



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.12 OF 2013

TARASILA WANJA.....1ST APPELLANT

KIAMBATI DAVID KIRIMI.....2ND APPELLANT

VERSUS

PETER KIRIMI MUTHURI.....RESPONDENT

J U D G M E N T

The appellants were the defendants at the lower court. The respondent had through an amended plaint dated 18th September, 2010 sued the two appellants claiming special damages of Kshs.6922/-, Kshs.50,000/- costs for removal of the K-wire, general damages for pain, suffering and loss of amenities with costs and interest arising out of a traffic road accident involving motor vehicle registration No. KBF 857U along Meru-Chuka road and which vehicle was owned by the 1st appellant and driven by the 2nd appellant and in which vehicle the respondent was a lawful passenger.

That by consent judgment on liability was entered at 90:10 in favour of the respondent and medical reports by Dr. Antony Njeru and Dr. John Macharia were admitted without calling the makers. The respondent gave evidence in support his claim and produced treatment notes as exhibit 1(a), Discharge note as exhibit P(b), receipts of Kshs.3222/- as exhibit P2, P3 Form as exhibit P3, medical report as exhibit P4(a),(b), a receipt for Kshs.3000 as exhibit P4(b), Police abstract as exhibit P5(a), receipt as exhibit P5(b), motor vehicle search as exhibit P6(a), receipt exhibit P6(b) and demand notice as exhibit P7.

The learned counsel put in their respective written submissions supported by authorities. The learned trial magistrate after considering the evidence, annexures and submissions tendered before him entered judgment for the respondent for general damages of Kshs.350,000/- with special damages of Kshs.6922/- less 10 percent contributory negligence leaving a balance of Kshs.321,230/- plus costs and interest.

The appellant's being aggrieved by the trial court's judgment preferred this appeal setting out four grounds of appeal as follows:

- 1. The applicant has lodged an appeal against the judgment of this Honourable court being High Court Civil Appeal No.130 of 2011.***
- 2. The said appeal as lodged runs the risk of being rendered nugatory if the plaintiff herein executes against the defendants for the decretal amount herein and will hereby occasion them irreparable damages and substantial loss.***

3. ***The plaintiff has already proclaimed against the applicant's goods and will proceed to attach and sell the same unless restrained by this Honourable court.***
4. ***The insurer of the applicant is ready and willing to deposit the decretal sum in court as security in the form of an insurance bond which is equivalent to the decretal amount.***

The learned Counsel sought directions that the appeal be determined by way of written submissions. The appellants through their advocate M/S Grace W. Kamuyu & Co. Advocates filed their submissions on 22nd April, 2013 whereas the respondent's counsel M/S Kiogora Ariithi & Associates filed theirs on 26th April, 2013. That both counsel opted not to highlight on their respective submissions preferring to seek a judgment date. I have carefully perused the pleadings, proceedings, authorities relied upon in support of opposing respective positions. I will in this appeal deal with all grounds of appeal each ground on its own before reaching my conclusion in this appeal.

The facts of this case is that the respondent was on 31/1/2010 a lawful passenger in motor vehicle Registration No.KBF 857U travelling along Meru-Chuka Road when the said motor vehicle owned by the 1st appellant and driven by the 2nd appellant was involved in an accident. The appellant and respondent recorded consent on liability on the basis of 90:10 in favour of the respondent. That as a result of the said accident the respondent sustained as per plaint bodily injuries being:

(a) Fracture of the left radius of the left forearm

(b) injury to the chin.

The treatment note exhibit 8(a) shows same injuries. The discharge summary exhibit P2(a) revealed same injuries and indicated that the respondent was under deep pain and was referred to A.F.M.H clinic as the pain was not responding to treatment and the left hand had lost function. The P3 Form exhibit 3 indicated fracture of the left radius and the injury was classified as harm. The medical report exhibit P4(a) by Dr. John K. Macharia revealed same injuries being cut on the chin, dislocation of left lunate bone(small wrist bone). The report shows the respondent has a scar on the chin, surgical scar on the left wrist. That the left wrist is stiff and movement reduced in range and was painful. The doctor's opinion is that the respondent requires undergoing vigorous physiotherapy to alleviate the reduced and painful movements of the left wrist. The respondent is likely to develop arthritis of the joint which is a chronic debilitating condition. That the K-wire will be removed at a cost of about Kshs.50,000/-. That report was made on 7/9/2010. Medical report exhibit 4(b) by Dr. Antony Njeru, for the appellants indicates the respondent sustained the following injuries:-

- a. ***small cut wound on the chin(left side)***
- b. ***anterior dislocation of the left bone(small bone of the hand forming part of the must joint)***
- c. ***soft tissue injuries to the chin on the right leg and left knee joint***
- d. ***traumatic extraction of the left lower molar.***

The doctor noted the respondent has same complications as disclosed to Dr. Macharia. The doctor concluded that the respondent has developed traumatic arthritis of the affected wrist joint which requires him to be on physiotherapy and pain medication and that due to the limited joint range of motion of the left wrist joint his working is greatly limited. The doctor assessed disability as permanent disability to the left joint at 40 percent. The respondent in his evidence before the trial court testified that he sustained back injury, and had a fracture of the left hand. That a plate was put on his hand and would be removed in the future at a cost of Kshs.50,000/-. The respondent's evidence was not challenged either through cross-examination or by calling witnesses by the appellants.

