



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 76 OF 2012

(An appeal from the judgment of the Principal Magistrate, Embu in CMCC No. 85 of 2011 dated 17/05/2012)

FLORENCE NYAMBURA..... APPELLANT

VERSUS

ROBERT MUREITHI KALUNGANO.....RESPONDENT

RULING

1. The appellant was the defendant in Embu in CMCC No. 85 of 2011 where the respondent was awarded general damages for injuries sustained in a road traffic accident. The parties recorded consent on liability at the ratio of 70:30. The damages were assessed at Kshs.300,000/= plus costs of the suit.

2. Being dissatisfied with the award, the appellant lodged an appeal on the grounds that the award was manifestly excessive and that the trial magistrate failed to consider the appellant's submissions in the judgment.

3. This appeal was disposed of by way of written submissions. The appellant in the lower court had proposed that an award of Kshs.50,000/= was adequate for loss of amenities as regards the soft tissue injuries sustained. She relied on the case of **WAMUNYU CHILDREN'S DEVELOPMENT FUND VS MICHAEL MULUKU HCCA No. 125B of 2001 Machakos** where the plaintiff was awarded Kshs.420,000/= for soft tissue injuries which award was upheld by the High Court. The appellant urged the court to follow the principles laid down in decided cases and intervene to reduce the award.

4. The respondent submitted that the award was reasonable and comparable and should not be disturbed.

5. The duty of the first appellate court was explained in the case of **KENYA PORTS AUTHORITY VERSUS KUSTON (KENYA) LIMITED [2009] 2EA 212** wherein the Court of Appeal held *inter alia* that:-

On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

6. The guiding principles for interfering with an award of damages were explained by the court of appeal in the case of **BUTT VS KHAN [1977] 1 KAR LAW JA** (cited in the case of **KENYATA UNIVERSITY VS ISAAC KARUMBA NYUTHE [2014] eKLR**) where it was held that an appellate court will not interfere with an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the wrong principle, misapprehended evidence in some material respect and gave a figure inordinately high or low.

7. In the case relied on by the appellant namely the **WAMUNYU CHILDREN'S DEVELOPMENT FUND** the court cited the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE AND GATHOGO KANINI VS LUBIA AND OLIVE LUBIA [1980-83] KAR 728** where the court set out the principles to be followed in a case of this nature. It was held:-

The principal to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge in assessing damages took into account an irrelevant factor or left out of a relevant one, or that short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.

8. The medical report attached by the plaintiff in his lower court submissions By Dr. Njiru indicate that the plaintiff sustained the following injuries;

? cut wound on the right frontal region

? cut wound on the left frontal

? tenderness on the left side of the chest

1. The medical report by the respondent's doctor was not at variance with that of Dr. Njiru. It showed the following injuries:-

? Deep cut wound on the forehead

? soft tissue injury on the left side of the chest

? soft tissue injuries on the shoulders and elbows

1. Judgment was delivered on 17/5/2012 and the parties were in agreement that the plaintiff sustained soft tissue injuries which was evident in the two medical reports.

2. In the case of **DICKSON NDUNGU KIREMBE & ANOTHER VS THERESA ATIENO & 4 OTHERS [2014] eKLR** the 5th respondent suffered multiple cuts on both legs anterior aspect, tenderness on the chest and bruises on the hands. The initial award of Kshs.450,000/= was found to be inordinately high and was substituted with an award of Kshs.150,000/= in the year 2014.

3. In the case of **CHANNAN AGRICULTURAL CONTRACTORS LTD VS FRED BARASA MUTAYI [2013] eKLR** the respondent sustained a blunt injury to the chest and head and cut wound to the left leg. The respondent also complained of chest pain and frequent headache. The court substituted the initial award of Kshs.250,000/= by the lower court to Kshs.150,000/= in the year 2013.

4. In view of the appellant's authority and the two independent decisions of **DICKSON NDUNGU KIREMBU (supra)** and that of **CHANNAN AGRICULTURAL CONTRACTORS LTD (supra)** I am satisfied that the award of Kshs.300,000/= made in the year 2012 was excessive and not comparable to the injuries suffered by the respondent. The trial magistrate acted on the wrong principles and arrived at an award that was inordinately high.

5. I am guided by the case of **RODRICK NDIRANGU WANDAMA** where a passage was cited from the case of **WEST II & SONS LTD VS SHEPHARD [1964] AC 326** as follows:-

Further more it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.

6. I am of the view that the damages awarded were not assessed with moderation considering the nature of the injuries sustained by the respondent.

7. I hereby set aside the award of Kshs.300,000/= and substitute it with Kshs.200,000/=. The amount payable to the respondent based on the ration of 70:30 is Kshs.140,000/= plus interests at court rates from the date of judgment.

8. The appeal is hereby allowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Maina for P.N. Mugo for Respondent