



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CIVIL APPEAL 182 OF 1995

CHARLES K. MUKUA APPELLANT

AND

JUDDY WAIRIMU MIRANGORESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii (Mbaluto, J.) dated 4th July, 1995.

IN

H.C.C.C. NO. 512 OF 1994)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant in the superior court against the judgment of Mbaluto, J. whereby he ordered the appellant to pay to the respondent (plaintiff) a total of Shs. 3,416,800 as damages, general and special.

The plaintiff, a business woman based at Kisii, Migori and Isebania towns, was travelling from Kisii to Migori in the defendant's bus registration No. KZQ 128 when at Nyabigege Suneka market the bus overturned as a result of which she was seriously injured. The plaintiff filed the proceedings in the superior court seeking to recover general and special damages arising from the injuries she sustained as a result of the accident. The defendant accepted full liability for the accident and the case proceeded before the learned judge for assessment of damages only.

After a full hearing of the case the learned judge entered judgment for the plaintiff against the defendant for:

- (a) General damages for pain and suffering and loss of amenities Shs. 1,300,000/-
- (b) Loss of earnings and earning capacity Shs. 840,000/-
- (c) Cost of future treatment Shs. 840,000/-
- (d) Cost of future operations Shs. 420,000/-
- (e) Special damages Shs. 16,800/-

Total

Shs. 3,416,800/-

On appeal it was contended on behalf of the appellant that the award of general damages of Shs. 1,300,000/- was excessive and that this court should interfere with it. The principles on which this court will interfere with the trial judge's assessment of damages are now well settled in Kenya. It will only interfere whenever an error of principle by the trial judge is shown or where the damages awarded are so high or so low that they must be a wholly erroneous estimate and an error of principle must be inferred. We are satisfied that no error of principle by the learned judge was shown and damages awarded were not so high that an error of principle could be inferred. The award of Shs. 1,300,000 for pain and suffering and loss of amenities is upheld.

The learned judge also awarded Shs. 840,000/- for loss of earning capacity. This was based on a finding by the learned judge that the plaintiff's income from her business was Shs. 5,000/- per month or Shs. 60,000/- per annum with a multiplier of 14 thus amounting to Shs. 840,000/-. This award cannot, with respect, be sustained as there was no evidence whatsoever that the plaintiff's income from her business was Shs. 5,000/- per month. This part of the award must, therefore, be set aside. Nor was there any evidence upon which damages for cost of future medical and nursing care at Shs. 5,000/- could be based. This part of the award is also set aside. As for the cost of future operations at Shs. 420,000, these were costs already incurred. This is made up of the cost of operation by Dr. Ombogo of Shs. 320,000/- and a further sum of Shs. 100,000/- which were started in the report of Prof. Mbindyo of 11th February, 1994. The plaint was filed on 25th August, 1994 and these damages being special damages should have been pleaded in the plaint. This was not done. It is now well settled in our courts that a claim for special damages, if it is to succeed, must be pleaded and proved. Since these special damages were not pleaded, they cannot be allowed and are accordingly set aside. The special damages of Shs. 16,800/- awarded by the learned judge was not challenged before us.

In the result, the appeal succeeds to the extent that the sum of Shs. 840,000/- for loss of earnings and earning capacity; Shs. 840,000/- for future medical and nursing care; and Shs. 420,000/- being the cost of future operations are all set aside and the decree appealed against is reduced to Shs. 1,316,800 with cost and interest thereon at court rates from the date of judgment on the general damages, but from the date of the filing of the suit on the special damages.

The appellant will have half the costs of the appeal.

Dated and delivered at Kisumu this 22nd day of March, 1996.

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL