



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 155 OF 2011

BETWEEN

COAST BUS (MSA) LIMITED APPELLANT

AND

JOSEPH ODHIAMBO OKELLORESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Biwott, PM dated 11th October 2011 at the Principal Magistrates Court at Winam in Civil Case No. 394 of 2006)

JUDGMENT

1. The respondent, Joseph Odhiambo Okello, filed suit in the subordinate court against Dolphin Coaches Limited, the owner of motor vehicle registration number KAS 874 M as the 1st defendant, and the appellant, as owner of motor vehicle registration number KAP 759 T, as the 2nd defendant. He claimed damages for injuries he sustained because of an accident which took place on 24th March 2006 when the vehicles collided while he was a passenger in the appellant's vehicle.
2. The respondent denied liability and in a test suit, liability was apportioned at 10% against the 1st defendant and 90% against the appellant. The only issue the court was tasked with was to determine the quantum of damages due to the respondent. The parties produced documents in support of their case as exhibits and filed written submissions. In his judgment delivered on 11th October, 2011 the trial magistrate awarded the respondent Kshs. 250,000/- as general damages and Kshs. 1,500 as special damages. The appellant being aggrieved by the trial magistrate's decision preferred this appeal.
3. The injuries sustained by the respondent are not in dispute. According to the casualty record card issued by the Nakuru General Hospital on 24th March 2006, the respondent sustained multiple bruises without cuts. He complained he was suffering head and neck pain. The P3 form issued on 10th May 2006 confirmed that the respondent sustained bruises in the scalp and blunt neck injury, blunt chest injuries and extensive bruises on to the abdomen and bruises to the right arm. The respondent was examined by Dr Dickson Nyamogo on 10th May 2006 and Dr J. O. Odondi. Both doctors observed that the respondent had suffered soft tissue injuries and had fully recovered.
4. Before the subordinate court, the respondent suggested that Kshs. 300,000/- was sufficient to compensate the him. He relied on ***Fanny Esilako v Dorothy Muchene NBI HCCC No. 642 of 1991 (UR)*** where the plaintiff suffered multiple soft tissue injuries including cuts over the left upper arm, cuts on the left wrist, left knee, right arm and injury to the head and was awarded Kshs. 150,000.00 in 1993. In ***Gitonga Njeu Thara v Albert Gitaari Mugera NBI HCCC No. 4987 of 1997 (UR)***, the plaintiff

sustained multiple soft tissue injuries on the scalp, face, left arm, left shoulder and left wrist and was awarded Kshs. 180,000.00 in 1993.

5. The appellant submitted that Kshs. 40,000.00 was reasonable in the circumstances. It relied on the case of ***Peter Thiong'o Mbai v Karen C. Mbugua* NRB HCCC No. 4851 of 1986 (UR)** where the plaintiff sustained multiple cuts over the head, neck, face and the wounds had healed leaving permanent scar on the forehead, right jaw and neck. He was awarded Kshs. 40,000.00 in 1989. It also relied on the case of ***Justus Mwema Malinga & Others v Wilson Kadzoyo Karisa* NRB HCCC NO. 2760 of 1987 (UR)** where the claimant sustained a blunt injury with dislocated of the neck, a blunt chest injury and dislocation of the with wrist and multiple soft tissue injuries and was awarded Kshs. 35,000.00 in 1989.

6. The appellant argues that the learned magistrate in awarding the damages applied wrong principles which resulted in damages that were excessive as to amount to an erroneous estimate of loss. He suggested a global figure of Kshs. 50,000/-. On the other hand, the respondents' counsel stated that the learned magistrate assessed the damages properly and arrived at the right conclusion considering the decisions cited and the rate of inflation.

7. The general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial court, the appellate court will only interfere where the trial court in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (See ***Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto* [1979] EA 414** and ***Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5**).

8. I have re-evaluated the injuries sustained and the cases cited by the parties in light of the above principles and it is clear that the respondent sustained multiple soft tissue injuries which were relatively minor and had healed without any residual effect by the time of the trial.

9. The decisions cited by the respondent though relevant to an extent were clearly outdated as they were 15 to 17 years old. I think it is the duty of advocates to assist the court by providing more recent and relevant cases particularly in this age of online reportage. In addition, *our courts have also pointed out that there is need for consistency in awarding damages for similar although it is agreed that not all injuries are the same (see ***Simon Taveta v Mercy Mutitu Njeru* CA Civil Appeal No. 26 of 2013 [2014] eKLR**). The current value of the shilling and the economy have to be taken into account and although astronomical awards which must be avoided, the court must ensure that awards make sense and result in fair compensation (see ***Ugenya Bus Service v Gachoki* NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR** and ***Jabane v Olenja* [1986] KLR 661**).*

10. In ***Simon Muchemi Atako & Another v Gordon Osore* NRB CA No. 180 of 2005 [2013]eKLR**, the Court of Appeal awarded Kshs. 120,000/- as general damages for soft tissue injuries in 2013. The claimants in that case sustained cut wounds and bruises all over the body. Taking all the factors I have cited into account; I find the award of Kshs. 250,000.00 on the higher side. **Kshs. 130,000.00** reasonable in the circumstances.

11. The appeal is allowed to the extent that I set aside the award of general damages and substitute with an award of **Kshs. 130,000.00** subject to contribution by the 1st defendant before the trial court. The said sum shall accrue interest at court rates from the date of judgment in the subordinate court.

12. The appellant shall have costs of the appeal.

DATED and DELIVERED at KISUMU this 14th day of November 2016.

D.S. MAJANJA

JUDGE

Ms Simiyu instructed by Akwala and Company Advocates for the appellant.

Mr Njoga instructed by Ouma Njoga and Company Advocates for the respondent.