



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 27 OF 2019

PETER NGANGA NJOROGE.....APPELLANT

VERSUS

PHOEBE ATIENO ODAGA.....1ST RESPONDENT

LEEMAN ONYANGO ODUO.....2ND RESPONDENT

(Being an appeal from the Judgment of the Hon. M. Mutua (RM))

delivered on the 27th May, 2019 in Naivasha CMCC No. 136 of 2014)

JUDGMENT

1. The appeal herein concerns only the question of assessment of the quantum of damages. The grounds are that the trial magistrate made an inordinately low given the evidence; and that he misapplied the principles applicable in assessment of damages; and that he did not properly analyse the testimony and evidence of injuries.

2. At the lower court the trial magistrate's award was as follows:

a. Liability entered at 100% in favour of the plaintiff

b. General damages - Kshs 50,000/=

c. Special damages - Kshs 7,500/=

Total - **Kshs 57,000/=**

3. The injuries sustained by the plaintiff in the accident on 31st December, 2013, are indicated as follows:

a. Severe soft tissue injuries.

b. Soft tissue injuries of the left shoulder joint.

c. Sever soft tissue injuries of the left leg.

d. Soft tissue injures of the right leg.

4. In the lower court the appellant had proposed an award of Kshs 400,000/=. The Defendant proposed an award of Kshs 60,000/=. The appellant relied on authorities on soft tissue injuries namely: **Devki Steel Mills Limited v James Makau Kisuli [2012] eKLR** where an award of Kshs 250,000/= was made. He also pointed out that the defendant had not bothered to adduce evidence in their defence.

5. The Respondent defendant in the lower court relied on the case of **Mega Spin Limited v Gibson Nyamesa Ngoge [2011] eKLR** where the plaintiff was awarded Kshs 50,000/=.

6. The trial magistrate considered the two authorities availed, but also properly reminded himself that damages must be awarded in accordance with principles on assessment of damages as stated in **West (H) & Sons Limited v Shepherd (1964) AC 326** and **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR**. The principles are that the award must be a reasonable compensation should secure uniformity in awards; that comparable injuries must be compensated with comparable awards.

7. The trial court also considered the case of **Ndungu Dennis v Ann Wangari Ndirangu & Another [2018] eKLR** where Ngugi J awarded Kshs 1000,000/= for soft tissue injuries sustained by a person who had fully healed. He further stated that regard had to be had for the nature and extent of the injuries.

8. Dr. Omuyoma, in making his report relied on the P3 Form. But he also falsely indicated that the plaintiff “*was taken to Kiambu District Hospital where he was put on the following treatment: Tetanus toxoid injection, oral antibiotics, oral analgesics*”. The plaintiff did not in his own evidence avail that evidence. Instead he said he bought drugs at a chemist in Kiambu. He did not provide any proof of the alleged visit to Kiambu Hospital, or of the purchase of any drugs and medicines. This may explain the skepticism of the trial magistrate evident in his judgment as set out in the following two paragraphs.

9. The trial magistrate noted that the plaintiff did not produce any evidence that he was treated for the said injuries although he produced a P3 Form dated 7th January, 2014. Thus the trial magistrate wondered where the medical officer who filled the P3 Form obtained information on the injuries. He also stated in respect of Dr. Omuyoma’s Report:

“It beats my logic as to how Dr. Omuyoma came to a conclusion that the plaintiff sustained the aforementioned injuries.”

10. He noted that the plaintiff travelled all the way from the scene of accident at Kinungi to Kiambu without popping into any hospital and allegedly only bought medicines from a chemist.

11. As properly stated by Ngugi J in the **Ndungu Dennis** case, it is necessary to ascertain the injuries using treatment cards, then discharge summaries and of course the evidence of the witness. Clearly, the more contemporaneous the document evidencing the injuries is to the date of the incident in question, the more reliable generally.

12. In order to justify interference with the discretion exercised by the trial magistrate in making his award, and hence interference with the award, I must be satisfied with tow conditions. First, that the trial court took into account irrelevant factors of left out relevant factors when assessing damages; and second, that the amount of damages is so inordinately high or low that the quantum is an erroneous estimate of damages based on the injuries sustained.

13. Even in a case like the present one where the defence adduced no evidence, it is for the plaintiff to adduce evidence sufficient to demonstrate the severity of the damage suffered to warrant compensation.

14. Having fully carefully considered the material placed before the trial magistrate, I do not see anything suggesting that he did not

carefully assess the damages in accordance with the proper legal principles and in light of the injuries alleged to have been suffered.

15. Accordingly, I decline to interfere with the award of the lower court and hereby dismiss the appeal with costs.

Administrative directions

16. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

17. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

18. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 23RD DAY OF SEPTEMBER, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Kiberenge for the Appellant
2. Obura for the Respondents
3. Court Assistant - Quinter Ogutu



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