



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 42 OF 2013

(Being an Appeal from the Judgment and Decree of the Honourable D.M.Machage

(S.R.M) at Mariakani in SRMCC No. 75 of 2011 (Principal Magistrate's court

delivered on 26th March 2013)

ZIRO CHIMBA ZIRO.....APPELLANT

VERSUS

ELEMA

1. JARSON WARIO

2. DIKUS TRANSPORTERS.....RESPONDENTS

JUDGMENT

1. By a memorandum of appeal dated the 8/4/2013 the appellant has impugned the judgment and decision of Hon. Machage, PM in Mariakani SRMCC No. 75 of 201 dated the 26/3/2013 on the grounds that:-

i. THAT the Learned Magistrate erred in law and in fact in awarding the Appellant general damages of Kshs.200,000.00 which were inordinately low in the circumstances of the case.

ii. THAT the Learned Magistrate erred in law and in fact in holding that Plaintiff had only pleaded and specifically proved Kshs.2,500.00 as special damages.

2. Since **SELLE & ANOTHER -VS- ASSOCIATED MOTOR BOAT CO. LTD. [1968] EA, 123**, the law has crystallised that for an appellate court to interfere with a trial court's findings of fact, it must be established that in reaching to the conclusion it did, the trial court failed to take into account particular circumstances or probabilities or if the impression of the demeanour of witness is inconsistent with the evidence generally. The court is however bound to reevaluate and reexamine the evidence in totality while bearing in mind that it lacks the benefit of having taken the evidence of the witnesses and observed the demeanour of witnesses as they testified.

3. With my boundaries clearly set, there are only two questions that beg my consideration and determination based on the record of trial before the trial court, and the law applicable. I have read the record and the submissions by the parties and identified the two issues as follows:

(a) Did the court in awarding general damages for pains suffering and loss of amenities err in any manner as to justify my interference?

(b) Was the award of special damages in the sum Kshs.2,500 supported by evidence on record?

4. I will start with the second issue being a straight forward matter. It is now established principle of law that special damages must not only be specifically pleaded but must equally be strictly proved. In the appeal before me the Appellant in his plaint dated 20/6/2011 pleaded special damages in the sum of kshs.13,300.

5. At trial Pw1, the Respondent said at page 75 of the record:

“I have treatment note from Coast General I wish to produce them MFI-1 I paid Kshs.10000. I have receipts to that effect – Exhibit P11... I was examined by Dr.Adede, he prepared a report to that effect, I paid him Kshs.,2,000 I was issued with receipt Mfi Vii .

Pw2 at page 77 of the record said

“I signed the report was paid Kshs.2000. I issued a receipt the same day I produce the receipt Kshs,2,000.”

6. Those receipts are at pages 23 and 27. The Doctors receipt for kshs.2000 is at page 23 while those from Coast General hospital are at page 27 and add to Ksh.9800. When I add the total I get kshs.11,800. That was the sum the Respondent proved as the expenses incurred by him and qualify as special damages.

7. In the record before me there is totality no reference to the sum of Kshs.2,500 as awarded by the trial court. It was never pleaded not proved and I am tempted to hold and I do hold that it had no foundation or justification. In failing to consider the documentary evidence produced before the court, the trial court erred and for that error, I am bound to interfere with the judgment and I therefore interfere by substituting, the award of special damages in the sum of Kshs.2,000 with sum of Kshs.11,800.00

Was the award of kshs.200,000 so low as to amount to the error in principle?

8. The assessment of damages in personal injury claims is a matter of discretion dependent on a judges experience and the material presented to court in the nature of decided cases and evidence. For an appellate court to interfere with an assessment of damages, it must be demonstrated that the trial court failed to consider the evidence or the applicable principle or did consider an irrelevant matter and failed to consider a relevant matter.

9. The injuries suffered by the Appellant as proved at trial were as follows:-

(I) Dislocation of the right Hip joint.

(ii) Blunt injury to the right knee,

(iii) Blunt injury to the right ankle.

10. In a reserved judgment dated 26/3/2013 the determination by the trial court is expressed as follows:-

“I have had the occasion to read through both counsel submissions and I am of the view that an award of Kshs.200,000 will address the injuries suffered by the plaintiff subjected to 15% contribution leaves me with Kshs,170,000 which sum I award. I also award Kshs.2,500 under special being specifically pleaded and proved.”

11. I have looked at the Record of appeal filed and noted that there were written submission offered to the

trial court. The submissions by the Appellant, as plaintiff then, cite decided cases which however were about 20 years old. The Defendant/Respondent however did not cite any case but preferred to distinguish the decision cited by the plaintiff as referring to more extensive injuries than in the instant case.

12. The law enacted under the Civil Procedure Act, order 21 Rule 4 obligates a court to include in its judgment a concise statement of the case, the point for determination and the determination on such points and reasons for such determination. In the judgment appealed again I find that the trial court did not discharge its obligation under the law. To that extent, the trial court erred once again.

13. I further find that the decision in NAIROBI Hse No. 3176 of 1987 **LEONARD MUTUA MUTHAMA -VS- JOHN GICHOBI** cited to court was of comparable injuries and was in fact a good guide to the measurement of damages to be awarded. That the judgment was about 20 years old was a consideration for the court to consider together with the fact that passage of time had the inevitable effect on eroding the value of money. It is not evident from the judgment appealed whether the court considered that judgment or indeed its age. What is in the judgment suggests that the figure could have been picked from the air. That was not advisable nor justifiable as there was a decision of a superior court cited and which was binding upon the court. I find that to be an error that entitles me to interfere with the assessment of damages. I set aside the award of damages in the sum of Kshs.200,000/=.

14. Having so interfered, I must of necessity embark on the duty to assess the damages regard being had to the evidence as recorded by the trial court. I in particular give regard to the medical report produced as exhibit P7 and the evidence of Pw2 at page 77 of the Record of appeal where the witness said.

“I expected him to heal with residual, disability because of dislocation which make it unstable with further dislocation”

15. In the medical report the doctor recorded as follows:-

“(a) Permanent partial disability if the right Hip joint due to

1) Dislocation

2) joint instability and risk for future dislocation,

3) post dislocation arthritis and pain

(b) Dislocation of hip joint involves overstretching the joint and bone displacement both of which damage the joint to cause instability and arthritis.

Accompanying soft tissue injuries will leave no residual disability.”

16. The report also reveals that the plaintiff/Appellant was admitted in hospital for a period of 12 days.

17. In assessing damages under pains, suffering and loss of amenities, a court looks not only at the extent and the residual effect of the injuries but also the resultant pain, the duration the pain persists and the possible suffering and loss of amenities. These are the considerations the trial court needs to have paid attention to but it seems no due attention was accorded. In discharging that duty the court takes into account that damages must be within limits set out by decided cases and also within limits that the Kenyan economy can afford.

18. For my part as a first appellate court, and being aware of my boundaries, I take the case of LEONARD MUTUA (supra) as a guiding point. I have taken into account the duration of hospitalisation and the opinion of the doctor and the date of the decision relied on and assess the plaintiff's damages for pains, suffering and loss of amenities at Kshs.400,000. The award thus works out as follows:-

a. General damages for pains, suffering and

loss of amenities	Kshs.400,000
Special damages.....	Kshs. 11,800
Total	Kshs. 411,800
Less 15% contribution.....	<u>Kshs. 61,770</u>
.....	<u>350,030</u>

19. I therefore set aside the award of the trial court and in its place I substitute an award of Kshs.350,030 plus costs of this appeal and interests. Interests on special damages shall run from the date of filing suit while interest on general damage shall run from the date of judgment by the trial court.

20. It is so ordered.

Dated, signed and delivered at Mombasa this 4th day of December 2015.

In the presence of:

No appearance for Appellant.

No appearance for Respondent.

P.J.O.OTIENO

JUDGE