The appellants first ground of appeal is that the trial magistrate erred both in law and facts in awarding the respondent 350,000/- as general damages as the same is excessively high.

The appellants submitted the award of Kshs.350,000/- is excessive given the nature of the injuries sustained by the respondent. The appellants concede the respondent's injuries as pleaded in the plaint and as stated in the treatment note and discharge notes are similar. I have carefully perused the respondent's

treatment notes, discharge notes, the P3 form and the two medico-legal reports and I have found that there is agreement on the injuries sustained by the respondent. The trial court did not misapprehend the evidence on the respondents' injuries. The respondent sustained several injuries leading to reduced and painful movement of the left wrist which requires him to undergo physiotherapy to alleviate the same. He is likely to develop arthritis of the joint which is a chronic debilitating condition. Due to limited joint range of movement of the left wrist joint, his working is greatly limited. His occupation as a Chef for Kenya Army is greatly affected.

The parties counsel submitted authorities in support of their opposing positions. I have looked at the authorities which range from 1988 to 1993 and the nature of injuries. The authorities are not only too old but irrelevant as the injuries sustained by claimants in those cases were different. The trial court considered the authorities and what was being claimed and offered by each party. I have carefully considered that the respondent sustained serious injuries, which would affect his work as a chef in Kenya Army and that he will require to undergo an operation to remove the K-wire at an estimated cost of Kshs.50,000/- and the fact that he may develop arthritis and that he has restricted movement of the wrist joint and that he has suffered a permanent disability to the extent of 40percent and find that the sum of Kshs.350,000/- awarded be to fair and reasonable award in view of the nature of the injuries sustained by the respondent. I find no merit in ground No.1 and the same is dismissed.

On ground No.2 the appellants fault the trial Magistrate for failing to take into account the medical documents before him whilst making the award. The appellants argue that the trial court did not analyze the medical reports produced in court as evidence given. The respondent's contention is that the court analyzed the evidence and the medical reports. The learned trial Magistrate in his judgment was specific that he considered the evidence, exhibits produced as well as medical reports and even indicated the nature of injuries sustained by the respondent and found them to be consistent with injuries indicated in the P3 Form. The court further noted no evidence was tendered before it for the defence. I have very carefully analyzed the medical report so as to come to my independent conclusion in this matter and having done so I find that the medical reports were considered by the learned trial Magistrate before reaching his decision on question.

I therefore find no merits in ground No.2 of the appeal and the same is dismissed.

On ground No.3 of the Appeal the appellant's faults the learned trial Magistrate for failing to take into account the submissions of both counsel whilst making the award. The appellants submitted that the respondent submitted for general damages of Kshs.600,000/- which was grossly excessive whereas the appellant's submitted for kshs.180,000/-. That both counsel relied on various authorities. The respondent relied on the case of **MWANGI MACHARIA & ANOTEHR V PETER MWANGI HCCC NO.4641 OF 1987** in which the plaintiff had been awarded Kshs.600,000/- whereas the appellant's relied on the case of **JEFA V KENYA PORTS AUTHORITY HCCC 72 OF 1988** in which the plaintiff was awarded Kshs.125,000/-.

I have carefully perused the court's judgment relied upon by both counsel and I do find the court considered the submissions by both counsel. That whereas the court did not comment on the authorities relied upon, I find that failure to do so did not prejudice any of the party as the authorities are old and not relevant as injuries sustained by the claimants in those cases were quite different from the injuries sustained by the respondent in this appeal.

I have also carefully considered the authority referred to me in this appeal by the appellants in the case of **JABANE V OLENYA(1989) KLR 1** which sets out the principles which a court must take into account in the assessment of general damages namely:

1. *each case depends on its own facts;*
2. *for the sake of those who have to pay insurance premiums, medical fees or taxes, the awards should not be excessive;*
3. *Comparable injuries should attract comparable awards;*
4. *Inflation should be taken into account;*

5. Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence, or is so low as to be an erroneous estimate, it should be left alone.

I have considered the principles set out in the above-mentioned case in respect of the award by the trial court and agree that in assessment of damages each case depends on its facts for there is no case that is similar to the other in terms of injuries, and agree that compensable injuries should attract comparable awards, however, in this case the appellants counsel did not submit authorities relevant to the trial case and as such the court could not rely on the authorities which were not relevant.

The award by the trial court is not based on the application of a wrong principle nor misapprehension of the relevant evidence nor is it so high to be an erroneous estimate and as such I find no basis of interfering with the award(see **Kemfro Africa Ltd T/A Meru express service Gathogo Kanini V A.M. Lubia & Olive Lubia C.A 21 of 1984(1982-1988) 1KAR 727.**

In view of the foregoing I find no merits in ground No.3 of the appeal and the same is dismissed.

On ground No.4 the Magistrate is faulted for erring both in law and fact in making an award on quantum which was unsupported by authorities. The appellants did not upon perusal of the submissions by the appellant submit to the lower court authorities with comparable injuries and the same were ignored.

Furthermore the authorities relied upon by the appellants is 26 years old and taking into account of the high rate of inflation since the judgment was delivered in 1992 even if the authority was to be considered relevant the award given by the trial magistrate is fair and reasonable award.

In view of the foregoing I find no merits in ground No.4 of this appeal and the same is dismissed.

The upshot is that the appellants appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. M/S Grace W. Kamunyu & Co. Advocates for the appellant(absent)
2. Mr. Kiogora Arithi for the respondent(present)

J. A. MAKAU

JUDGE