



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSOLIDATED CIVIL APPEAL NUMBER 30 AND 33 OF 2017

JYOTI STRUCTURES LIMITED.....1ST APPELLANT

MICHAEL KIPCHIRCHIR RONO2ND APPELLANT

VERSUS

TRUPHENA CHEPKOECH TOO..... RESPONDENT

AND

JYOTI STRUCTURES LIMITED.....1ST APPELLANT

MICHAEL KIPCHIRCHIR RONO.....2ND APPELLANT

VERSUS

PIUS ONYANGO ONGERRESPONDENT

(Being an appeal arising from Judgment/Decree of Hon. E. A. Obina, Senior Resident Magistrate, Kapsabet, delivered on 7th February, 2017 in Kapsabet SPMCC No. 128 of 2016 and SPMCC No. 130 of 2016)

J U D G M E N T

1. The two (2) plaintiffs/Respondents filed separate suits Kapsabet Principal Magistrate's Civil Case Number 128 of 2016 and 130 of 2016 respectively, they sued the defendant/appellants following a Road Traffic Accident that happened on 16th May, 2016 when they were travelling in motor vehicle registration KBL 743F along the Nandi Hills Chemelil Road at Chebarus . It was their case that the 2nd defendant drove motor vehicle registration number KBY 828X in a negligent manner resulting in a collision with KBL 743F as a result of which they the plaintiffs sustained injuries.

Each sought general and special damages plus costs and interest.

2. Along the way, the parties entered into a consent on liability at 80%:20% in favour of each of the plaintiffs. It was now left to the learned trial magistrate to assess general damages.

3. The learned trial magistrate in separate judgments delivered on 7th February, 2017 made the following findings:-

In the case of Truphena Chepkoech Too

- That she had sustained the following injuries.

Blunt injury to the head, neck, chest, back, both thighs. He assessed general damages at Kshs. 250,000/= special damages of Kshs.6, 000/= plus costs and interest.

In the case of Pius Onyango Onger

- That he sustained bruises on the parietal scalp, blunt injury to chest, deep cut wound on right forearm and right hand. He assessed general damages at Kshs. 200,000/=, special damages of Kshs. 6,000/= plus costs and interest

4. Aggrieved, the defendant/appellant filed this appeal. The Memorandum of Appeal bears the same grounds in each of the files.

1. THAT the learned Trial Magistrate erred and misdirected himself as to the exact and nature of the Respondent's injuries and therefore erred in law in his assessment of damages awardable to the Respondent which was manifestly excessive.

2. THAT the learned Trial Magistrate erred in law and in fact by failing to properly consider and analyze the defendant's submissions and hence arrived at a wrong determination on the aspect of quantum awardable to the plaintiff.

3. THAT the learned trial Magistrate erred in law and in fact by making excess awards on general damages considering the injuries sustained by the Respondent and the evidence that was adduced by the Respondent.

4. THAT the learned Trial Magistrate erred in assessing damages and failed to apply the principles applicable in award of damages and comparable awards made for analogous injuries.

4. The appellant filed written submissions on 20 June 2020. When the matter came for hearing on 11th September, 2020 counsel for the Respondent indicated that they too had filed their submissions. I directed them to forward the same to court email. As at the time of writing this judgment the submissions had not been filed and none had been forwarded to the court's email. From the memorandum of appeal, it emerges that the issue for determination in both appeals is whether there is any reason at all to disturb the trial court's award on general damages. For this I am guided by the holding in **Butt vs Khan [1978] eKLR** 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, in this case, the magistrate, proceeded on wrong principles, or that he misapprehended the evidence in somewhat material respect, and so arrived at a figure, which was either inordinately high or low.**

5. To arrive at that determination, the appellate court is duty bound *re-evaluate the evidence and then determine the evidence upon which the trial Judge relied upon to arrive at those conclusions.* See **Henry Hilaya Kenga vs Manyema Manyoka (1965) EA 705**, and the case of **Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini vs A M Lubia & Olive Lubia** where the Court of Appeal set the principles out;

"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 is 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"

6. I now proceed to look at the evidence availed in support of the claims for general damages.

7. In the case of **Truphena C. Too**, I perused the P3 form filed on 30th May 2016, two (2) weeks after the Road Traffic Accident. It was indicated that she had sustained blunt injuries, which were assessed as blunt trauma, and degree of injury as harm. There was also the treatment chit dated 16th May 2016. This bore the notes made on the date of the accident. It was indicated that she had been in a Road Traffic Accident, and at that time, she complained only of headache and pain at the thighs. It was indicated that she had sustained soft tissue injury.

8. The other evidence was the medical report by Dr. Sokobe dated 30th May 2016. In it was indicated that she had sustained soft tissue injuries, had persisted headaches and thigh pains, but that she was recovering well.

