



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 95 OF 2014

S A O (MINOR SUING THRONEXT FRIEND) M O O...APPELLANT

VERSUS

THE REGISTERED TRUSTEES, ANGLICAN CHURCH

OF KENYA MASENO NORTH PARISH.....RESPONDENT

(Being an Appeal from the Judgment of Hon. A. A. Odawo (RM) in Kisumu CMCC NO.18 of 2014 delivered on 5th August 2015)

JUDGMENT

S A O (minor suing thro next friend) M O O) (*hereinafter referred to as appellant*) sued **The Registered Trustees, Anglican Church Of Kenya Maseno North Parish** (*hereinafter referred to as respondent*) in the lower court claiming damages for injuries allegedly suffered on 13th May 2013 while the appellant was lawfully walking along Kisumu-Kakamega Road. The appellant's claim was founded on negligence. The particulars of negligence on the part of the respondent were laid out in paragraph 4 of the plaint.

On the other hand, the defendant/appellant filed a statement of Defence on 13th February 2014 and denied the particulars of negligence and in the alternative pleaded contributory negligence on the part of the minor.

The appellant called four (4) witnesses and the respondent called one (1) witness. On **5th August 2015**, the learned trial magistrate having considered the evidence on behalf of both parties, the written submissions and various authorities cited, reached the verdict that the appellant had proved her case on a balance of probability, apportioned liability at 100% in favor of the appellant as against the respondent and awarded the appellant general damages in the sum of Kshs. 200,000/- and special damages in the sum of Kshs. 10,330/-.

The Appeal

The Appellant being dissatisfied with the lower court's decision on quantum, preferred this appeal and filed the Memorandum of Appeal dated 2nd September 2014 which set out 3 grounds that may be summarized into the following two major grounds that:-

- 1. The Learned Magistrate erred in law and in fact and misdirected himself in awarding the appellant damages which were inordinately and not commensurate with the injuries suffered by the appellant**
- 2. Learned Magistrate erred in law and in failing to appreciate the degree, extent and long**

term effect of the injuries on the appellant minor

SUBMISSIONS BY THE PARTIES

Appellant's submissions

When the appeal came up for hearing on 21.3.17, both counsels agreed to dispose it off by way of written submissions which they dutifully filed in time to support their clients' respective rival positions and this court is now called upon to determine the appeal based on those submissions applying both statutory and case law.

In further exposition of the above grounds of appeal, learned Counsel for the appellant, invited this court to consider the medial report by Dr. Manasseh O. Onyimbi who observed that the appellant suffered disabling grievous harm.

Respondent's submissions

It was submitted for the respondent that the award by the trial court was in line with available precedent law and that there was no justification for the court's interference with the award.

Analysis and Determination

I need to remind myself of my duty as the first Appellate Court which was stated by the Court of Appeal in the case **Abok James Odera T/A A. J. Odera&Associates versus John Patrick Machira T/A Machira& Co. Advocates [2013]eKLR** as follows-

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

I have perused the entire record of appeal and considered the submissions by counsels for both parties and I note that the entire appeal revolves around quantum on general damages.

Dr. Manasseh Onyimbi's report dated 14.11.13 noted that the plaintiff disabling grievous harm as follows:

- Head injury with brain concussion and damage of right lower mandible jaw and left cheek
- Blunt chest injury
- Multiple friction lacerations/bruises on right elbow joint
- Fracture of right tibia/fibula at midshaft region
- Compound fracture left tibia/fibula at distal metaphysic
- Multiple cut wounds on left lower limb involving thigh down to knee region
- Fracture left ankle joint involving malleolus bones
- Dislocation right ankle joint

In their submissions before the lower court, counsel for the appellant had proposed an award of Kshs. 1,000,000/- and the defendant had offered Kshs. 100,000/-. The learned trial magistrate held, and correctly so, that there was no evidence to support the doctor's opinion that the appellant suffered brain damage. There was similarly no evidence to support the doctor's opinion that the appellant was indicated for further comprehensive super specialist surgeries and treatment at a cost of Kshs. 3 to 5 million.

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.**

“... 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, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

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 Mutitu Njeru 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”.

In the case of **Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others [1986] eKLR**, the court of Appeal held:-

“.....inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.....”

The appellant suffered serious injuries which included various fractures. In the case of **NAIROBI HCCC 1152 OF 2002 Kornelius Kweya Ebichet versus C & P Shoes Industries Ltd & Another** cited by the appellant, the Court awarded Kshs. 1,000,000/- for blunt trauma to the forehead and compound fracture left tibia and fibula bones that resulted in permanent disability. The case was 7 years old as at the time of judgment in this case.

In **Jessee Muriithi V John Gichunge Baituru & Another [1992] eKLR** cited by the respondent, the plaintiff was awarded Kshs. 70,000/- for bruises on the left leg, swelling on the left leg and fracture of the left tibia at the distal one third. The case was 23 years old as at the time of judgment in this case.

In the case of **Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR**, an award of Kshs. 800,000/- was upheld on appeal for fracture left tibia bone which went into non-union (oblique fracture shaft of the tibial bone), facial cut wounds, fracture left ulna (middle third ulna bone fracture and permanent disability of 12% while in **Alphonse Muli Nzuki v Brian Charles Ochuodho [2014] eKLR**, the court upheld an award for Kshs. 800,000/- for compound comminuted fracture right tibia and fibula and degloving injury medial aspect of right leg and foot. Although the foregoing two authorities were not cited to guide the court to arrive at a fair decision, the injuries suffered in those cases are comparable to the injuries suffered by the plaintiff in this case.

Having in mind that this court can only interfere if the sum is inordinate low or high, I find using the comparables cited above that the award was inordinately low in the circumstances.

Therefore the appeal succeeds. The judgment of the trial court is set aside and judgment is entered for the sum of Kshs.600,000/-. The award for special damages in the sum of Kshs. 10,330/- is upheld. The appellant will have costs of the appeal and the proceedings in the lower court.

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant FELIX

Appellant N/A

Respondent N/A