



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 154 OF 2011

COAST BUS (MSA) LIMITED.....APPELLANT

VERSUS

ESTHER ACHIENG ORIEMA.....RESPONDENT

[Being an appeal from the judgment of Mr. Biwott PM in Winam PMCC No. 398 of 2006 delivered on the 11th October 2011]

JUDGMENT

The Respondent sued the Appellant and another in this case for damages for personal injuries sustained in a motor accident involving their motor vehicles Registration Numbers KAS 874M and KAP 759T respectively. The collision is alleged to have occurred along the Kisumu – Nairobi highway on 24th March 2006.

Liability which was determined in a test suit was in favour of the Plaintiff against the Defendants in the ratio 10%:90%. A discharge summary, a casualty card and a P3 form all from the New Nyanza Provincial General Hospital, a medical report by Dr. Olima, a medical report by Dr. Nyamogo, a medical report by Dr. Odandi and a receipt for Kshs.1500/= were produced by consent without the necessity of calling the makers. The Court was then left to assess the quantum of damages.

After considering the medical evidence before him the trial magistrate found it a fact that the Respondent had sustained the following injuries:-

- **Cut wound on the left side of the neck**
- **A cut on the tongue**
- **Loss of a tooth on the left upper mandible**
- **Soft tissue injury to the chest**
- **Fracture of the left wrist**
- **A cut wound on the left thigh**
- **A cut wound on the left foot**

He then upon considering the submissions by Counsel for the parties awarded general damages in the sum of Kshs.700,000/=, the proven special damages of 1500/=, costs of the suit, and interest at court rates till payment in full. Being aggrieved the 2nd Defendant filed this appeal. The grounds of appeal are:-

“1. That the learned trial magistrate erred in law and in fact in awarding the respondent general damages of Kshs.700,000/= which award was so inordinately high and unjustified considering that the respondent's injuries as pleaded and proved were not grave and the respondent had recovered from the said injuries.

2. That the learned trial magistrate failed to appreciate that in considering an award on quantum awardable to the respondent the only injuries which ought to have been taken into account were those which were specifically pleaded and strictly proved and the trial magistrate erred in considering other injuries or factors which were not pleaded and or were irrelevant and extraneous and he erred by dismissing out of hand the submissions or issues raised by the appellant.

3. That having failed to analyze and evaluate the evidence on record in totality especially on the crucial issue of the injuries pleaded and proved and their gravity the trial magistrate's award of general damages was, compared to awards in similar cases, excessive, disproportionate, unreasonable, unfair, biased and indefensible and has resulted in a miscarriage of justice.”

This Court heard the arguments of Counsel for the parties on 16th January 2017. Counsel for the appellant had also filed written submissions which he highlighted at the hearing. The gist of the appellant's appeal is that the Trial Magistrate failed to address his mind to the injuries sustained culminating in an inordinately high award. Counsel for the Appellant submitted that the respondent sustained minor injuries from which he had fully recovered. He also submitted that the award was not consistent with what was awarded in other cases where the Plaintiffs had suffered similar injuries. To support his submissions he relied on -

1. Simon Taveta Versus Mercy Mutito Njeru [2014]eKLR

2. Lukenya Ranching and Farming Co-operative Society Limited Versus Kavoloto [1997]EA 414

He urged this Court to set aside the judgment of the lower court and substitute it with an award that is lower.

Counsel for the respondent opposed the appeal arguing, firstly, that the appeal was incompetent as no decree was annexed and hence the appeal does not comply with Order 42 Rule 13(f) of the Civil Procedure Rules and, secondly that the appeal has no merit as the injuries sustained by the respondent were far from minor as he healed with unsightly scars. He contended that as this Court did not see the respondent as did the trial magistrate it would be extremely difficult for it to dismiss the injuries as minor. Further that this is not an opportunity for this Court to substitute the award with its own. He submitted that the trial magistrate took the nature of the injuries into account and that inflation is always a factor to be considered. He urged this Court to find that no error of principal is demonstrated and dismiss the appeal with costs.

In her reply Counsel for the appellant submitted that they could only annex what was supplied to them by the Court and a decree was not one of them. She also submitted that this Court has power to either uphold, upset, disturb or scale down the award of the lower court; that while inflation is a relevant fact it should not be the only factor and the nature of the injuries is also relevant.

In this appeal there is no contest on the issue of liability. On the quantum of damages the principle to guide this Court was restated by the Court of Appeal in **Mariga Versus Musila [1984] KLR 251** at page 252:-

“The assessment of damages is more like an exercise of discretion and appellate Court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principle.”

It is clear from the judgment of the lower court that in arriving at the award the trial magistrate considered

the nature of injuries sustained, the authorities cited by Counsel and inflation all of which are factors that should guide the Court in the assessment of damages. There is nothing to demonstrate that the trial magistrate took into consideration irrelevant matters and I am not persuaded that he acted on an error of principle. As submitted by Counsel for the respondent although she recovered from the injuries she was left with unsightly scars not to mention the loss of one tooth. The trial magistrate's estimate of the damage was not erroneous and the award was not excessive. The appeal has no merit and is dismissed with costs to the Respondent. It is so ordered.

Signed, dated and delivered at Kisumu this 16th day of March 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Odhiambo for the Appellant

Miss Langat for the Respondent

Court Assistant – Serah Sidera