



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT CIVIL APPEAL NO. 32 OF 2016

PHINEAS KIRIMI1ST APPELLANT

JOSYLINE KANYUA MUGENDI.....2ND APPELLANT

VERSUS

FRIDAH GAICUGI.....RESPONDENT

(Being an Appeal from the Judgment of the Ag. Principal Magistrate at Chuka SPMCC No. 2 of 2013 delivered on 13th August, 2014 by B.N . IRETI- Ag. PM)

J U D G M E N T

1. This appeal arises out of a Judgment of Hon. B.N. Ireti Ag. Principal Magistrate in Chuka SPM's Court Civil suit No. 2 of 2013. In that case the respondent herein - **FRIDAH GAICUGI** had sued the appellants herein **PHINEAS KIRIMI** and **JOSYLINE KANYUA MUGENDI** for negligence that resulted in a road traffic accident that cause the respondent to suffer some injuries. The parties herein at the trial compromised and agreed on the issue of liability which was to the effect that the appellants were to shoulder 90% of the blame while the respondent conceded to 10% liability. The trial court was then required to assess the quantum of damages payable which it did and found that the respondent herein was entitled to an award of Kshs.500,000/- less 10% in general damages and special damages of Kshs.10,101/- which translated to a total of Kshs.460,101/-

2. The appellants felt aggrieved by the quantum of damages awarded and preferred this appeal citing the following grounds namely:-

i. That the learned trial magistrate erred in fact and in law on the question of quantum.

ii. That the award of Kshs.500,000/- was manifestly excessive and it amounted to a wrong estimate.

iii. That the trial magistrate erred in law and fact by not considering the appellants' submissions.

3. The parties to this appeal agreed by consent to canvass this appeal by way of written submission. In their written submissions made through Mbigi Njuguna &Co. Advocate, the appellants faulted the learned trial magistrate for finding that the authorities cited by the appellants were similar on account of the extent of the injuries the respondent had suffered and at the same time awarded the respondent almost 3 times the amount awarded in the cited authority of **FRANCIS SHAMALLA -VS- KERENGA BUS SERVICE (NRB HCC NO.2048 of 1994)**. It is submitted that the learned trial magistrate should have followed the settled principle of law that similar injuries attract similar damages

unless special circumstances exist. In their view, there were no evidence of any special circumstances at the trial since the respondent's evidence showed that she had completely healed.

4. The appellants have urged this court being the first appellate court to re-evaluate the evidence tendered and come to an independent conclusion and have cited the decision in the case of **SELLE- VS- ASSOCIATED MOTOR BOAT CO. LTD 1968 E.A. 123.** They have further urged this court to interfere with the lower court's award by lowering it contending that there is basis to do so as per decision cited in the case of **KEMERO AFRICA LTD T/A MERU EXPRESS SERVICE -VS- AM LUBIA & ANOR [1998] eKLR** where the court stated that an appellate court can justifiably interfere with the quantum of damages awarded by the trial court. If it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

5. The respondent through written submissions through her learned counsel Mr. Mwanzia has opposed this appeal. She has pointed out that she suffered the following injuries in the accident namely:-

- a) Three fractured ribs
- b) Soft tissue injuries on the neck (pain and restricted movement).
- c) Bruises on the face and left upper limb.

The respondent has pointed out the doctor's report tendered in evidence and contended that her evidence on the nature of injuries suffered was not contested at the trial. She has submitted that her plea at the trial was an award of Kshs.900,000/- but the learned trial magistrate awarded of Kshs.450,000/- and in her view he was properly guided to do so.

6. The respondent has contended that there was nothing wrong with the award given by the learned trial magistrate and submitted that there was no basis to disturb the award citing the decision of **WANDERI MWANGI & 3 OTHERS -VS- KENYA BUS SERVICE LTD & ANOTHER** where the court held that an appellate court should not interfere with an award unless it is satisfied that the lower court acted on wrong principles or has misapprehended facts or for other reasons made a wholly erroneous estimate of the damages suffered. The respondent has further cited a Court of Appeal decision in **BHOGAL -VS- BURBIQGE [1975] eKLR** to support her assertion that recent court awards in comparable cases should be the yardstick. In her view the learned trial magistrate was justified in arriving at the award he gave because he took into account the cited old cases and the inflationary factor.

7. I have considered this appeal and the written submissions by both counsels. I have also considered the cited authorities by both counsels and agree with the cited decision that the work of a first appellate court in an appeal such as this one is to re-assess or re-evaluate the case and evidence tendered at the trial court and come up with own conclusions based on the case and evidence tendered at trial. The case presented to the trial was fairly a simple and straight forward case of a road traffic case commonly referred to a "***running down***". Both the respondent and the appellants compromised and agreed on the issue of liability (which was 90% to 10% in favour of the respondent) and all the trial magistrate was left to do was to assess damages payable based on the evidence and submissions tendered by both counsels. I have considered the evidence tendered by the respondent and more particularly the medical report (P.Exh 3) and what she told the learned trial magistrate during trial. She stated as follows:-

"I am now fully healed."

Besides the above observations the doctor's report tendered as P.Exh. 3 clearly shows that the doctor expected the patient to heal with time and this brings me to the relevant question in this appeal which is whether the learned trial magistrate took this relevant factor into consideration when quantifying the general damages payable.

8. I have considered the judgment delivered by the learned trial magistrate in this case and have noted the learned trial magistrate erroneously failed to take into consideration the fact that the injuries suffered by the respondent in this appeal had fully healed with no permanent disability. Of course I noted from the medical report tendered in evidence that the accident left her with some scars on her forehead but the extent of those scars are unfortunately not given but if the scars were that bad, I am sure the same should have been a subject at the trial and should have been pointed out by the respondent in her submissions. In view of the fact that the same were not mentioned during the trial or in the written submissions herein, this court concludes that the scars were of minor nature to be disregarded otherwise it would have formed a basis of either justifying the award by the learned trial magistrate or asking the trial to enhance the award to compensate for the scars/or disfigurement if at all.

9. I have also noted that the learned trial magistrate award special damages of Kshs.10,101/- which were specifically proved vide production of receipts but failed to subject the amount to the consent on liability which had been agreed between the parties. The amount awarded on special damages should be Kshs.10,101/-, less 10% liability.

10. Taking into account the nature of injuries suffered by the respondent herein and the fact that by 28th June, 2014 when she was heard in by the trial court, she had completely healed as expected by her doctor going by his medical opinion (P Exh 3). This court finds that the learned trial magistrate gave an award on general damages which this court finds a bit high and amounted to an erroneous estimate given the authorities cited by both counsels.

In the premises this court finds merit in this appeal. For the reasons advanced above I will allow this appeal, set aside the Judgment of the lower court in its place, and award the respondent as follows:-

i. General damages	Kshs. 270,000/-
ii. Special damages	Kshs. <u>10,101/-</u>
Total	Kshs.280,101/-
Less 10% liability agreed	Kshs. <u>28,010/-</u>
Total amount	Kshs.252,091/-

The respondent shall pay half costs in this appeal for the interest of justice.

Dated and delivered at Chuka this 8th day of March, 2017.

R. K. LIMO

JUDGE

8/3/2017

Judgment signed, dated and delivered in open court in the presence of Mwanzia for the Respondent and in the absence of the appellant and Njuguna Advocate.

R.K. LIMO

JUDGE

8/3/2017