



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 141 of 2003

SIMON KAMAU KABALI.....1ST APPELLANT

DOINYO LESSOS CREAMERIES.....2ND APPELLANT

VERSUS

ZIPORRAH CHEGE.....RESPONDENT

(Being an Appeal from the Judgment of Mr. Njage Principal Magistrate delivered in Eldoret Principal Magistrate Courts civil Suit No. 827 of 2003 on 19th November 2003)

JUDGMENT

Through a Complaint presented on 25th September 2005 the respondent sued the appellants for general damages and special damages of Kshs. 70,200/=. The claim was based on an accident that occurred that occurred on 6th June 2002 involving motor vehicles KAJ 976 J owned by the appellants and motor vehicle KAM 603D driven by the respondent. It was averred that the accident was caused by the negligence of the appellants and that as result of the said accident the Eespondent suffered injuries. The particulars of injuries were given as follows in paragraph 6 of the plaint.

- a) Fracture of the superior right pubic rami
- b) Fracture of the inferior right pubic rami
- c) Fracture dislocation of the symphysis pubic
- d) Cut wound of about 5cm to the right shin
- e) Cut wound of about 5cm to the left shin
- f) Cut wound of 6cm to the elbow region of the right upper limb.

The appellants were served and filed a defence denying liability and alleged contributory negligence on the part of the respondent. On 26th September 2003 a consent judgment on liability was entered in the ratio 10:90 against the appellants. Case proceeded for hearing on assessment of damages and in a judgment delivered on 19th November 2003 by Honourable W.N. Njage Principal Magistrate he awarded Kshs. 700,000/= as general damages for pain and suffering and loss of amenities as well as special damages of Kshs. 30,345 making a total award of Kshs. 730,345/=. The respondent was to bear 10% liability leaving a net of Kshs. 657,345/=. The appellants were aggrieved and in a Memorandum of Appeal lodged on 8th December 2003 they contend that:-

- 1. The learned trial magistrate erred in law and fact in disregarding the defendant's written submissions and documentary evidence presented before the Honourable Court.**
- 2. The learned trial magistrate erred in law and fact in awarding excessive and punitive amounts inconsistent with the modest authorities cited and placed before the court**
- 3. The learned trial magistrate erred in law and fact in using wrong principles in the assessment of damages.**
- 4. The learned trial magistrate erred in law and fact by making an unjustifiably high award as general damages which reflect an erroneous estimate of the compensation due in light of the extent of injuries sustained.**
- 5. That the learned trial magistrate erred in law and fact in awarding the sum of Kshs. 30,345/= as special damages when the same was not specifically pleaded as by law required.**

The appellants prayed that the lower court judgment on quantum be set aside. The appeal was admitted to hearing on 3rd October 2005. Counsel for the appellant started by submitting that the appeal was only about quantum. Consent judgment on liability was entered. She dropped ground no. 5 of the Memorandum of Appeal. Counsel argued grounds 1-4 on quantum. Counsel cited the case of S.J. **Chege and another v Johanna W M Vesters and anor (1982-88) 1 KAR 1197** as justifying interference where the award is excessive. Counsel submitted that the trial magistrate did not err on the law but misapprehended the facts as to permanent disability suffered by the respondent. That the trial magistrate wrongly used a figure of 60% disability instead of 6% disability as per defence exhibit 1. Counsel submitted that the award was wholly erroneous as the trial magistrate failed to base her award on comparable awards. The trial magistrate relied on recent decisions as opposed to comparable awards. Authorities were of more severe awards. The appellant referred to an older case but more comparable. Court should have been guided by similarities in injuries and not on age. Counsel urged that the appeal be allowed. An award of Kshs. 300,000/= would have been adequate.

Counsel for respondent opposed the appeal. He cited the case of **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) 1 KAR** in support of the proposition that an appellate court will not disturb an award 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 inordinately high or low. Counsel submitted that the appeal was all about a question of fact. Whether the injuries suffered were severe or not? The respondent lost consciousness for more than 5 months. No comment was made on the courts finding as to the severity of the injuries and longevity of treatment. He referred to the P3 form exhibit 6 showing that injuries were maim. The injuries were enumerated by both doctors and so the award is in agreement with the extent of injuries and resulting loss and damage to the plaintiff. There was no misapprehension of facts. Grounds 1-4 should be rejected. That the award should not be disturbed.

