



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 40 OF 2014

BETWEEN

ELISHA AKELLO RAGA.....APPELLANT

AND

SHAJANAND HOLDINGS LIMITED.....1ST RESPONDENT

JOSEPH MWANGI NGIGI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.B.M.Kimtai, SRM dated 3rd April 2013 at the Senior Principal Magistrates Court at Nyando in Civil Case No. 52 of 2013)

JUDGMENT

1. This is an appeal against the subordinate court decision awarding the appellant Kshs. 450,000.00 as general damages for injuries sustained in a road traffic accident which took place on 1st August 2012 while he was driving his vehicle registration number KBJ 560 L along Katito-Kendu Bay road. The vehicle collided with the 1st respondent's vehicle registration number KAY 436L. The issue of liability was settled by consent at a ratio 80:20 against the respondents.

2. The appellant has now lodged this appeal on the following grounds set out in the memorandum of appeal;

(a) The trial magistrate erred in law and fact in awarding the decretal sum of Kshs. 450,000/- less 20% liability, an award that was inordinately low in the circumstances as to present a miscarriage of justice.

(b) The trial magistrate failed to appreciate the nature of the injuries suffered by the appellant presented in the evidence.

(c) The trial magistrate failed to appreciate the submissions by the appellant.

3. Mr Ojuro, learned counsel for the appellant, submitted that the award of Kshs, 450,000/- was too low considering the injuries the appellant sustained; the shortening of his leg and percentage 10% disability. Ms Ojwang, counsel for the respondent, supported the judgment and submitted that the award was reasonable and reflected the injuries sustained by the appellant.

4. The appellant sustained the following injuries set out in the plaint;

- Cut wound on the right orbital area
- Blunt trauma to the chest
- Contusion on the right hip joint leading to dislocation of the right hip.
- Bruises on the right knee.
- Fracture of the femur

The appellant further pleaded that as result of the injuries, he had difficulty walking on the right limb and was using a walking stick.

5. The appellant gave oral testimony. He told the court that after the accident he was admitted to Nyanza Provincial General Hospital from 1st August 2012 to 14th August 2012. According to the Hospital Discharge Summary he was put on skeletal traction but left hospital despite advice to the contrary. He was examined by Dr Ezekiel Oganda Zoga on 29th January 2012 who noted that the appellant complained that he had pain and difficulty walking on the right limb. He noted that he was in stable general condition and that there was loss of function of the right lower limb as it could not bear weight. The other soft tissue injuries had healed with permanent scars. Dr P. W. Oketch, who examined the appellant on 19th December 2013, confirmed that the appellant had suffered a fracture of the right femur (thigh-bone) and that he was put on traction. The doctor noted that because of premature discontinuation of traction, the fracture malunited leading to shortening of the leg. As a result, the appellant was expected to suffer post-traumatic osteoarthritis of the right hip joint that would make him limp. He assessed permanent disability at 10%.

6. Before the subordinate court, the appellant submitted that Kshs. 1,200,000/- was sufficient to compensate the him. He relied on the case of ***Mary Wangechi and Elija Mwangi v Kenya Tea Development Authority HCCC No. 2732 of 1998*** where the plaintiff was awarded Kshs. 800,000/- in 2001 for a posterior dislocation of the left hip joint and laceration wound on the right groin. A copy of the decision or case abstract was not furnished to the court. He also relied on ***Gilbert Nicholas Otieno v Oil Crop Development Company Ltd and Another NRB HCCC No. 1224 of 1999[2009]eKLR*** where the plaintiff sustain a fracture of the right inferior and superior pubic ramus and fracture of the socket of the hip and was awarded Kshs. 1,200,000/- in 2009.

7. The respondent submitted that Kshs.150,000/- was reasonable and called in aid the case of ***Akipo Odhiambo Otieno v Kenya Bus Services Limited NRB HCCC No. 1304 of 2004[2005]eKLR*** where the plaintiff sustained a fracture of the right femur and was awarded Kshs. 150,000/- in 2005

8. The general principle applicable in considering an appeal on quantum is that while the assessment of damages is within the discretion of the trial court, the appellate court will only interfere where the trial court in assessing damages either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (See ***Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto [1979] EA 414*** and ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***).

9. I have re-evaluated the injuries sustained and I find that apart from minor soft tissue injuries, the appellant sustained a fracture of the right femur and a contusion of the right hi p joint. Because of the fracture and contusion, the appellant's right leg was shortened and he could not walk without difficulty. The soft tissue injuries had healed without any residual effect by the time of the trial.

10. I have read the decision cited by the appellant and I find that the injuries sustained by the plaintiff in that case involved multiple fractures. The decision cited by the respondent though relevant to an extent, was clearly outdated by about 8 years. I think it is the duty of advocates to assist the court by providing

more recent and relevant cases particularly in this age of online reportage. In addition, *our courts have also pointed out the need for consistency in awarding damages for similar injuries although it is agreed that not all injuries are the same (see **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR**). While the current value of the shilling and the economy have to be taken into account, astronomical awards must be avoided and the court must see to it that awards make sense and result in fair compensation (see **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR** and **Jabane v Olenja [1986] KLR 661**).*

11. Taking all the factors I have cited into account, I cannot say the award of Kshs. 450,000/- is unreasonable or too low in the circumstances to call for interference by this court.

12. The appeal is dismissed with costs.

DATED and DELIVERED at KISUMU this 20th day of December 2016.

D.S. MAJANJA

JUDGE

Mr Ojuro instructed by Ochillo and Company Advocates for the appellant.

Ms Ojwang instructed by Okong'o Wandago and Company Advocates for the respondent.



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