



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NUMBER 99 OF 2014

CHARLES ORIWO ODEYO.APPELLANT

VERSUS

APPOLLO JUSTUS ANDABWA.....1ST RESPONDENT

KENMAR LIMITED.2ND RESPONDENT

(An Appeal from the judgment and decree in Original Kisumu CMCC No. 519 of 2013 delivered on 15th August, 2014 by Hon. Adika Ag Senior Resident Magistrate)

J U D G M E N T

The Appellant Charles Oriwo Odeyo sued the Defendant claiming general damages, special damages, loss of earning, capacity, costs of the suit and interest. The claim is based on injuries sustained in a road traffic accident involving motor vehicle Registration No. KBP 894D owned by the 2nd respondent and driven by the 1st Respondent as its driver and/or agent. The Appellant's claim was that on 10th February, 2012 he was walking on the pedestrian walk along Kisumu-Busia Road when the said driver carelessly, negligently veered off the road onto his path and knocked the Plaintiff down whereby he sustained injuries leading to amputation of his right leg below the knee, injuries on left leg leading to inability to walk; injuries on the head leading to concussion and bruises and lacerations on legs and hands.

The Respondent's denied the claim and/or any negligence and without prejudice averred that if any accident occurred, the same was solely caused/or contributed by the negligence of the Appellant. The Defendant enumerated the particulars of negligence on the part of the Respondent. The Appellant called witnesses including a police officer and Doctor who testified. The Respondent did not call any witness but tendered documents as defence exhibits. By judgment dated 15th August, 2014, the trial magistrate found the Respondents 100% liable and assessed general damages in favour of the Appellant of Ksh.450,000/- costs and interest.

Aggrieved by the judgment, the Appellant filed this appeal. He faulted the trial magistrate for the award of Ksh.450,000/- for pain and suffering which according to the Appellant was so inordinately low; that he failed to appreciate the nature of the injuries sustained; that he took into account issues that were never canvassed before him and finally that he misapprehend the law and facts before him and failed to take into account relevant facts. The Appellant prayed that the judgment be set aside and this court make a proper assessment of general damages.

This is a first appeal. The duty of the first appellant court is as was stated in **Jabane vs Olenja (1986) KLR 66** where Hancox JA (as he then was) stated: -

“I accept this proposition so far as it goes and this court does have power to examine and evaluate the evidence and finding of fact of the trial court in order to determine whether the conclusions reached on the evidence should stand (See Peters Vs Surway Post (1968 EA 424)). More recently the court has held that it will not likely to differ from the finding of fact of the trial judge who had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

The evidence before the trial magistrate was that on 10th February, 2012 the Plaintiff was carrying manure using a handcart and was on the left side of the road when facing Maseno along the Kisumu-Busia Road when the Respondent’s motor vehicle which was being driven from Kisumu to Busia swerved to the left side and hit him and ran over him on both legs by the hind wheels. He sustained injuries and the driver took him to Maseno Hospital where he was transferred to Mbale Hospital where he was admitted for two days. He went home and was later admitted at New Nyanza Provincial Hospital “Russia” where he was admitted from August to October, 2013. He was treated and his right leg was amputated. Dr. Were Okombo PW 2 examined the Plaintiff on 20th November, 2013 and found that the right leg was amputated below the knee with unhealed wound which was discharging pus. In preparing his report he relied on treatment notes and discharge summary from Jaramogi Oginga Odinga Teaching and Referral Hospital dated 25th October, 2013.

The learned trial magistrate analysed the evidence and made a finding that the Respondent were 100% liable and assessed general damages at Ksh.450,000/-

Mr. Anyumba for the Appellant submitted that this sum was so inordinately low taking into account the injuries sustained which included the below knee amputation of the right leg.

Mr. Nyamweya opposed the appeal submitting that the award was reasonable. He submitted that the amputation was not due to accident but due to a gangrenous wound on the foot which was not related to the accident.

The trial magistrate identified as one of the issues for determination whether the right leg was amputated as a result of the injuries sustained in the accident. In his judgment he rendered himself thus: -

“From the evidence on record, the Plaintiff said that the injuries that were seen were the ones on the left leg. The initial injuries treatment was for injuries on the left leg. The question then begs if the left leg is if the one that was injured and that is what was treated initially by the hospital how come the right leg was amputated?”

The Police officer who attended the Plaintiff at the time of the accident said there was a slight injury and he even encouraged the parties to negotiate and come to an agreement. For a human being’s leg to be amputated it means the Doctors had no way of ensuring that they can save the leg. I have not been supplied with any reason why the Plaintiff’s leg had to be amputated. This means that the Plaintiff sustained injuries on the left leg after the accident. The Plaintiff did not produce anything to show when the amputation was done and if it had anything to do with the accident.”

The Appellant in his evidence in chief on the injuries he sustained testified: -

“I was injured on both legs, on my head and hand. My right leg was amputated. On the left leg is had a wound that has not healed.”

This evidence is supported by Dr. Were Okombo who examined him on 20th November, 2013 and who relied on the physical examination and the discharge summary from Jaramogi Oginga Odinga Teaching and Referral Hospital dated 25th October, 2013 which showed that the Appellant was admitted at the facility from 27th August, 2013 to 25th October, 2013. The notes show he was admitted and below knee

amputation was done. The P3 issued to the Appellant also shows that he reported that as a result of the accident he sustained injury on both legs.

From the above evidence on record there was clearly material evidence before the trial magistrate to find that the Appellants right leg was injured during the accident and the subsequent amputation of the same was due to the injuries sustained. The fact that the Appellant would have developed the wound leading to amputation due to other causes had no support in the evidence on record. I am therefore, satisfied that the trial magistrate erred in finding that the amputation of the Appellant right leg was not related to the accident. Consequently, I confirm liability of 100% against the Respondent and set aside the dismissal of amputation of right leg as injuries sustained and add amputation of below knee as injuries sustained by the Appellant in the accident.

On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See **Butler Vs Butler (1984) KLR 225**.)

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See **Boniface Waiti & another Vs Michael Kariuki Kamau (2007) eKLR**.)

It is clear from the judgment of the trial magistrate that in the award of general damages for pain and suffering he did not take into account the below knee amputation of the Appellants right leg. I, therefore set aside the award of Ksh.450,000/- for pain and suffering and substitute thereof the sum of Ksh.800,000/- (Eight Hundred Thousand Only) for pain and suffering. As no evidence was tendered under the head of loss of earning capacity, no award is made under that head.

In the result the judgment is entered for the Appellant against the Defendant for the sum of Kenya Shillings Eight Hundred Thousand (Ksh.800,000/-), costs of this suit and interest from time of judgment till payment in full at court rates.

Dated, signed and delivered at Kisumu this 5th day of April, 2017.

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S N RIECHI

JUDGE