



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 25 OF 2016

MOMBASA MAIZE MILLERS KISUMU LTD.....APPELLANT

VERSUS

DENNIS ORORA NYABUTO.....RESPONDENT

(Appeal from the Judgment and Decision of N. Wairimu, SRM delivered at Ogembo in Civil Suit No. 205 of 2014)

JUDGMENT

1. The appellant, **Mombasa Maize Millers (Kisumu) Ltd**, was sued by the respondent, **Dennis Orora Nyabuto**, for damages arising from a road accident which occurred on the 20th September 2014, along the verge of the Kisii –Kilgoris road at Mogonga Market and in which the respondent suffered bodily injuries after being knocked down by the appellant’s motor vehicle Reg No. **KAS 473T**.

2. In the plaint dated 7th November 2014, it was pleaded that on the material date at the material place, the appellant’s driver so negligently and/or carelessly drove the said vehicle such that it veered off the road and knocked down the plaintiff who was lawfully walking along the verge of the road. Consequently, the plaintiff suffered severe injuries as well as loss and damage. He therefore prayed for special and general damages against the defendant together with costs of the suit and interest.

3. The appellant’s statement of defence dated 19th December 2014, was a denial of the occurrence of the accident, ownership of the motor vehicle and indeed all allegations made against itself by the respondent/plaintiff.

The appellant prayed for the dismissal of the plaintiff’s suit with costs.

4. At the trial of the case, the respondent testified along with his two witnesses and closed his case. However, when the matter came up for defence case on the 20th January 2016, the parties recorded a consent on liability.

Liability was thus entered against the appellant at 75% and against the respondent at 25%.

The parties thereafter filed their written submissions and on the 18th April 2016, the trial court rendered its judgment.

5. The respondent was thus awarded a sum of Kshs. 2 (two) million general damages and a sum of Kshs.

69,984/= special damages plus costs of the suit.

Being dissatisfied with the said award, the appellant preferred this appeal on the basis of the grounds contained in the Memorandum of Appeal dated 3rd May 2016, and filed herein on 12th July 2016.

6. The appeal was canvassed by way of written submissions and in that regard submissions were filed by **Messrs O.M Otieno & Co. Advocates**, on behalf of the appellant and **Messrs Ochoki & Co. Advocates**, on behalf of the respondent.

Having considered the grounds of appeal in the light of the rival submissions, the duty of this court was to revisit the evidence and draw its own conclusions having in mind that the trial court had the benefit of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123**).

7. In that regard, the respondent's case was briefly that the respondent was heading home on the material date when he stopped at a place where motor cycles were being repaired. Immediately thereafter, he was hit by the appellant's vehicle. He suffered injuries on his pelvis, left leg and abdomen. He was taken to Christa Marian hospital and admitted for a day before being taken to Tenwek hospital where he was admitted for about two weeks.

8. Later, the respondent reported the accident to the police at Ogembo and also obtained a medical report from **Dr. Ogando Zoga (PW 1)**, who examined him and compiled the report.

PC Elmark Owuor (PW 2), investigated the accident and preferred a charge of careless driving against the driver of the material vehicle. He also produced the necessary police abstract.

9. The appellant did not call any witness to support its case and rebut the evidence raised by the respondent.

Suffice to state that the respondent's case was uncontroverted. Nonetheless, the trial court rendered its judgment mainly on assessment of damages considering that the issue of liability had been settled by consent of the parties.

Indeed, this appeal is essentially on the quantum of damages awarded by the trial court.

10. The grounds of appeal are basically complaints relating to quantum of damages and the manner in which they were arrived at by the trial court. In that regard, the principles to be observed by an appellate court in deciding whether or not to interfere with the quantum of damages awarded by a trial court were clearly set out by the Court of Appeal in the case of **Kemfro Africa Ltd t/a Meru Express Services & Another Vs. A.M Lubia & Another (1982 – 1988)KAR 727**.

11. It was held in that case that:-

“The principles 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 that 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 damages”.

In this case, the trial court awarded general damages in the sum of Ksh. 2 (two) million and in doing so stated as follows:-

“Upon consideration of the submissions by the parties, the age of the plaintiff which is indicated as 30 years and the occupation of the plaintiff who stated that he was a construction worker, I am inclined to assess general damages at Ksh. 2,000,000/= (subject to liability as agreed by the parties) as the injuries sustained by the plaintiff in the instant case were more severe than those

sustained by the plaintiff in the authorities cited by both the plaintiff and the defendant in comparison to the injuries sustained by the plaintiff in the instant case but do not in my view warrant the Kshs. 5,000,000/= sought by the plaintiff”.

12. It is apparent from the foregoing that the trial court relied mainly on the authorities cited by the parties respectively to arrive at the figure of Kshs. 2 million.

The appellant is of the view that the figure was inordinately high while the respondent thinks that the figure was reasonable and should in fact have been higher considering the injuries suffered by himself (respondent).

13. The medical report by Dr. Zoga (PW 1) shows that the respondent was examined on 20th October 2014, a month after the accident, and was found to have suffered a deep cut on the forehead, a fracture of the acetabulum right side, deep cut wounds on the lower lumbar area, left ankle and pelvic area near the left hip. He also suffered laceration on the left leg and bruises on the four toes of the left leg.

14. The doctor opined that the respondent in effect suffered multiple severe soft tissue injuries which were in the process of healing with permanent scarring. He also suffered fracture of the acetabulum which affected the joint morphology and would need long term follow up with likelihood of post traumatic arthritis.

The doctor assessed permanent disability at 35%. He said in his evidence that the joint mobility was affected such that healing to normal was unlikely.

15. In this court’s opinion, apart from the fracture of the right acetabulum (associated with the pelvis) the rest of the injuries were not as serious and were expected to heal in due course.

In the authorities relied upon by the respondent and in particular the cases of **Mwaura Muiruri Vs. Suera Flowers Ltd (2014)e KLR** and **Edward Nzanili Katana Vs. CMC Motor Group Ltd & Another (2006)e KLR**, the injuries suffered by the plaintiff were of a much serious nature than those suffered by the respondent herein, yet in the former case general damages were awarded at Ksh. 1,450,000/= while in the later case a sum of Ksh. 2,000,000/= was awarded.

16. However, the respondent’s injuries were of a more serious nature than those sustained by the plaintiffs in the authorities cited by the appellant in the trial.

It would therefore follow that the award of Ksh. 2 million made by the trial court for general damages was excessively or inordinately high thereby giving room for this court to interfere with and reducing it to Ksh. 1,000,000/= to cater for pain and suffering as well as loss of amenities.

17. As for special damages, the award of Ksh. 64,984/= made by the trial court was proper as it reflected what was specifically established by necessary documentary evidence.

In sum, this appeal is allowed only to the extent that the judgment of the trial court on general damages in the sum of Ksh. 2,000,000/= (Ksh. 2M) is hereby set aside and substituted with judgment on general damages in the sum of Ksh. 1,000,000/= (Ksh.1M). The award of Ksh. 64,984/= special damages is hereby sustained.

Accordingly, judgment be and is hereby entered against the appellant in favour of the respondent in the total sum of Ksh. 1,064,984/= less 25% respondent’s contributory negligence together with costs and interest.

The appellant shall have the costs of the appeal.

Ordered accordingly.

[Delivered and signed this 8th day of December 2016].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ondari holding brief for Mr. Ochoki for respondent

Njoroge CC