



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.147 OF 2012

BETWEEN

ANTHONY KERIGA MOGESI.....APPELLANT

AND

FLORENCE NYOMENDA TUMBO.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. Ogola, SPM,

dated 8th November 2012 in the original Ogembo SPMCC No.123 of 2011)

JUDGMENT

1. By a plaint dated 25th August 2011 the Respondent sued the Appellant in respect of road traffic accident on 9th May 2011 involving the Respondent and motor vehicle Reg. No. KAH 259 E owned by the Appellant as a result of alleged negligence on the part of the Appellant particulars whereof were pleaded in paragraph 4 thereof.

2. As a result of the said accident, it was pleaded that the respondent sustained serious injuries and suffered pain, loss and damages particulars of which were stated as follows:-

PARTICULARS OF INJURIES

- *Open book pelvic fracture;*
- *Cut wound on the left upper eye lid;*
- *Facial cut wound;*
- *Contusion to lower limbs;*
- *Cut wound on sacroiliac joint.*

PARTICULARS OF LOSS DAMAGE PAIND AND LOSS OF FUTURE EARNING CAPACITY

The Plaintiff was treated conservatively at Kisii Level 5 District Hospital time then later to Moi Teaching and Referral Hospital Hospital from 11th August 2011 to 3rd June 2011 where skeleton traction and

treatment for nerve regeneration time which she suffered immense pain, loss and she risks suffering complication with post traumatic osteoarthritis thus she shall seek for damages under the head of loss of future earning capacity.

PARTICULARS OF SPECIAL DAMAGES

- *Police abstract* Kshs.200/=
- *Medical report and doctor's court attendance fee* Kshs.6500/=
- *Treatment expenses* Kshs.70,000/=
- *Future treatment expenses to be adduced at the hearing.*
- *Cost of search of M/V KAH 259 E* Kshs.500/=

On 10th October 2011 the Appellant filed a statement of defence in which he denied ownership of motor vehicle Reg. No. KAH 259E the occurrence of the accident as pleaded and in the alternative and without prejudice deliberate the said accident to the negligence on the part of the respondent the particulars of which were pleaded in paragraph 2 thereof.

Based upon the said pleadings the matter proceeded for hearing on the question of quantum the parties having recorded consent on liability at 30%:70% in favour of the Respondent and the court awarded Kshs.1,500,000/= in general damages, Kshs.6500/= in special damages less 3%.

Being aggrieved by the said judgment on quantum the appellant filed this appeal and raised the following grounds of appeal:-

- 1. The Learned Trial Magistrate erred in law and in principle by failing to appreciate that the injuries alleged to have been sustained by the Respondent were in the nature of soft tissue injuries, of lesser magnitude and did not commensurate with the amount of general damages awarded.*
- 2. That the award of General damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance.*
- 3. That the Learned Magistrate erred in law and in principle by failing to properly consider the submissions and authorities filed by the Appellant while giving weight to the amount proposed by the Respondent as the judgment of the Court, thereby occasioning miscarriage of justice and error in principle.*

SUBMISSIONS

Directions were given that the appeal be heard by way of written submissions and the same fixed for mention on 10th February 2015 at which time the Respondent had not filed her written submission and neither did her advocate attend court for the highlighting of the submissions. Miss Kusa appeared for the appellant and highlighted their written submissions. For record purposes the respondent's submissions were filed on 27th February 2015.

APPELLANT'S SUBMISSIONS

It was submitted that this court can interfere with an award of damages on the following terms:-

- i. When the award is inordinately high or low as to represent an entirely erroneous estimate.*
- ii. The trial court proceeded on wrong principles or misapprehended evidence in some material*

respect.

In support thereof the case of **Texcal House Service Station Ltd & another -vs- Jappinen & another (Nairobi CA No.134 of 1998)** was submitted.

It was further submitted that damages must be within limits set out by previous comparable decided cases and there must be uniformity in awards in cases involving similar injuries and in support thereof the case of **Stanly Maore -vs- Geoffrey Mwenda Nyeri CA No.147 of 2002 Court of Appeal** was submitted.

It was therefore submitted that the injuries sustained by the respondent were of minor nature, not similar to the authority used in support thereof of **Samuel Makumi Githambo -vs- South Sioux Farms Ltd. & 3 others** wherein the plaintiff who sustained multiple fractures of the right and left femur, fracture of inferior public ramus radius and right pelvis fracture of the right scapular, closed fracture medial malleolus of the leg was awarded Kshs.1,500,000/=.

It was submitted that the respondent suffered less severe injuries for which Kshs.400,000/= was proposed based upon the cases of:-

Jackson Musyoka Ndunda -vs- Lochab Transport Limited Machakos High Court C/a BI,172 of 2011 where Kshs.400,000/= was awarded.

Jane Wangui Kamau & 2 others -vs- Alice Atandi Mungamangi & another Nakuru HCCC No.136 of 2003 where Kshs.,350,000/= was awarded.