I have considered submissions of both counsels and as corrected pointed out the issue in appeal is whether there was misapprehension of the evidence on injuries and whether the misapprehension affected the assessment of quantum. It is the duty of this court to re-evaluate the evidence and test the conclusions of the trial magistrate of course giving allowance to the fact that this court has not seen the witnesses. The evidence of the respondent about her injuries was as follows. She stated that she was injured as a result of the accident. She was injured on the pelvis. She had a fracture of the pelvis three times. She was also injured on the right upper arm. She sustained a cut. There was a scar on her elbow. She got injured on the legs. She was cut. All the cuts were stitched on the arm and on the leg. She stated that she sustained a serious injury. Sh has not completely healed. She is unable to walk. She can't walk far. She experiences pain on her hips. She is unable to farm maize, potatoes or cabbage that she used to farm before. She stated that the appellants counsel insisted that she examined by Dr. V.V. Lodhia. That she was examined and the doctor agreed that the injuries were serious.

Dr. V.V. Dodhia in the medical report produced as exhibit 8 gave an opinion of 6% permanent

disability. The trial magistrate in his ruling referred to a permanent disability of 60%. I do not think that this error alone affected his assessment. He considered that counsel for the appellant had submitted that an award of Kshs. 300,000/= was reasonable. He considered that the appellant counsel had submitted that the plaintiff in **Joseph Mungai Gibutia v. Luka M. Warui (NBI HCCC No. 294/1988)** had suffered more serious injuries. The reason why he did not agree with counsel for the defendant is to be founded in the following passage:

“The case cited by the defence counsel was decided in the last century in 1991, more than twelve years ago. The plaintiff was then awarded Kshs. 250,000/= considering the rate of inflation, my belief is that if Joseph Mungai case were being decided today the plaintiffs in that case would have been awarded general damages in excess of Kshs. One million considering the nature of injuries suffered. The amount of Kshs. 250,000/= therefore awarded in that case in the year 1991 should not be used as the basis to determine that an award of Kshs. 300,000 to the plaintiff in the present case today in the year 2003 is adequate as submitted by counsel for the defendant. The amount is in my view inadequate, considering the nature of injuries sustained by the plaintiff in his case which I find to be of serious nature.”

Counsel for the appellant has argued that it was wrong for the trial magistrate to dismiss the case on the basis of age. I do not agree with this submission. In as much as counsel's have a duty to protect the interests of their client their primary duty is to assist the court to dispense justice. This duty behoves them to bring to the attention of the court all relevant material that may be useful to the court in dispensing justice. The authority for sure was inappropriate in term of age. The injuries could be similar but it does not provide a comparable yardstick. That is why the trial magistrate talks of what would have been the award today. Case law on comparable awards should not only be similar in terms of injuries but also age. I have reviewed the case law relied upon and I do not find the award of Kshs. 700,000/= general damages as inordinately high. We must always remember that assessment of damages is not a scientific exercise but more or less an exercise of discretion. This court is not justified to interfere simply because it could have awarded something else. The error of 60% permanent disability does not appear anywhere else in the judgment. In order for it to be inferred that it affected the assessment of general damages at least should have been a component of packaging the award. Dr. V.V. Lodhia (who was appellant's expert) had referred to the injuries as severe injuries. The trial magistrate awarded the sum of Kshs. 700,000/= because he was of the view that the injuries were serious not because of 60% permanent disability. I find that grounds 1-4 of the appeal lack merit and they fail accordingly.

The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated AND signed at Nairobi on this 2 4TH day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 10TH day of OCTOBER 2012.

F. AZANGALALA
Judge

In the presence of : Ms Ayuma h/b for Ms Odede for the appellants.

Mr. Keter h/b brief for Mr. Ngala for the respondent