



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

H.C. CIVIL APPEAL NO. 67 OF 2013

RODGERS SHIJENJE ATSAYA----- APPELLANT

VERSUS

FRANCIS WAFULA ANGOYE----- RESPONDENT

(An Appeal arising out of the Judgment and Decree of Hon. I.T MAISIBA PM delivered on 27th November 2013 in Busia Civil case No. 31 of 2011)

JUDGMENT

1. On 11th September 2010, Rodgers Shijenji Atsaya (who shall continue to be referred to as the “Plaintiff” in this Appeal) sustained injuries in a Road Traffic Accident involving Motor Vehicle Registration KAH 315C and motor cycle registration KMCK 348U. In the Plaint presented to the Lower Court on 2nd March 2011 it was alleged that Francis Wafula Angoye (the “Defendant”) was the registered owner of the Motor Vehicle and the Plaintiff a pillion passenger on the motor cycle.
2. At the Subordinate Court, Hon. I.T. Maisiba P.M. found in favour of the Plaintiff and awarded him Kshs. 100,000/- General damages for pain, suffering and loss of amenities, specials of Kshs. 4000/- plus costs and interest. The Plaintiff being dissatisfied with that award has preferred this Appeal in which he raises two grounds;
 - i. The Learned Trial Magistrate erred in law and fact in the exercise of his judicial discretion on assessment of damages as to amount to abuse and wrong application of the principles on award/assessment of damages
 - ii. The learned trial Magistrate erred in law and fact in awarding damages that were inordinately low as to amount to gross underestimation of the injuries sustained by the Appellant.
3. This being an Appeal against quantum only, the work of this Court will be guided by the principles restated in **Butt vs – Khan (1981) KLR 349** upon which an Appellate Court will interfere with an award of Damages of a Trial court. There, Law JA said;

An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

4. But first a preliminary issue has arisen. Following the judgment of the Lower Court dated 27th November 2013, the parties herein filed a written consent dated 22nd January 2014 on the following terms;

“By Consent of both parties it is HEREBY AGREED THAT;

The matter be and is hereby marked as settled between the parties.”

The Parties have taken divergent views on the effect of this Consent on the Appeal. The Defendant’s Counsel took the view that the Consent meant that all questions between the two parties had been settled. I understood the Defendant to be saying that the Consent compromised the Appeal. The Plaintiff, on the other hand, thought that it could not be so as it was not filed in the Appeal. Further, the High Court having admitted the Appeal to hearing by not rejecting it under the provisions of Section 79 of the Civil Procedure Act, the Appeal had to be heard on merits. Further, that the Defendant failed to raise this issue at the opportunity presented by the taking of Directions of the Appeal on 3rd June 2015.

5. This is the view I take of the preliminary matter. The Consent herein was filed in the Subordinate Court file on 26th February 2014. This was a date after the Appeal had been presented on 18th December 2013. The consent makes no reference whatsoever to the already existing Appeal. Secondly, the Consent was not filed in the Appeal file. In the circumstances, this Court would have a difficulty construing the Consent as compromising the Appeal as argued by the Defendant because if that was the intention of the parties then they would have expressly said so in the Consent or, consensually, at a later occasion in the Appeal. As there is no agreement, I would prefer to hold that the Consent did no more than to confirm that the Defendant had met his obligation under the terms of the Lower Court judgment.
6. What injuries did the Plaintiff sustain? The Learned Magistrate set out those injuries as follows:-
 - Bruises on the left cheek (sic)
 - Bruises on the abdomen
 - Left small finger was amputated
 - Bruises on the left elbow.
 - Bruises on the left thigh, left knee joint, left Maleolar.

In doing so, he made a finding of fact as to the injuries sustained by the Plaintiff. The Defendant now submits, in respect to the injuries, that:-

“The Appellant/Plaintiff testified he was initially treated at Nangina Hospital. However, his medical chit did not indicate amputation of left finger. PW3 collaborated this by stating the chit indicated crust injuries to the left finger (reference to page 41 lines 6)”

This argument cannot further the cause of the Defence because the Defendant did not cross-Appeal challenging the findings of fact of the Learned Trial Magistrate. This Court will proceed on the basis of the findings made by Learned Magistrate.

7. Is an award of Kshs. 100,000/- General damages manifestly low as submitted by the Plaintiff’s Counsel? In attempting to persuade this Court, Counsel cited the following authorities:-
 1. **Shabana Hardware & General Stores Ltd - vrs – Samwel Okumu** (2010) eKLR where Musinga J (as he then was) did not think that a sum of Kshs. 300,000/- for an amputated left thumb was so excessive as to warrant interference.
 2. **Senate Boi Khaukha vs Warimwe General Contractors Ltd** (2015) eKLR where Aroni J made an award of Kshs. 250,000/- General damages for an amputated right middle finger.
 3. **Woodtex (K) Limited vs Moses Otiangala Solomon** (2005) eKLR where Visram J (as he then was) did not think that General Damages of Kshs. 290,000/- was “inordinately high” for the following injuries:-
 - a. Amputation of the 1st finger on the right hand
 - b. Laceration of the third and fourth fingers of the right hand

- c. Stiffness of the digital interphalangeal
- d. Permanent scarring of the digital phalanges.

8. To dissuade me, Counsel for the Defendant cited the following Decisions:-

- 1. **Abed Rashid as next friend vs Omar Mohamed Abdullahi Ali** (1983) eLKR where Kneller JA awarded Kshs.14,000/- for the partial amputation to a finger of a 9 years old boy.
- 2. **Kataka Nzioka vs Bamburi Portland Cement Factory Ltd** where Bosire J (as he then was) made an award of General damages of Kshs. 90,000/- for a crush first to the left finger right and small fingers of the left hand

9. This Court has considered the authorities cited to it. Those cited by the Defendant, though relating to similar injuries where Decisions made in 1983(**Abed Rashid supra**) and 1989 (**Katana Nzioka supra**) and the passage of over 25 years would not make them a very helpful guide to a matter determined on 27th November 2013. This Court is of the view that the decision in **Senate Boi Khaukha (supra)** provides a good comparison. There, Judge Aroni, not so long ago, on 17th March 2015 awarded Kshs. 250,000/- for loss of a right middle finger. On my part I would award Kshs. 200,000/- General Damages for the injuries sustained by the Plaintiff which was not only an amputation to the left small finger but bruises on the left cheek, abdomen, left elbow, left thigh and left knee joint. Being double what the Lower Court awarded, I make a finding that the award of the Lower Court was manifestly low. I therefore interfere with it and instead award the Plaintiff General Damages of Kshs. 200,000/- for pain, suffering and loss of amenities.

10. There shall be interest at Court rates on the General damages from the date of the Lower Court judgment being 27th November 2013. The Plaintiff will also have costs of this Appeal.

Dated, signed and delivered at Busia this 12th day of OCTOBER 2015

F. TUIYOTT

J U D G E

In the presence of :-

OrwasaC/Assistant

Omondi..... For Appellant

N/A... For Respondent