



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: VISRAM, KARANJA & KOOME J.J.A
CIVIL APPEAL NO. 117 OF 2016

BETWEEN

MARY WAIRIMU NJUGUNAAPPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITEDRESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Justice P.J Otieno, delivered at the High Court of Kenya at Mombasa, on 9th October, 2015 in High Court Civil Appeal No. 101 of 2014

JUDGMENT OF THE COURT

1. By a plaint dated 16th June, 2009 filed before the Resident Magistrate's Court at Mombasa, Mary Wairimu Njuguna, (the appellant) sued Kenya Power and Lighting Company (the respondent), for special and general damages for injuries she had suffered after being electrocuted by a live wire while crossing a road.
2. The respondent who was the supplier of the electricity transmitted through the wire in question, denied liability. The matter went to full hearing and the learned magistrate gave Judgement in favour of the appellant and awarded her Ksh. 800,000.00 as general damages and Ksh 6,265.00 as special damages. Being aggrieved with the judgment, the respondent moved to the High Court on appeal against the quantum of both the special and general damages. The High Court,(Otieno J) heard the appeal and by a judgment rendered on 9th October, 2015, reduced the general damages from Ksh 800,000.00 to Ksh.500,000.00. The judgment was silent on the fate of the special damages, but the respondent was also awarded half the costs of that appeal.
3. Unhappy with this turn of events, the appellant lodged this second appeal, in which she contends that the learned Judge erred: by failing to find that no sufficient reason had been shown by the respondent to warrant the court's interference with the discretion of the trial court in so far as the award of damages was concerned; by terming the quantum awarded for pain and suffering as wrong and substituting it with a figure of his own assessment; by interfering with the quantum awarded without citing any comparative case law relied on for similar injuries; in relying on the decision in **Kenya Power & Lighting Co. Limited v. Nehemia Wachira (2014) eKLR**; by failing to hold that in assessing quantum of damages payable in cases of death, the trial court is not bound by the authorities placed before it, but rather, is free

to exercise its own discretion, which discretion can only be interfered with on appeal in clear cut cases, where the amount so awarded is excessively high or low.

4. The appeal was canvassed by way of written submissions, with oral highlights at the plenary hearing. Appearing for the appellant, was learned counsel **Mr. Jengo**, who identified the main issue for determination as the quantum of damages payable. He submitted that the learned Judge improperly interfered with the magistrate's discretion by substituting the quantum awarded for a lesser figure. In addition, that while so doing, the Judge relied on the **Nehemiah case** (*supra*) which was a grave error because not only were the injuries sustained in that case different from those in the present suit, but that the decision was five years old and in relying thereon, the Judge failed to factor in inflation.

5. Counsel contended that in contrast, the trial court had duly considered and was guided by the authorities placed before it; the first appellate Judge therefore, had no basis for interfering with the trial court's award, more so since that award was within the range normally awarded for similar injuries. Elaborating further, counsel pointed out that the Judge completely ignored the nature of the injuries sustained in this case, which went beyond mere soft tissue injuries and that as per the medical report supplied by the appellant, the examining doctor had even described them as severe life threatening injuries involving vital organs. Citing the decisions in the cases of **Henry Hidaya Ilanga v. Manyema Manyoka (1961) 1 EA 705** and **Kimatu Mbuvi T/A Kimatu Mbuvi & Sons v. Augustine Munyao Kioko C.A No. 203 of 2001**, counsel went on to state that an appellate court is not justified in interfering with the quantum of damages solely because it would have been of a different opinion. Instead, the first appellate court must be satisfied that not only was the sum so awarded inordinately high (or low), but that the same is based on the wrong principles of law. According to the appellant, such was not the case herein and as a result, the appeal should be allowed, and the judgment of the first appellate court set aside with costs

6. On behalf of the respondent was **Mr. Oloo**, who opposed the appeal, contending instead that the first appellate court duly reanalyzed and re-evaluated the evidence before coming to its own independent conclusion. He submitted that the injuries sustained in this case were soft tissue injuries and the authorities from which the learned Judge derived guidance, were apt and comparable to the circumstances herein. Citing the cases of **Lim Pho v. Camden & Islington Aarea Health Authority (1979) 1 All ER 332** and **Tayab v. Kinamu (1982-88) 1 KAR**; counsel further submitted that the principle behind damages for pain and suffering is not full compensation to the victim. Rather, it is to ensure that both the victim as well as the wrongdoer are subjected to what is just and fair in terms of damages. Consequently, that the figure of Kshs. 500,000/- awarded by the learned Judge was fair in the circumstances. It was also urged that even in the unlikely event that the appeal is allowed, the respondent should not be condemned to bear the costs of the appeal.

