



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HIGH COURT CIVIL APPEAL NO. 107 OF 2017

BETWEEN:

MUSA WERE MUSAKHWEAPPELLANT

AND

SILVER STYLE INVESTMENT COMPANY LTD..... RESPONDENT

JUDGMENT

1. The Court has before it an Appeal from the Judgment and Decree by Hon Fredrick M. Nyakundi delivered in the Principal Magistrates Court Mumias in *PMCC No. 44 of 2016* on 18th September 2017. The Appeal is in principal an appeal against the decision in relation to the quantum of damages. The Memorandum of Appeal is dated 28th September 2017 and filed on 4th October 2017

2. The Grounds of Appeal states; “that the Appellant herein... being aggrieved and dissatisfied with the decision, judgment and decree with respect to quantum.... DO HEREBY APPEAL to the High Court and sets forth the following grounds of appeal, namely:-

1. That the Learned Magistrate erred in fact and in law in awarding the appellant general damages that were inordinately low.

REASONS WHEREFORE *THE Appellant prays for judgment against the Responded for orders that:*

a) the appeal to be allowed and the judgment delivered on 18/09/2017 to be set aside with respect to quantum

b) The Honourable Court to make its own findings on quantum

c) Costs of the Appeal.

3. The Appellant filed Written Submissions in the Appeal, the Defendant did not. All the Written Submissions filed within the Appeal and the Suit have been considered by the Court. The Suit was about a road traffic accident. The Plaintiff was a 32 year old boda boda on the Kakamega Mumias Road. The Plaintiff was going about his business on the side of the road. An employee/agent of the Second Defendant/Respondent was driving a tractor (Registration No. KTCA 391D) with a trailer attached.

4. The Plaintiff alleged negligence against two defendants but in particular against the Defendant who owned the vehicles. The

Learned Trial Magistrate held the Second Defendant liable. On the issue of damages, the Plaintiff claimed special damages and general damages. The items of special damage were enumerated and valued. The Learned Trial Magistrate allowed those amounts in the sum of KShs.10,500/=.

5. In relation to general damage, the Plaintiff particularized his injuries as (a) Blunt injury to the chest, (b) Blunt injury to the back and head (c) complaining of chest pain and backache. He was treated with antibiotics and analgesics. The Injuries were recorded in the P3 and Medical Reports. The Plaintiff adduced evidence of the injuries through the oral evidence of the Plaintiff and a medical doctor (Dr Charles Andai) who prepared and produced the report. Also before the Court were the treatment notes from Libunu Medical Clinic. Dr Andai confirmed that the Plaintiff had suffered the injuries listed and complained of tenderness of the anterior wall of the chest and paid in the lumbo-sacral region of the back. He formed the view that the injuries were moderate and would heal completely *“after 8 months from now”*. The medical officer who examined the Plaintiff on the day of the accident stated he was in pain and had swollen chest pain and headache. He was treated for soft tissue injuries. It should be noted that Dr Andai’s evidence/report contains some contradiction. He examined the Plaintiff about one and a half months after the injuries were incurred. He stated that the injuries had healed yet he also noted tenderness. Tenderness suggests the healing was not complete at that time.

6. The Learned Trial Magistrate recorded the authorities that had been referred to in legal submissions The Plaintiff produced a 2015 authority (*Francis Ochieng and Anor v Alice Kajimba*) which awarded KShs.350,000/= for soft tissue injuries without any serious head injury. That was in 2015. The Defendants produced authorities putting forward comparables ranging from KShs.11,000/- to KShs.70,000. Those authorities date from 1999 to 2006, that is 10 years or more before the hearing. The Learned trial magistrate came to a decision which he express thus; *“In view of the above authorities, doing the best that I can, I hereby award Ksh 50,000 as general damages considering the rate of inflation and lapse of time. I do also award Ksh 10,500 as special damage as the same was proved.”*

7. That is the decision impugned by the Appellant. The authorities relied upon by the Defendant were summarised in the Written Submissions. That notwithstanding it is clear they were dated. In coming to his decision, it is clear that the learned trial magistrate erred in principal. Firstly, he did not give reasons for his judgment. He did not say what assessment he made of the pain and suffering of the Plaintiff. He did not make a finding on how long that was experienced. He did not state whether he was satisfied that the healing was complete at the time of the trial or was still ongoing. Those are all matters that he would have had to consider in coming to a quantum. He did not.

8. The Learned Trial Magistrate lists the Defendant’s authorities which refer to awards ranging from KShs.11,000 to KShs.70,000. The Learned Trial Magistrate (through a process not explained) came up with an award of KShs.50,000. He stated that in coming to that award he had taken into account inflation and the lapse of time (ten to seventeen years). However, he does not explain which phenomenon of inflation caused an award of KShs.70,000 to become discounted into an award of KShs.50,000/=. That reasoning demonstrates further that the Learned Trial Magistrate erred in principal and the award is inordinately low. There was similarly, no consideration of the 2015 authority of the High Court of Kisumu which could be considered as a closer and more applicable comparable.

9. The Appellant reminds the Court that the purpose of compensation is not to remedy or recompense every injury but must be a reasonable compensation in line with comparable awards (*West (H) & Son Ltd v. Shephard [1964] Ac 326 at 345*). In order to interfere with the award of the lower court, this Court must be satisfied that the Trial Court did not exercise its discretion judiciously. This Court is so satisfied.

10. In the circumstances it is clear that the award of KShs.50,000/- was inordinately low. That award of the Trial Court is set aside. The Court must now consider whether to assess its own damages or whether to remit the case back to the PM’s Court. In light of the lapse of time between the filing of the appeal and this Judgment, and the effects of the Covid-19 pandemic, this Court takes the view that the interests of justice are served by an assessment at this stage by this Court.

11. Taking into account the seriousness of the accident, namely pedestrians suddenly being involved in a collision with a tractor attached to a fully loaded trailer, it appears the pedestrians would have suffered from and/or experience a strong impact. It appears they were sent flying thereby suffering injuries to their bodies and limbs. Fortunately, the injuries were moderate – being described as harm with the expectation of full recovery. Taking into account the age of the Defendants authorities, it seems to this Court that

the correct award lies in a higher sum and more comparable the authority of *Francis Ochieng and Another v Alice Kajimba (2015) KLR*. For those reasons, this Court re-assesses the award of general damages to the sum of KShs.200,000/-, in line with more recent authorities. In particular, in light of the suffering that would have been experienced as a result of the trauma of the accident.

12. ORDER: Appeal Allowed with Costs. Quantum awarded is set aside. Re-Assessment of quantum is KShs. 200,000/-. The Respondent to pay the Plaintiff's costs of Appeal.

Order accordingly,

FARAH S. AMIN

JUDGE

DELIVERED, SIGNED AND DATED IN KAKAMEGA, THIS THE 16TH DAY OF SEPTEMBER 2021 ON LINE USING THE MS TEAMS PLATFORM

In the Presence of:

Court Assistant: Clement

Appellant: Mr Otsyeno Holding Brief for Mr Abok

Respondent: No Appearance (date was given in Court)



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