It was therefore submitted that the court proceeded on wrong principles since the injuries were not similar. Miss Kusa therefore submitted that an award of Kshs.400,000/= would be very adequate based upon the authority of **Stanly Maore** (supra).

RESPONDENT'S SUBMISSION

For record purpose I must point out that the respondent's submissions are not properly before the court as the same was not filed within the set period of time. That notwithstanding, it was submitted that the respondent suffered severe injuries which cannot be considered soft tissue injuries and that the trial court considered the submission filed by the respondent.

It was submitted that the trial court did not act on no evidence and that the submissions by the appellant was based on wrong appreciation of the respondent's injuries and therefore the cases submitted by the appellant were irrelevant. It was further submitted that the cases were decided in 2005 and 2007.

On the authority of **Simon Taveta -vs- Mercy Njeru CA at Nyeri C.A. No.26 of 2013** the court was urged not to interfere with the findings of the trial court. It was further submitted that the trial court took into account the principles set out in **Michael Maina Gitonga -vs- Serah Njuguna [2012] e KLR** on assessing the quantum of damages in any personal injury claim in arriving at Kshs.1,500,000/= and submitted the following cases in support thereof:-

Alphonse Mwatsuma Mwanganchi -vs- Joseph Mwanzia Mwanzu & another Mombasa High Court Civil Suit No.300 of 2001 where Kshs.1,200,000/= was awarded.

Florence Hare Mkaha -vs- Tawakal Mini Coach & another Mombasa HCCC No.85 of 2010 where Kshs.2,400,000/= was awarded.

The principles upon which the appellate court will interfere with the findings of the trial court were stated in the case of **Jabane Volenja [1986] KLR 661** to wit the court will only interfere if they are based on no evidence or the judge is shown to demonstrably to have acted on wrong principles in reaching the findings he did and in **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini -vs- A.M. Lubia & another [1982-88] 1 KAR 777:-**

“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 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 wholly erroneous estimate of the damages.”

The issue therefore for determination is whether the award herein was inordinately so high to be interfered with by this court. This being the first appellate court, the court is under duty to re-assess the evidence tendered before the trial court to reach its own conclusion on the matter.

According to PW1 FLORENCE NYOMENDA TUMBO the same was injured on the right leg on the waist that got fractured, above the knee also got fractured, the back bone also got fractured. The medical report on the plaintiff by Dr. Maurice Nick Raute undated was produced by consent according to which the respondent sustained the following injuries:-

- *Cut wound on the left upper eye lid;*
- *Open book fracture of pelvic bones;*
- *Weak lower limbs.*

He concluded that the respondent suffered severe injuries which had completely disabled her and also left her disfigured with multiple scars.

In arriving at Kshs.1,500,000/= the trial court stated that he was guided by the case of **Samuel Makumi Githambo -vs- South Sioux Farms Ltd** (supra) which he stated were of similar injuries. However in that case the plaintiff sustained the following injuries:-

- a. Fracture distal end of the right femur;*
- b. Fracture distal end of the left femur;*
- c. Fracture inferior public ramus of the right pelvis;*
- d. Fracture right scapular;*
- e. Multiple cut wound on the face;*
- f. Closed fracture medial malleolus of the leg;*
- g. Dislocation of the right shoulder;*
- h. Loss of one upper incisor tooth;*
- i. Loss of one lower incisor*

It is therefore clear that the said injuries were not similar with those suffered by the respondent herein and therefore in holding that they were similar the trial court took into account irrelevant matters and therefore fell into error for which his judgment is liable to be interfered with.

I have looked at the cases of **Michael Maina Gitonga** (supra) and **Florence Hare Mkaha** (supra) and is of the considered opinion that they were in respect of more severe injuries than those sustained by the respondent herein and are not relevant to this aspect.

I have looked at the following cases which I find relevant to the injuries sustained by the respondent:-

i. Julius Kiprotich -vs- Eliud Mwangi Kiholia Nakuru High Court Civil case No.207 of 2004 wherein

the plaintiff sustained a fracture of the pelvic bone, internal abdominal injuries and head injuries was awarded Kshs.450,000/= by Kimaru J on 31st May 2006.

ii. Kiru Tea Factory & another -vs- Peterson Wathaka Wanjohi Nairobi High Court Civil Appeal No.1045 of 2004 wherein Waweru J. confirmed an award of Kshs.800,000/= in general damages for pain and suffering in respect of the plaintiff who sustained the following injuries:-

i. A degloving injury to the right hand with fracture of the radius and ulna bone;

ii. Fracture of the right iliac bone in the pelvis;

iii. Generalized pain over most of the chest.

1. Taking into account the above authorities I find that the award of Kshs.1,500,000/= was inordinarily high and would therefore allow the appeal herein and set aside the award of the trial court and substitute the same with an award of Kshs.600,000/= having taken into account the rate of inflation and the loss in value of money and the injuries sustained by the respondent herein.

2. The appellant shall be entitled to costs of this appeal.

Delivered, dated and signed at Kisii this 11th day of March, 2015

J. WAKIAGA

JUDGE

In the presence of:-

Aboge for otieno for Appellant

N/A for Respondent