



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 11 OF 2015

JAMES MWARO SHADRACKAPPELLANT

VERSUS

ALI ZULEKHA1ST RESPONDENT

ALI ABSY NASSIR2ND RESPONDENT

DAVID MURIGI WAMAI 3RD RESPONDENT

ANTHONY KOSGEI4TH RESPONDENT

(Being an Appeal from the Judgement and decree of Hon. L. Gicheha, Senior Principal Magistrate,
delivered on 10th February, 2015 in Malindi C.M.C.C. No. 69 of 2010)

JUDGEMENT

The appellant was involved in a road traffic accident on 22.9.2009 along the Malindi Mombasa road at Msabaha. He filed Civil Suit number 69 of 2010 before the Malindi Chief Magistrate's Court. After hearing the case, the trial court awarded the appellant Kshs.100,000/= as general damages. Liability was agreed upon between the defendants.

The grounds of appeal are that the trial court did not take into account the nature of the injuries suffered before assessing damages. That the amount awarded as damages does not meet the injuries suffered. That the award is an erroneous and oppressive estimate of the damages and that the trial court failed to take into account all relevant considerations and principles of assessing the quantum of damages. In short, the appellant is of the view that the awarded damages are not adequate.

Counsel for both parties agreed to determine the appeal by way of written submissions. Mr. Shujaa, counsel for the appellant submit that the trial court did not take into account the medical evidence. There was a psychiatrist report which indicated that the appellant developed memory impairment, poor attention and concentration, loss of interest in various activities, poor appetite and sleep disturbances. He has frequent migraine headaches and irritability. It is difficult for the appellant to be in gainful employment. The appellant lost consciousness.

Counsel for the appellant contends that the trial court did not appreciate the nature and extent of

seriousness of the injuries suffered. Although the injuries are itemized as a deep cut wound on the scalp which was stitched and concussion, the injuries resulted into a disability rendering the appellant incapable of gainful employment. Counsel is seeking an award of Kshs. one million (Kshs.1,000,000,000/=) as damages. This is based on the authority of **MERCY RONGOMA V PATRICK MAGANGA, MOMBASA HCCC No. 491 of 1992**. In that case the plaintiff suffered laceration on the frontal part of the head and fracture of the left side of the skull. The court awarded Kshs.500,000/= as general damages. Counsel further relies on the case of **BENJAMIN SHELMIYA V SCOOBY ENTERPRISES LIMITED, Kisii High Court Civil Appeal No. 233 of 2006**.

Counsel for the respondent did not file any written submissions. The respondent urged the trial court to award Kshs.60,000/= as general damages before the trial court.

The appeal is basically on the amount of damages awarded by the trial court. This is a first appeal and the court is required to evaluate the evidence afresh and make its own conclusion.

The appellant was the first witness before the trial court. He informed the court that after the accident he lost consciousness and later found himself at Malindi District hospital. He was injured on the left foot, chest and head. He sustained brain injury. There was a cut that was stitched. He further told the court that he had not fully recovered and experiences memory lapses. He is an accountant and his work has been disrupted. He still experiences pain on the head and chest. He attended medical checkup for the last time on 31.12.2009. He is a certified public accountant.

PW2 IBRAHIM HUSSEIN is a clinical officer who was stationed at Malindi District hospital. He produced a P3 form for the appellant that was filed on 16.2.2010. He relied on medical records from Coast General hospital and Malindi District hospital to fill the P3 form. According to him, the appellant might take a long time to recover from psychiatric problem.

PW3 DR. ATHENS MWAYAI MWADENA examined the appellant on 9.4.2010. The appellant was 50 years old. The appellant suffered a deep cut wound on the scalp and contusion on the head. The appellant's head was confused. His occupation as an accountant was affected. PW3 also saw a psychiatrist report that was prepared four months after the accident. According to PW3, the appellant had not fully recovered but was out of danger.

The respondents did not adduce any evidence. The medical report by PW3 itemized the injuries as follows: -

(a) Deep cut wound scalp

(b) Contusion head.

The appellant was attended at both Malindi District hospital and Coast General hospital. A psychiatrist report dated 18.1.2010 by Dr. C.M. Mwang'ombe of Coast General hospital was produced as plaintiff's exhibit number 2. According to that report, the appellant suffered deep cuts on his scalp which were stitched. He also had concussion (disturbance of the brain). The doctor indicated that the appellant had developed memory impairment, poor attention and concentration, loss of interest in previous activities, poor appetite and sleep disturbance. He will need long term medication and counseling to enable him lead an independent life.

The principles upon which a superior court can disturb an award of damages by a trial court are well established. The award of the trial court should be either inordinately too low or too high, or that the trial court took into account irrelevant factors or failed to consider relevant factors. The award should be seen as an erroneous estimate of the damages. Comparable injuries deserve comparable awards and the court's discretion to assess the damages should be exercised within the above parameters. There is no scientific computation of general damages but the above principles act as a guide to trial courts. Inflation has to be considered. Cost of medication and treatment keep on increasing and time is a factor to be considered in assessing damages. What was awarded five years ago, will act as a guide now but the court will have to

consider the time factor and inflation.

The judgement of the trial court considered the authorities provided by counsels for all the parties and found that an award of Kshs.100,000/= was appropriate. The appellant contends that the injuries suffered led to permanent incapacity. The appellant is a Certified Public Accountant. It is not indicated whether he is self-employed or he is employed somewhere. It is not clear whether he lost his employment due to the accident. The evidence does not show that the appellant is not capable of working as an accountant. The accident occurred on 22.9.2009. The appellant was discharged from Malindi District Hospital on 23.9.2009 and transferred to Coast General hospital. It is not clear when the appellant was discharged from Coast General hospital.

The judgement of the trial court indicate that the appellant sustained soft tissue injuries which have healed but have psychologically affected him. The trial magistrate observed that the appellant requires counselling. In the case of **MERCY RONGOMA** (supra) the plaintiff's injuries healed with a resultant post traumatic concussion syndrome of headaches. There were chances of developing epilepsy in future. Those are serious injuries even if the authority is over twenty years old.

I do agree with counsel for the appellant that the trial court did not consider the injuries in great detail. Although there is no evidence of loss of income, it is clear that the injuries are not ordinary soft tissue ones. The appellant's future life was slightly affected due to the head injury. He developed memory lapses.

Given the medical evidence as indicated hereinabove, I do find that the award of Kshs.100,000/= as general damages is extremely low. I do set aside that award and replace it with an award of Kshs.350,000/= as general damages.

In the end, the appeal is merited and is hereby allowed. The appellant is awarded Kshs.350,000/= as general damages plus Kshs.3,200/= as special damages. Parties shall meet their own costs of the appeal.

Dated, signed and delivered in Malindi this 6th day of March, 2017.

S.J. CHITEMBWE

JUDGE