9. In the subordinate court, it was submitted for Truphena, that an award of general damages Kshs. 450,000/= would suffice. Counsel relied on the case of **Catherine W. Kingori vs Gibson T. Gichuhi [2005] eKLR**, wherein the 1st plaintiff sustained injuries to left ankle, legs and chest and was awarded Kshs. General damages of 300,000/=; and the case of **Kiwanjani Hardware Limited & Another vs Nicholas Mule Mutinda [2008] eKLR**, where an award of Kshs. 150,000/= was made where the plaintiff had sustained the following injuries;

- a. blunt injury to the head without loss of consciousness.
- b. blunt injury to the neck
- c. a cut to the throat
- d. blunt injury to the left shoulder and back
- e. blunt injury to the chest
- f. blunt injury to the right forearm
- g. deep penetrating wound on the left leg with cuts and bruises on the same leg.

10. Before the same court the defence proposed that a sum of Kshs.50, 000/= as general damages would suffice. For this reliance was made on the case of **Joshua Ogada Onyango vs Payless Car Hire & Tour Limited Nairobi HCCA 615 of 2013** wherein the plaintiff had sustained blunt traumatic injury to the spine and pelvic region.

11. In the case of Pius O Onger, the P3 was filled on 18th May 2016, two (2) days after the Road Traffic Accident. It indicated that he had sustained bruises on the scalp, a blunt chest injury and cut wounds on right forearm and hand. The degree of injury was assessed as harm. He was also examined by Dr. Sokobe on the same date, 18th May 2016, and he noted that the cut wounds on the right arm were stitched. He concluded that the plaintiff had sustained soft tissue injuries and was recovering well. His counsel submitted for an award of general damages of Kshs. 450,000/=. He relied on the case of **Martin Mugi vs the Attorney General, Nairobi HCA 791 of 1999** where the plaintiff who had sustained deep extensive cut on the face, mild concussion and generalized soft tissue injuries, was awarded Kshs. 350,000/= and the **Catherine W. Kingori case**. On its part, the defence relied on the same submission as in **Truphena's** case and sought general damages of Kshs. 50,000/=.

12. In this appeal, the appellants argue that the awards made by the learned trial magistrate were way beyond the acceptable wards for similar injuries. Truphena's case, they urged this court to find that the award of Kshs. 250,000/= was too high and substitute it with an award of Kshs. 90,000/=. Similarly, that in the case of Pius, that the award of Kshs. 200,000/= be substituted with an award of Kshs. 90,000/=. To support this position they relied on the following cases:-

PF (Suing as next friend and father of SK (Minor) v Victor O Kamadi & Another [2018] eKLR Kakamega High Court Civil Appeal 19 of 2017 where the court awarded Kshs. 100,000/- for the following injuries: Cut wound to the forehead, Multiple small abrasions to the face, Blunt injury to the head leading to loss of consciousness for some time. Abrasions to the back, abrasion wounds to the dorsum of the right hand and a cut wound to the right leg.”

In **Maimuna Kilungwa vs Motrex Transporters Ltd [2019] eKLR Makueni Civil Appeal No. 11 of 2017** the court awarded Kshs. 125,000/= for injuries to the neck, left ear and left shoulder.

In **Nyambati Nyaswabu Erick vs Toyota Kenya Limited & 2 Others [2019] eKLR Kisii Civil Appeal No. 66 of 2018** the court awarded Kshs. 90,000/= as general damages for the following injuries: a deep cut on the scalp extending to the maxillary area blunt injury to the left side of the chest, contusion on the back and contusion on both legs.

In **Ndungu Dennis vs Ann Wangari Ndirangu & Another [2018] eKLR** awarded Kshs. 100,000/= for minor bruises on the back; no fractures on the tibia or fibula area of the right leg which was hit; tenderness on the right leg, blunt injury; head concussion (brief loss of consciousness); blunt injuries to the chest and both hands.

13. It is not in dispute that the two (2) respondents, sustained soft tissue injuries. That the doctor who examined each of them found that each was healing well. For each one of them the degree of injury was assessed as harm. A perusal of the authorities cited before the subordinate court in support of plaintiffs/respondents clearly indicates that the plaintiffs in those authorities sustained injuries that were far more serious. It is also evident that from the authorities cited that the awards made to the plaintiffs/ respondents were much higher than the trend of between Kshs. 100,000/= to Kshs. 150,000/= for same injuries.

14. I find therefore that in this case the awards were inordinately high and did not take into consideration the fact that the respondents sustained soft tissue injuries, which according to the unchallenged medical evidence they were each healing well at the time of examination.

15. The awards of Kshs. 250,000/= and Kshs. 200,000/= are each set aside and substituted with an award of Kshs. 125,000/= each, special damages of 6000, total Kshs. 131,000/=. @ 80% works out at Kshs. 104,800/=.

16. The appellant will have half the costs of this appeal.

17. Judgment is entered for each of the respondents against the appellant at Kshs. 104,800/= plus costs below and interest at court rates from the date of the judgment of the subordinate court.

18. Right of appeal 30 days.

Dated and delivered virtually this 7th day of December 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Edna

For Appellants: Notified: N/A

For Respondents: Mr. Matekwa for Mwinambo