



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 55 OF 2013

F. KIBON CHANGWONY.....APPELLANT

VERSUS

PHOEBE NANJALA LUBUKHA.....RESPONDENT

(Being an appeal from the original judgment of F. N. Kyamba, Principal Magistrate

in Eldoret CMCC No. 141 of 2010 delivered on 22nd March 2013)

JUDGMENT

1. This appeal is restricted to quantum of damages. The appellant is aggrieved by the assessment of damages by the Principal Magistrates Court in a judgment dated 22nd March 2013. The memorandum of appeal is dated 22nd April 2013. The liability of the respondent for negligence had been settled by consent in the lower court at the ratio of 80%.
2. The appellant contends that the damages of Kshs 250,000 were exorbitant. The appellant contends that the learned trial magistrate misapprehended the evidence and applied erroneous principles in his judgment. The appellant relied on written submissions filed on 17th July 2015.
3. The appeal is contested by the respondent. There is no cross-appeal. The respondent's counsel submitted that the medical report by Dr. Aluda dated 17th December 2009 was admitted into evidence by consent. It showed that the respondent's scalp, shoulders, arms and right eye were all swollen and tender; and, she had blunt trauma injuries to the neck, chest, lumbar spine, lower abdomen and legs. Learned counsel submitted that the appellant failed to get a second medical opinion. In the premises, the lower court was entitled to accept the findings in the medical report. In a synopsis, the respondent's case is that the judgment of the lower court was sound. I was implored to dismiss the appeal.
4. On 17th November 2015, learned counsels addressed the court on those matters. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.
5. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.
6. The respondent sustained the injuries when the motor vehicle she was travelling in rolled. She testified that she was injured on the chest, shoulder, face and her back. She was first treated at Moi Teaching & Referral Hospital. She did *not* produce any treatment notes from the hospital. She was examined by Dr. Aluda *seven days* after the accident. Like I stated, the doctor's report was admitted in evidence without objection by the appellant. I thus find that the lower court was entitled to rely on it. Fundamentally, there was no evidence by the respondent to *controvert* the

- findings by Dr. Aluda.
7. From the medical report dated 17th December 2009 the respondent's scalp, shoulders, arms and right eye were all swollen and tender; and, she had blunt trauma injuries to the neck, chest, lumbar spine, lower abdomen and legs. The doctor opined that the injuries were severe but continued to heal; that the pain would subside with use of analgesics; the swelling would subside over time; and, that the scabs would fall off.
 8. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Kemfro Africa Limited & another v Lubia & another [1987] KLR 30, Akamba Public Road Services Ltd v Omambia Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
 9. From the respondent's testimony and the medical report, the respondent suffered severe multiple soft tissue injuries. There were no permanent injuries or fractures. In Peter Kahugu & another v Ongaro, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In Mumias Sugar Company Limited v Julius Shibia, High Court, Kakamega, Civil Appeal 112 of 2011 [2004] eKLR the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000.
 10. Like I stated, the award of damages is at the discretion of the trial court. I can only interfere if the lower court applied the wrong principles and arrived at an unjust decision; or the award is manifestly high or inordinately low. Butt v Khan [1982-88] KAR 1. The award of Kshs 250,000 in the present case was too high considering there were no permanent injuries or consequences. Considering the injuries, and the rate of inflation, an award of Kshs 150,000 was sufficient. I will not disturb the award on special damages of Kshs 2,200. They were specifically pleaded and strictly proved. See Kampala City Council v Nakaye [1972] E.A 446.
 11. In the result, the judgment of the lower court dated 22nd March 2013 is hereby set aside. Judgment is now entered in favour of the respondent against the appellant as follows-
 - a. Liability is apportioned by consent at 20% to 80% in favour of the respondent.
 - b. General and special damages are assessed at Kshs 152,200 less 20% contributory negligence which is to say Kshs 121,760 nett.
 - c. I award the respondent costs in the lower court and interest. Costs of the appeal are at the discretion of the court. The appellant has succeeded in this appeal. I award the appellant costs of the appeal. It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 9th day of February 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Kenei for Mr. Songok for the appellant instructed by Nyaundi & Tuiyott Advocates.

Mr. Odongo for Mr. Mwinamo for the respondent instructed by Mwinamo Lugonzo & Company Advocates.

Mr. J. Kemboi, Court clerk.