



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, O’KUBASU, J.J.A. & RINGERA, AG.J.A.)

CIVIL APPEAL NO. 138 OF 2002

MORRIS MUGAMBI 1ST APPELLANT

SILAS IMANENE (JASHO) 2ND APPELLANT

AND

ISAIAH GITIRU RESPONDENT

(Appeal from the decree of the High Court of Kenya at Meru (Kasanga Mulwa, J.) dated 20th March, 2002 in

H.C.C.C. NO. 99 OF 2001)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Mulwa, J.) in *the High Court Civil Case No. 99 of 2001* delivered at Meru on *20th March, 2002*. The appeal is basically on assessment of damages as the issue of liability was settled by consent at 85% and 15%.

The respondent herein (who was the plaintiff in the superior court) was hit by a vehicle owned by the 2nd appellant and driven by the 1st appellant as he walked along Meru-Maua road near Kwa Mugo. The respondent filed a suit claiming special and general damages from the two appellants alleging that the said accident was caused by the negligence of the 1st appellant for which the 2nd appellant was vicariously liable. The accident took place on 2nd November 2000 after which the respondent was admitted at Maua Methodist Hospital where he spent 20 days before being transferred to Meru General Hospital. Two medical reports were produced during the trial. Dr. J.W. Barasa in his medical report dated 23rd April, 2001 stated inter alia:-

“The above named 44 years old male was involved in a road traffic accident on 2nd November, 2000.

He alleges that he was a pedestrian along Maua - Kangeta road when a fast moving vehicle hit him. Consequently, he sustained the following injuries: -

- 1. Comminuted fracture of the left femur.*
- 2. Comminuted fracture of the right femur.*

The subject received initial treatment at Maua Mission Hospital and later at Meru District Hospital.

The investigations carried out were: -

- 1. X-Ray left femur – showed comminuted fracture of the left femur with marked displacement at the mid -shafts.*
- 2. X-Ray of the right femur showed comminuted fracture of the mid -shaft of the right femur”.*

Dr. Andrew Hicks in his medical report of 28th August, 2001 stated inter alia:-

“Mr. Gatiru stated that at 5:30 p.m. on 2 nd November, 2000 he was walking along the Maua Kangeta road when the driver of a lorry lost control of the vehicle and knocked him down.

After the accident he was admitted to Maua Mission Hospital with the following injuries .

- 1. Shock and concussion. He said h e did not remember anything for 48 hours.*
- 2. Open fracture of his left femur a little below the midline.*
- 3. Closed fracture of his right femur.*
- 4. Other comparatively minor soft tissue injuries and lacerations which were cleaned sewn up and medicines rubbed in l ocaly.*

The fact that his right lower limb is shorter by two cm compared with the left aggravates his abnormal method of walking and hastens the onset of osteoarthritis in the areas affected.”

Various authorities were cited to the learned Judge by counsel appearing for the parties and in the end the learned Judge in his judgment expressed himself thus:-

“I have looked at these authorities, as well as others from my own sources, and the nature of the injuries sustained by the plaintiff, and find that an award of Shs.1,000,000/= as general damages for pain and suffering and loss of amenities would be the most appropriate. The total award to the plaintiff therefore will be: -

1. General damages and loss of amenities

Kshs.1,000,000 x 85 = K.shs.850,000/= 100

2. Special Damages = K.shs. 30,100/=

Total Award = K.shs. 880,100/=

Being dissatisfied with that assessment of damages the appellants filed this appeal citing three grounds of appeal:-

- 1. The award of Kshs.1,000,000/= in general damages for pain and suffering was too excessive regard being had to the injuries sustained by the respondent and therefore erroneous.*
- 2. The award of Kshs.30,100/= in special damages was against the law as the same were not specifically*

pleaded particularized and proved.

3. *The learned Judge of the superior court erred in failing to reduce the award in special damages by the agreed 15% plaintiff's contributory negligence."*

Mr. Kiautha Ariithi, counsel for the appellants, submitted that the award of 1,000,000/= was excessive in the circumstances of this case. He pointed out that in the authorities cited before the learned Judge by the respondent's counsel there was none in which the award for general damages was over Kshs.600,000/=. It was Mr. Ariithi's contention that the figure of Shs.1,000,000/= was plucked from the air by the learned Judge. Mr. Ariithi urged us to reduce the award of Shs.1,000,000/= to Shs.300,000/=.

Mr. Kiogora Ariithi, for the respondent, opposed the appeal stating that the respondent sustained very severe injuries and, in his view, the award of Shs.1,000,000/= was justified. He therefore urged us to dismiss this appeal. We have considered the material placed before the learned Judge by way of medical reports and the legal submissions and we wish to state that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.

In so saying, we adopt fully what was said by Lord Morris of Both-y-Gest in *H. WEST AND SON LTD V. SHEPHARD* [1964] AC 326 at p.345 .

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

While we bear in mind the foregoing, we must still come to the question of whether this Court would be entitled to interfere with the assessment of general damages by the learned Judge. The general approach is that for this Court to interfere with an award of the superior court it must be shown that a relevant factor was not taken into consideration or an irrelevant factor was taken into account, or that the trial judge did not appreciate the importance of some material evidence or that the award is so inordinately low or high that some such like mistake must be assumed.

In their memorandum of appeal the appellants stated that the award of Shs.1,000,000/= is so excessive as to be erroneous. If this Court considers the award to be so excessive as to be erroneous then it would be entitled to interfere.

In the case of *SALIM S. ZEIN T/A EASTERN BUS SERVICE & ANOTHER VS. ROSE MULEE MUTUA* – Civil Appeal No. 147 of 1994 (unreported) this Court after referring to the cases of *ILANGA V. MANYOKA* [1961] E.A. 705 and *KEMFRO AFRICA LTD. T/A MERU EXPRESS SERVICE GATHOGO KANINI V. A.M. LUBIA AND OLIVE LUBIA* [1985] 1 KAR 727 stated the pertinent law as follows:-

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

In the present appeal we observe that counsel appearing before the learned Judge cited various cases of comparable injuries and comparable awards. Counsel for the appellants (defendants in the superior court) brought up cases in which the awards were low while counsel for the respondent relied on cases in which higher awards were made. We have now considered all those authorities but it would appear that in the decided cases where similar injuries were sustained there was no authority in which the injured party was

awarded more than Kshs.600,000/=. In his judgment the learned Judge stated that he had looked at the authorities cited “as well as others from my own sources” .The problem here is that we do not have the benefit of these other sources, so as to be able to say whether they, indeed, supported the figure awarded. In our view the figure of Shs. 1,000,000/= awarded as general damages is too high in the circumstances of this case. We must interfere and reduce it to the awards in comparable cases. In our own assessment the award of Shs.500,000/= would be fair and reasonable in view of the injuries sustained by the respondent.

As regards special damages, we are satisfied that there was sufficient evidence by way of receipts to support the award of Shs.30,100/=.

Since liability had been agreed at 15% contributory negligence on the part of the respondent, this will be taken into account in computing the final award. In view of the foregoing, the final award to the respondent will be as follows:-

1. General Damages Shs.500,000 x 85 = Kshs. 425,000/=

100

2. Special Damages Shs.30,100 x 85 = Kshs. 25,585/=

100

Total Award = Kshs. 450,585/=

As the appellants have succeeded to a considerable extent we order that they be awarded half the costs of this appeal.

Dated and delivered at Nairobi this 28th day of May, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

A.G. RINGERA

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AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR