He produced PW1's P3 form as P.Exh.2. PW3 the Base Commander testimony was by consent applied as stated in Civil Case No.10 of 2014.

PW4 was Dr. Ogando Zoga. He confirmed that he examined PW1 on 10/1/2014 who had sustained the following injuries:

- **Blunt trauma to the back**
- **Blunt trauma to the chest**
- **Contusion on left foreleg**
- **Bruises on left leg.**

He confirmed that PW4's injuries were soft tissue injuries which had already healed and produced treatment notes which were marked as MFI-1.

In civil suit No.12 of 2014 PW1 was Jackline Magoma Barare. She told the court that on 16/11/2013 she was travelling from Litein in motor vehicle registration No.KBK 923V heading to Kisii town and that at Metamaywa they were involved in an accident with motor vehicle registration No.KBF106N whereby the car she was travelling on was hit from behind. That as a result of the said accident she sustained the following injuries:-

- **Bruises to the face**
- **Bruises to the right forearm**
- **Deep laceration wound to the left anterior back.**

She was later treated at Gucha District hospital. She produced a copy of treatment notes which were marked MFI-1. She also reported the accident at Keroka police station, was issued with a P3 form which was marked MFI-3. He also led Dr. Ogando who prepared a medical report marked as MFI-4 and she paid Kshs.5,000 which she produced as P.Exh.5. She blamed the driver of the G4s vehicle KBF 106N for knocking the motor vehicle from behind and causing them to roll.

PW2 was Joel Ongaro a clinical officer at Kijauri Level 4 hospital. He told the court that he examined PW1 aged 24 years who had sustained the following injuries:

- **Bruises to forehead (healed)**
- **Bruises to forearms (healed) bilaterally**
- **Bruises to right leg posteriorly (healed.) He classified the degree of injuries as harm ad produced P3 form as Exhibit 2.**

PW3's evidence Abraham Ndegwa the Base Commander at Keroka Police Station was adopted as stated in Civil Suit No.10 of 2014.

PW4 was Dr. Ogando Zoga. He told the court that he examined PW3 on 10/1/2014 and she had the following injuries:-

- **Bruises on the face**
- **Bruises on the left arm and right arm**
- **Lacerations on her back**
- **Bruises on left leg**

He however confirmed that the injuries had healed well and produced a mechanical report as exhibit P.Exhibit.4.

This marked the close of the plaintiff cases.

The defence also closed its case. Parties were then directed to file their written submissions and the said submissions were duly filed.

In her judgment on liability of the defendant the trial magistrate noted that liability had already been determined in civil case no.229/2013 which is a sister file at 100% and adopted the same.

On quantum after considering authorities filed by counsels representing all parties the trial magistrate held:-

In Civil suit No.10 of 2014 the plaintiff suggested a sum of Kshs.33,000 as general damages and **Penny Basilako –versus- Dorothy Muchene NRB H. CCC NO.642 of 1991.**

The defendant on the other hand suggested a sum of Kshs.80,000 and cited **Bungoma HCCCA NO.47 of 2003 Johnstone Amaya –versus- Barrack Odhiambo and 2 Others & Nyeri HCCA 37, 38, & 39 of 2009 Caroline .M. Kahae & Another –versus- Nancy Muthoni Njoora. In Civil suit No.10 of 2014 Anna versus G4s** the trial court after considering the above stated authorities gave Kshs.180,000 as general damages and Kshs.5,700 as special damages hence a total of Kshs.185,700.

In **Civil Suit No.11 of 2014 Sylvanus –versus G4s** the trial court noted that the clinical officer PW2 and Dr. Zoga Oganda [PW4] testified that the injuries the plaintiff sustained were soft tissue injuries. After considering the authorities cited by counsels representing each party she gave Kshs.160,000/= as general damages and Kshs.5,000 as special damages. Thus Kshs.165,000 in total.

In **Civil Suit No.12 of 2014 Jackline –versus- G4s** limited the court considered the injuries suffered by the Plaintiff and both PW2 [Clinical officer] and PW4 [Dr. Zoga] evidence that the injuries the plaintiff sustained were soft tissue injuries. In addition to this the trial court considered authorities filed by the respective counsels for each party and gave general damages of Kshs.150,000 and special damages of Kshs.5000. Hence the plaintiff was awarded Kshs.155,000, plus costs and interests.

The respondent being aggrieved by the above judgment and decree preferred an appeal to this court. In his memorandum of Appeal dated 11th February 2015 the respondent has appealed against the above judgment and decree in grounds inter alia:-

- (1) That the learned trial magistrate erred in law and fact by awarding manifestly excessive amount of general damages**
- (2) That the learned trial magistrate erred in law and fact by using wrong principles in assessment of damages**
- (3) That the learned trial magistrate erred in law and fact by wholly disregarding the medical**

evidence put before the court.

REASONS WHEREFORE the appellant prays for ordered that:-

- (a) That this appeal be allowed**
- (b) This honourable court do re-assess the general damages and reduce the same.**
- (c) That cost of this appeal be borne by the respondent.**

When the above matter came before me on 7th September 2015 it was agreed that the above three appeals be consolidated and the same be argued by filing and exchanging written submissions. All parties have duly filed their written submissions and I have read the same.

This court being conscious of its role as the first appellate court as stated in **Selle –versus- Associated Motor Boat Co. Ltd [1968] P.A 123** has to re-evaluate the evidence that was tendered before the trial court assess it and make its own conclusions. The court must however bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.

From the Memorandum of Appeal this court was urged to interfere with the trial court's finding on quantum.

Regarding quantum of damages the learned trial magistrate did expressly state the authorities submitted by the parties before he arrived at the awards he gave to the respondents. It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must however, be reasonable and neither extravagant or oppressive. The trial court has to be guided by such factors as previous awards for similar injuries and such other relevant factors.

In the matters that were before the trial court each plaintiff testified, a medical report was produced and even a medical officer who examined all the plaintiffs gave testimony. According to Dr. Zoga all the plaintiffs sustained soft tissue injuries which had healed well by the time he made his report. The defendant on the other hand chose not to give any evidence in their defence hence, the plaintiffs oral evidence remained unchallenged.

In **Kemfro Africa Ltd t/a Meru Express and Another –versus- A.M. Lubia and Another [No.21 of 1987] KLR 30** it was held as follows:-

"The principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor 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."

Similarly in the case of **Sofia Yusuf Kanyare –versus- Ali Abdi Sabrte & Another Nairobi HCCC NO.478 of 2007** the court listed the principles that the court must bear in mind when the assessing damages they include:-

- (a) An award of damages is a matter of discretion in the part of the court that is seized of the matter.**
- (b) The award should not be too high or low, the award is not meant to enrich the victim but to try as much as possible to restore him/her in the position they were before the accident.**
- (c) Award in past decisions are meant to be mere guidelines and each case should be mere guidelines.**

(d) Where awards in past cases are taken into consideration, their age rate of inflation as well as the value and power of the Kenyan Shillings should be taken into consideration.

In the instant case, the learned trial magistrate appreciated the authorities cited by each side and the submissions. In my humble view it has not been demonstrated that trial magistrate took into account the wrong principles in arriving at the award or that she had misapprehended the evidence or that the figure awarded was so high as to constitute an erroneous estimate ending in failure of justice. Therefore, considering the awards made and the injuries suffered by all the plaintiffs, I would not say the awards were too high.

In my humble view the learned trial magistrate considered all the relevant factors in this case in arriving at her decision. These factors are the expert opinion by the doctors, the authorities in which awards for similar injuries were granted and the inflation rates in the country at the time of delivering the judgment. I therefore find the appeal to be without merit and is hereby dismissed with costs. The orders shall apply *mutatis mutandis* to **Civil Appeal No. 113 and 114 of 2015.**

Dated at Nyamira this 17th day of February 2017.

C.B. NAGILLAH

JUDGE

In the presence of:-

Soire hold brief for Onyinkwa for Applicant

Ms. Nyaega hold brief for Ochoki for Respondent

Mercy & Nancy - Court clerk