



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL. NO. 169 OF 2013

JOHN GATHENJI APPLICANT

VERSUS

REBECCA WANJIKU MWANGI RESPONDENT

RULING

1.The appellant *John Gathenji* is aggrieved by the judgment and decree in the Chief Magistrate's court at Eldoret dated 16th September, 2011.

The appellant was the defendant in the lower court while the Respondent *Rebecca Wanjiku Mwangi* was the plaintiff.

The Respondent had sued the appellant seeking special and general damages for injuries she sustained in a road traffic accident on or about 9th September, 2009 while being conveyed as a passenger in motor vehicle registration Number KAK 152 N owned by the appellant. It was the Respondent's case that the accident was caused by the appellant's negligence.

2. Particulars of injuries suffered by the Respondent were pleaded as follows:-

Head injury leading to loss of consciousness and brain concussion; swelling and tenderness on the scalp and face with two cut wounds on the scalp; blunt trauma to the spinal column which was tender; tenderness on right index finger which was dislocated on its proximal joint; a cut wound on the right small finger; tenderness and blunt trauma to the right shoulder; a cut wound on the right foot about 3 cm long.

3.In the course of the trial, parties recorded a consent on liability at the ratio of 80%: 20% in favour of the Respondent against the appellant. The Learned trial magistrate after considering the injuries sustained by the Respondent and submissions made by the parties awarded the Respondent general damages in the sum of Kshs. 300,000 and special damages in the sum of Kshs.7,000 in her judgement delivered on 16th September, 2011.

The appellant was dissatisfied with the judgment of the trial court and decree on quantum of damages. He filed an appeal to this court through a memorandum of appeal dated 7th October 2011. He pleaded five grounds of appeal the main ones being that;

(i)The learned trial magistrate erred in law and in fact in awarding damages which were inordinately high or excessive as to amount to an erroneous estimate of loss and damage suffered by the plaintiff.

(ii) The learned trial magistrate erred in law and in fact in using wrong principles in the assessment of damages.

(iii) The learned trial magistrate erred in law and in fact in failing to take into account the pleadings, evidence and submissions tendered by the defence in awarding damages.

4. This is a first appeal to the High court. As such, I am required to re-evaluate all the evidence on record and to draw my own independent conclusions. In doing so, I should be mindful that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses.

See: *Selle v Associated Motor Boat Company Ltd (1968) EA 123*; *Williamson Diamonds Ltd v Brown (1970) E.A. 1*.

5. The appeal was prosecuted by way of written submissions. Those of the appellant were filed on 17th July, 2014 while those of the Respondent were filed on 18th November, 2014.

In summary, the appellant submitted that the trial magistrate in her assessment of damages considered injuries which were neither pleaded nor contained in the medical report marked as PExbt 5(b); that the plaintiff in her evidence under cross examination had admitted that she had recovered from her injuries save for memory lapses, loss of smell and taste which were not covered in the medical report and could have been as a result of other unrelated causes not connected to the accident.

6. It was further submitted that the learned trial magistrate misdirected herself by not considering the authorities relied upon by the appellant in his submissions and thereby proceeded to compensate the Respondent with an amount of damages not comparable to other awards made in other decided cases for comparable injuries. For this proposition, reliance was placed in the court of appeal authority of *Zipporah Wambui Wamberia 417 others vs Gachoru Kiogora & 2 others Civil Appeal No. 10 of 2004 (2004) eKLR*.

It is the appellant's case that an award of Kshs. 80,000 was sufficient compensation for the Respondent's injuries.

7. The Respondent in her brief written submissions replicated the injuries sustained in the accident in question and emphasized that as a result of those injuries, she was admitted for treatment at the Moi Teaching and Referral Hospital. She also submitted that the award of damages by the trial court was adequate compensation for her injuries and the same ought to be upheld by this court. She urged the court to dismiss the appeal and enter judgment in her favour.

8. I have considered the pleadings and the evidence in the trial court; the grounds of appeal and the submissions of learned counsel for both parties.

I wish to start by re-iterating the general rule that an appellate court should not interfere with an award of quantum of damages unless the award was either too high or inordinately low or founded on wrong principles.

See: *Ali v Nyambu Eya Sisera stores (1990) KLR 534*; *Arkay Industries Ltd v Amani (1990) KLR 309*; *Kemfro Africa Ltd & Another v Lubia & Another (1987) KLR 30*; *Akamba Public Road Services Ltd v Omambia Court of Appeal, Kisumu Civil Appeal No. 89 of 2010 (2013) eKLR*.

9. From the evidence on record, it is clear that the medical report of **Dr. Samuel Aluda** confirmed the injuries sustained by the Respondent as pleaded. The medical report also shows that at the time of examination by the doctor, the Respondent still complained of occasional pains in the scalp, face, spinal column right shoulder, right index finger, small finger and right foot which were still tender. The Respondent had scars in those areas which were permanent.

The doctor concluded that the injuries were severe and though they had healed, the Respondent would continue experiencing occasional pains which will need to be managed by the use of analgesics. The discharge summary from the Moi Teaching and Referral Hospital also confirmed that the Respondent had been admitted in the said hospital for seven days following the accident.

10.The award of damages is at the discretion of the trial court.

As stated earlier, I can only interfere with it if it is demonstrated that the lower court applied the wrong principles and arrived at an erroneous or unjust decision; or that the award was manifestly high or inordinately low.

In this case, from a reading of the trial court's judgment, I find no evidence to show that the Learned trial magistrate applied the wrong principles or that she did not address her mind to the actual injuries suffered by the Respondent or the submissions made by both parties on quantum.

Given the evidence pertaining to the Respondent's injuries, I am not convinced that an award of general damages in the sum of Ksh.300,000 was manifestly high or inordinately low in the circumstances of this case. I cannot also say that the award was unreasonable.

The award of special damages in the sum of Kshs.7,000 cannot also be faulted as the special damages were pleaded and strictly proved.

11.In view of the foregoing reasons, I do not find merit in this appeal. It is consequently dismissed with costs to the Respondent.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF MARCH 2015.

In the presence of:-

Mr. Akenga for the Appellant present

None Appearance for the Respondent