



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E246 OF 2020

PETER GAKERE NDIANGUI.....APPELLANT

VERSUS

SARAH WANGARI MAINA.....RESPONDENT

(Being an appeal from the judgement by Hon. D. W. Mburu SPM in Nairobi, Milimani

Civil Case No. 8169 of 2017 delivered on 15/11/2019)

JUDGEMENT

1. This appeal arises from the judgement of Hon. D. W. Mburu SPM in Nairobi CMCC 8169 of 2017 in which the learned trial magistrate awarded the respondent a sum of Kshs 1,200,000 as general damages and Kshs. 8,500 as special damages arising from a road accident that occurred on 6/4/2017, in which the respondent was injured after being struck by the appellant while driving his *tuk tuk* registration No. KTW 056A.

2. The appellant was aggrieved by the said judgement and filed his appeal raising the following grounds in the memorandum of appeal;

- a. The learned magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Ksh. 1,200,000**
- b. The learned magistrate erred in fact and in law in finding that the respondent was entitled to general damages that were too high in view of the evidence tendered and injuries she suffered. The award was too high and the same not justified**
- c. The learned magistrate erred in fact and in law in failing to consider the appellants submissions on quantum**
- d. The learned magistrate erred in fact and in law in failing to consider conventional awards of similar nature.**

3. On 6/1/2021 this court directed that the appeal be disposed of by way of written submission which the parties have already filed.

4. The appellants in their submissions stated that the respondent's injuries were exaggerated because Dr Mwaura in his report states that the claimant sustained blunt injury to the scalp and head concussion but according to the treatment notes the same are not mentioned

5. The appellants therefore asked this court to make a finding that the plaintiff/respondent sustained pelvic fracture, soft tissue injury to the right thigh and chest.

6. The appellants further contended that that the award by the lower court was inordinately high compared to the injuries suffered and founded in the wrong principles. The appellant went ahead cited several cases in support which included;

- a. **George Osewe Osawa v. Sukari Industries Limited [2015] eKLR** where the plaintiff sustained a fracture of the pelvis and was awarded Ksh 400,00 in general damages in 2015
- b. **Lillian Wanja v. Cyprian Mugendi Igonga and 2 other CKA HCCA No. 24 of 2015 [2016] eKLR** where the plaintiff sustained a fracture dislocation of the hip, multiple soft tissue injuries and the court awarded Ksh 500,000

7. The appellants therefore urged this court to reduce the amount to between Kshs. 300,000-500,000.

8. The respondents on the other hand submitted that in awarding the amount the trial magistrate purely exercised her judicial discretion based on the evidence and guiding authorities. They opined that appellant's have failed to persuade the court that the trial magistrate was wrong on the issue of quantum

9. This being a first appeal, the court should analyze and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses when they testified. See **SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123 and KIRUGA V KIRUGA & ANOTHER [1988] KLR 348.**

10. This Appeal is only on quantum of damages, liability having been agreed in the ratio of 90:10 in favour of the Respondent. As a matter of law, assessment of damages is at the discretion of the trial court. Therefore, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI VS A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

“...the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages”.

11. See also the case of **BHUTT -VS- KHAN (1982 – 88) 1 KAR 1** where it was stated that:-

“a court of appeal will normally not interfere with a finding of a fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle”

12. At the trial only two witnesses testified. **PW1 Dr George Kungu** Mwaura testified and told the trial court that on 9/10/2017 he examined the respondent who had been involved in an accident and suffered pelvic fractures, blunt injuries in the chest, head, buttocks, right thigh, suffered a head concussion and the right lung had bruises. During cross examination he admitted that he relied on the discharge summary.

13. The trial court in its finding on quantum of Ksh. 1,200,000 relied on 3 authorities;

a. **Millicent Atieno Ochuonyo v. Katola Richard [2015] eKLR** in which the plaintiff was awarded Ksh 2,000,000 for injury to the pelvis involving fracture of ramus and diastasis of the symphysis pubis.

b. **Michael Maina Gitonga v. Serah Njuguna [2012] eKLR** in which the plaintiff sustained multiple fractures to the pelvis and was awarded Ksh.1,500,00 in the year 2012.

c. **Dennis Nyamweno Openda v. Anwarali & Brothers Limited & Another [2015] eKLR** where the plaintiff was awarded general damages of Ksh 1,800,00 for multiple fractures which include fracture of the left clavicle, fracture right humerus and unstable multiple fractures of the pelvic bones.

14. Examination of the medical records revealed a report from Dr Kagia stated a healing bilateral superior and inferior pubic rami fractures. A second report by Dr. G.K Mwaura stated that the respondent is still on treatment since she is on crutches, that she sustained grievous harm injuries as well as soft tissue injuries and a permanent degree of incapacity at 15%. There was additionally a third report by Dr Jenipher Kathuthu that indicated a disability of 15%, pelvic fracture and soft tissue injuries to the right thigh and chest.

15. I have considered the cases cited by the appellant and the ones that were relied on in the lower court's decision. On inspection of the authorities that the lower court relied on this court finds that the injuries in those cases were far greater than those contained herein.

16. In **Pyramid Packaging Ltd v Humphrey W. Wangala [2012] eKLR** might be more relevant to this case. The plaintiff sustained traumatic amputation of 3(three) fingers on the left hand and 15% permanent disability. He was awarded KShs.650,000/= for pain and suffering. In **Eston Mwirigi Ndege & another v Joseph Macharia Kawira [2019] eKLR** the respondent suffered fracture of the right femur, right arm, right forearm and was admitted for 3 months. He was assessed to have suffered 15% incapacity. The court assessed general damages at Kshs.500,000.

17. The above cited cases have similar injuries and percentage of disability that the respondent herein suffered. This court is therefore persuaded to reduce the amount of general damages awarded in the lower court and assess the it at Kshs.500,000 which shall attract interest from the date of judgment of the subordinate court.

18. This court notes that the parties recorded consent of liability of 90:10 in favor of the respondent it will not make any findings on it.

19. In the end, the appeal is allowed. Consequently, the decision of the trial court to award a sum of Kshs. 1,200,000 is set aside and substituted with an award of Kshs. 500,000.

20. Cost of the appeal is awarded to the appellant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF MAY, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent