



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 71 OF 2016

MOMBASA MAIZE MILLERS (KSM) LTD.....1ST APPELLANT

JULIUS KARAGAT KIPYEGON.....2ND APPELLANT

VERSUS

RENGO JOSHUA WAFULA.....RESPONDENT

(Being an Appeal from the Judgment and Decree Hon. B.Kasavuli (SRM) in WinamRMCC NO.55 of 2015 delivered on 26th August 2016)

JUDGMENT

Rengo Joshua Wafula sued (*hereinafter referred to as respondent*) sued **Mombasa Maize Millers (KSM) Ltd and Julius KaragatKipyegon**(*hereinafter referred to as appellants*) in the lower court claiming damages for injuries allegedly suffered on 14th March 2015 when 1st appellant's vehicle KAX 027V-ZB 8875 Mercedes Prime Mover which was negligently driven by the 2nd appellant collided on Motor vehicle GKB 196F as a result of which the respondent was injured.

The defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on **26th August 2016**, the learned trial Magistrate found and awarded the respondent general damages in the sum of Kshs. 600,000/- which was subject to the agreed 70:30% liability ratio.

The Appeal

The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 19th September 2016 which set out 5 grounds of appeal which can be summarized into 2 main grounds to wit:-

- 1) The Learned Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same**
- 2) The Learned Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneous estimate vis-à-vis the respondent's claim**

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 28.3.17; Mr. Mmboga for the appellant informed the court that the parties' advocates had agreed to canvass it by way of written submission which they dutifully filed.

Appellants' submissions

It was submitted for the appellant that a sum of Kshs. 300,000/- to Kshs. 400,000/- would be adequate compensation for the injuries suffered by the respondent.

Respondent's submissions

It was submitted for the respondent that he suffered severe injuries and ought to have been awarded Kshs. 800,000/-.

The evidence

I have perused the entire record of appeal and I notice that the appeal revolves around quantum which I shall consider as hereunder.

This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** cited by the appellants where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

In a plaint amended on 16.3.16 and filed on 22.3.16; the respondent pleaded at paragraph 5 that he suffered:

- i. Injury to the neck
- ii. Injury to the chest
- iii. Injury to the back
- iv. Injury to left shoulder joint
- v. Injury to left hip joint
- vi. Injury to right knee
- vii. Right condylar fracture

Dr. Okombo's report dated 28.7.15 which was produced as PEXH. 7 shows that the doctor observed that plaintiff suffered the following injuries:-

- i. Facial injury with fracture

- ii. Injury to right jaw and teeth
- iii. Injury to chest
- iv. Fracture right condylar (mandible)

At the time of examination on 28.7.15 which was about 4 months after the accident; the doctor observed that the respondent had:-

- 6 cm scar right cheek
- Pain on chest
- Pain on right jaw and teeth
- Inability to open the mouth fully
- Tenderness on chest
- Tenderness right leg

The doctor recommended physiotherapy and dental attention and pronounced that the respondent had suffered grievous harm.

Analysis and Determination

I have perused the entire record of appeal and considered the submissions by counsels for both parties. The most serious injury was the fracture on the mandible and the injury to the cheek which healed with a residual 6 cm scar.

The question that arises is whether I should now interfere with the lower court's award. The principles upon which this court should proceed are those stated in the case of **KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICE, GATHOGO KANINI VS A. M. M. LUBIA & ANOTHER. [1998]eKLR** cited by the appellants in which the Court of Appeal held inter alia that

“ the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this , he amount is so inordinately high that it must be a wholly erroneous estimate of the damages”

The same principle was reinstated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** where the Court of Appeal in held:-

An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low

General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards as the Court of Appeal observed in **Simon Taveta v Mercy MutituNjeru Civil Appeal 26 of 2013 [2014] eKLR** thus:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past”.

The respondent in his submission to the lower court prayed for Kshs. 800,000/- and cited the following authorities.

i. Isaac Waweru Mundia V Kiilu Kakie Ndeti T/A Wikwatyo Services [2012] eKLR in which the plaintiff was awarded Kshs. 750,000/- for:

- a. Fracture of the base of the skull
- b. Comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of left lower incisor tooth
- c. Right eye vertical dystopia and diplopia on left gaze with marked ptosis of the upper eyelids
- d. Resultant facial asymmetry caused by the above injuries
- e. Wounds and abrasions on the lip, chin, and both lower limbs
- f. Loss of blood, physical and psychological pain.

ii. Hassan Mohammed Adan v Tracom Ltd and Another NKU HCCC NO.508 of 1999 in which the plaintiff was awarded Kshs. 750,000/- for:

- a. A concussion with loss of consciousness for 14 days
- b. Fracture and dislocation of the left hip joint
- c. Fracture of the left humerus
- d. Fracture of the meta (sic)-capal of the third finger
- e. Blunt injury to the back
- f. Laceration on his face leading to permanent and unsightly scars on the face
- g. Laceration on his scalp

iii. Joseph Mwanza v Eldoret Express, Kisumu High Court, Civil Case 160 of 2004 (unreported). In that case, the court awarded Kshs 1,200,000/- for

- a. Head injury with multiple facial injuries
- b. Laceration over right frontal scalp
- c. Gross right periorbital oedema and tenderness with enophthalmos, diplopia and ophthalmoplegia of right eye
- d. Swelling and tenderness facial side bones
- e. Craniomaxillofacial fractures
- f. Compound depressed frontal bone fracture and small subdural haematoma
- g. Undisplaced fracture of odontoid

It is noteworthy that the plaintiff in that case suffered 40% disability.

The appellants offered Kshs. 300,000/- and cited Caleb Onyango Uyogo v P A (a minor suing through W R K as next friend) [2014] eKLR in which an award of Kshs.300,000/- was upheld on appeal for:-

- a) Soft tissue injuries with a swelling of the face**
- b) A fracture of the middle part of right femur.**
- c) Soft tissue injuries of the pelvis.**

The authorities cited by the respondent relates to more serious injuries than then ones suffered by the respondent in this case. The case cited by the appellants less serious injuries compared to the ones suffered by the respondent.

I am of the view that the sum of Kshs. 600,000/- was inordinately high to warrant interference with the award. I therefore reduce the sum for general damages to Kshs. 400,000/-.

In the result the appeal is allowed to the extent that the award of general damages is set aside and substituted with an award of Kshs. 400,000/-. Special damages are retained at Kshs. 37,118/-. This award shall be subject to the agreed apportionment ratio. The appellants shall have costs of the appeal.

DATED AND DELIVERED THIS 15th DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant FELIX

Appellants Mr. Maganga

Respondent Mr. Odero holding brief.