



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 32 OF 2015

VINCENT MBOGHOLIAPPELLANT

VERSUS

HARRISON TUNJE CHILYALYA RESPONDENT

(Being an appeal from the judgement delivered by the Honorable Obura (Mrs.) Principal Magistrate on the 8th of April, 2015)

JUDGEMENT

The respondent was involved in a road traffic accident on 13.5.2013 along the Mombasa – Malindi road. He filed Civil Suit No. 120 of 2013 before the Kilifi Magistrate’s Court. The trial magistrate awarded the respondent Kshs.500,000/= as general damages. The appellant is not satisfied with that award and preferred this appeal. The grounds of appeal are that: -

- 1) The learned magistrate erred in fact and in law in her judgement by asking her own assumptions, supposition and conjecture hereby finding that the plaintiff was entitled to the excessive general damages hence arriving at a decision based on wrong premises.**
- 2) The learned magistrate erred in fact and in law in failing to apply the law to the facts before her leading to higher compensation to the plaintiff therefore arriving at the wrong decision.**
- 3) The learned magistrate erred in fact and in law in failing to consider the defendant’s submissions and more specifically on the quantum by completely disregarding the submissions of the appellant hence thereby exempting herself from arriving at a decision based on merit.**
- 4) The learned trial magistrate erred in law and fact in finding and adopting the respondent alleged authority without evidential proof of excessive injuries hence failing to discharge its duty of ensuring justice for the parties before it.**

Counsel for the appellant submitted that all the grounds of appeal are similar and dealt with them together. It is submitted that the evidence on record did not prove that the respondent sustained a fracture of his left leg. PW2 testified that he did not have the x-ray report to prove that the respondent suffered a fracture. It is also submitted that the trial court awarded Kshs.300,000/= for pain and suffering and Kshs.80,000/= for removal of implants which amount had not been pleaded. The appellant had urged the trial court to award Kshs.100,000/= as compensation on the basis of the decision of **ISAAC MWENDA**

MICHENI V MUTEGI MURANGO [2004] eKLR. The respondent did not plead any future medical expenses and therefore the award of Kshs.80,000/= was made without any legal basis. Counsel also relies on the case of **KEMFRO AFRICA LIMITED T/A “MERU EXPRESS SERVICES (1976)” & ANOTHER V LUBIA & ANOTHER (no. 2) [1985] eKLR.** In that case the Court of appeal did set out the circumstances where an appeal court can disturb the quantum of damages awarded by the trial court.

Counsel for the respondent opposed the appeal. Counsel submitted that the appellant suffered fracture of the tibia leg borne and other soft tissue injuries. The medical evidence proved that fact and the award of Kshs.500,000/= as general damages is fair. Medical reports were produced to prove the injuries sustained by the respondent. The trial court evaluated the evidence as well as submissions by both parties. The appellant submitted for an award of Kshs.100,000/= while the respondent sought an award of Kshs.800,000/=. Counsel relies on the case of **SAVANNA SAW MILLS LTD VS GORGE MWALE MUDOMO (2005) eKLR.** In that case the court stated as follows: -

“It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”

Counsel for the respondent also submit that Nairobi Constitutional Petition No. 148 of 2015 Law Society of Kenya vs The Attorney General and Another declared as unconstitutional the schedule of damages stated in the amendment to the insurance (Motor Vehicle Third Party Risk Act) Cap 405 Laws of Kenya. Counsel is of the view that the appeal lacks merit.

Being the first appeal this court is required to evaluate the evidence before the trial court and make its own conclusion. Three witnesses testified before the trial magistrate. PW1 HARRISON TUNJE was the plaintiff. He testified that he was a passenger in motor vehicle registration No. KBK 717U. The vehicle was involved in an accident and he sustained a broken left leg and other soft tissue injuries. He was treated at Kilifi District hospital. PW2 DR. FARAJ TAHER is a medical doctor who was based at Kilifi District hospital. He filled the PW3 form for PW1 on 23.5.2013. It is his evidence that he saw the treatment notes and there was an x-ray showing the fracture. According to him, the respondent sustained bruises left upper limb, fracture left medial malleolus, bruises right toe. PW3 P.C. PETER MUNGAI was stationed at the Kilifi police station. He investigated the case. He confirmed that the respondent was a passenger in the accident vehicle.

The record of appeal shows that the respondent was also seen by Dr. Ajoni Adede on 1.6.2013 who prepared a medical report. The report summarizes the injuries as follows: -

Fracture of the left tibia leg bone (medial malleolus).

Blunt object injury to the chest and left lower limb.

Bruises on the left forearm, right foot and right big toe.

The appeal is not against liability as determined by the trial court. It is purely on the amount of quantum awarded by the court. I have gone through the judgement of the trial court and there is no award of Kshs.80,000/= for future removal of medical implants. There is also no award of Kshs.300,000/= as general damages as indicated by the appellant. The trial court awarded a global sum of Kshs.500,000/= in the following terms: -

“Having regard to the nature of injuries, passage of time and the economic realities, I find that a sum of Kshs.500,000/= should be fair and reasonable compensation for the plaintiff. Consequently, I award the said amount as general damages.”

The court also awarded Kshs.2,000/= as special damages. Counsel for the appellant contends that the award is excessive and amount to a higher compensation to the plaintiff. It is also submitted that the

submissions and authorities of the appellant were not considered by the trial court. In its judgment, the trial court considered the authorities of both counsels. It observed that the appellant estimated damages at Kshs.100,000/= while the respondent sought Kshs.800,000/=. The trial court was rightly convinced that the respondent sustained the injuries as per the evidence on record. I am also satisfied that the trial court was fully aware of the applicable principles in awarding damages when it stated as follows: -

“In awarding general damages, the court has to consider the nature of injuries suffered by the plaintiff as against comparable recent cases. It is trite law that comparable awards ought to be made for comparable cases. The court also takes into account the inflationary trends and the passage of time since the decision in the comparable case was made. I am also minded that when exercising its discretion in awarding damages, the court should not award an excessive amount and must be fair to the parties.”

The trial court evaluated all the authorities provided by both counsels in relation to quantum and was of the view that the case of **EDITH MARY OWUOR VS ACROSS AFRICA SAFARIS LTD HCC No. 1054 of 1996 Nairobi** provided comparable injuries. In that case the plaintiff suffered fractures of the upper 1/3 of the left tibia with depressed lateral tibia plateau and contusion over the left iliac crest. The court awarded Kshs.460,000/= as general damages.

Although counsel for the appellant contends that the respondent did not suffer any fracture, the evidence on record show that x-rays were taken and the respondent suffered a fracture as itemized in the medical report by Dr. Adede. PW2 Dr. Faraj also saw the treatment notes from the Kilifi District hospital as well as the x-ray. The appellant was to produce a medical report by Dr. Wainaina but the same was not produced. The evidence on the injuries is sufficient and quite elaborate.

Given the findings of the trial court, I do find that there is no sufficient grounds to disturb the award of quantum reached by the trial court. The authority of Edith Mary Awour case (supra) relied by the trial court is a 1996 case which is quite old. I do find that the assessment of damages by the trial court is extremely reasonable and cannot be held to be excessive. The appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered in Malindi this 22nd day of February, 2017.

S.J. CHITEMBWE

JUDGE