7. This being a second appeal, this court's beholden duty is as succinctly articulated in **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007)** wherein Onyango Otieno, JA stated that:

“In a second appeal, however, such as this one before us, we resist the temptation of delving into matters of facts. This Court on a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse”

The main bone of contention here is whether the quantum awarded is commensurate to the injuries sustained and by extension, whether interference with the same by the first appellate Judge was necessary. As per the plaint, the particulars of injuries sustained by the appellant were said to be as follows:

- a. Electric shock
- b. Electric burns on the right arm
- c. Blisters on the dorsum of the right hand

- d. Eye injury with bilateral conjunctivitis and reduced visual acuity on both eyes
- e. Acute kidney shutdown
- f. Contusion and bleeding on the lower back
- g. Light nerve damage on the left lower limb.

In support of that claim, the appellant produced a P3 form dated 3rd May, 2009, which was filled out by the police doctor, who described her injuries as 'maim'. He particularized the same as being:

- a. Bruised cheek
- b. Bruises on back region
- c. Blisters on right hand

Additional evidence came in the form of treatment chits dated 4th May, 2009 from Al Kawtar Health services where the appellant was attended soon after the accident. As per the said chits, the injuries sustained were given as being:

- d. blisters on the right hand
- e. bruise on the back around the region of the lumbar spine

There was also a final report dated 24th November, 2009 prepared by Dr. S.K Ndegwa, who upon instruction by the appellant's counsel, examined the appellant and detailed the following injuries:

- a. Electric shock
- b. Electric burns on the right arm
- c. Blisters on the dorsum of the right hand
- d. Eye injury with bi lateral conjunctivitis and reduced visual acuity on both eyes
- e. Acute kidney shutdown
- f. Contusion and bleeding on the lower back
- g. Light nerve damage on the left lower limb

The appellant has taken issue with the finding by the first appellate Court that the injuries sustained were only soft tissue injuries. According to the appellant, the case presented before the trial court showed graver injuries with long term consequences and the sum awarded by the trial court should not have been interfered with.

7. The principle guiding this Court on when to interfere with an award of damages was stated in the case of **Butt v Khan [1981] KLR 349** where it was held (per Law, JA) that:

"... 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..."(emphasis added)

Was the Judge's estimate entirely erroneous? Did he misapprehend the nature of the injuries suffered and as a result arrive at a wrong estimate? To answer these questions, we will have to revisit the issue of the nature of the injuries sustained by the appellant. From the evidence on record, it is apparent that the injuries proven to have been sustained by the appellant at the time of the accident were best reflected by the P3 form and the treatment chits. From the two documents, the injuries sustained were bruises to the cheek and back region and blisters on the right hand. None of the records indicated any kind of long term damage. The only document which alluded to a greater degree of harm was the later medical report tendered by Dr. Ndegwa.

8. As stated earlier, that report was prepared six months after the accident; yet it is upon that report that the appellant appears to have paid heavier reliance. It stands to logic that the appellant would prefer to emphasize the contents of that report over all others, given that it particularizes a greater degree of injuries. However, no evidence was led to indicate that the additional injuries were related to the accident and no explanation availed as to how the hitherto few injuries appear to have multiplied within a span of six months.

It is only logical for a court of law in a matter such as this, to be circumspect in determining upon which evidence it should place greater weight. Indeed, as stated in **Phipson on Evidence, 17th Edn; Sweet & Maxwell at para 7-17:**

'Unlike admissibility, the weight of evidence cannot be determined by fixed rules, since it depends mainly on common sense, logic and experience...'

Further, as per **Clerk & Lindsell on Tort, 18th Edn; at para 29-07:**

'The loss for which compensation claimed must be caused by, and be not too remote a consequence of the defendant's tort.'

9. In the present case, the eye injury with bi lateral conjunctivitis and reduced visual acuity on both eyes, acute kidney shutdown, contusion and bleeding on the lower back and the light nerve damage on the left lower limb are injuries only cited in the second medical report and were highly unlikely to have been as result of the initial accident.

10. Being a first appellate court, the learned Judge was duty bound to consider afresh the evidence that was presented before the trial court and come up with an independent decision. The Judge observed that the injuries suffered by the appellant were soft tissue injuries and that the appellant had fully recovered. He also found that the learned Magistrate failed to consider relevant legal authorities as guides for damages awarded in respect of similar injuries. He concluded that the magistrate had not exercised her discretion judiciously, hence his interference with the award.

11. Having considered the decisions of the two courts below, we find that the learned Judge properly re-analysed the evidence before him and considered other relevant material and arrived at the correct finding to the effect that the amount of damages awarded was not justified. There was no misdirection on his part for interfering with the discretion of the trial magistrate. Having so found we must defer to the learned Judge's decision and not substitute our figures for his own. We nonetheless find that the learned Judge overlooked the issue of the special damages, may be on account of the meager amount awarded. We find no basis for interfering with the same. On the whole, the appeal has no merit and is hereby dismissed save for the reinstatement of the Ksh.6,265.00 awarded as special damages which will attract interest from the date of filing the suit. Each party will also bear its costs of this appeal. We so order.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR