



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J.)**

**CIVIL APPEAL NO. 32 OF 2020**

**CHINA WU YI COMPANY LIMITED.....APPELLANT**

**VERSUS**

**LEAKEY MWANIA MUASYA.....RESPONDENT**

**(Being an appeal from the judgment delivered by the Honourable Senior Resident Magistrate**

**C.N Ondieki (Mr.) delivered on the 30<sup>th</sup> day of April, 2020 in Machakos CMCC NO. 668 of 2018)**

**LEAKEY MWANI MUASYA.....PLAINTIFF**

**VERSUS**

**CHINA WU YI COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

1. In a Complaint dated 14<sup>th</sup> September, 2018, the Respondent sued the Appellant seeking general damages for pain and suffering and loss of amenities, special damages of Kshs. 9,580/-, costs of the suit and interest as a result of a cause of action that arose from a road traffic accident that occurred on 15<sup>th</sup> June, 2018 along Machakos -Wote Road when the Respondent is said to have been hit and knocked down by the Appellant's motor vehicle registration number KCH 625T while lawfully walking way off the road near Legend Pub.

2. As a result, the Respondent pleaded that he sustained serious body injuries as follows; concussion of the brain, blunt injury to the right eye, linear undepressed skull fracture of right temporal region, deep cut wound to the right eye, crush injury to the right ear with loss of hearing, right mastoid hemossinus, right cerebella hemisphere, occipital and left temporal lobe haemorrhage, blunt injury right loin region, fracture right wrist joint and right sided facial soft tissue oedema.

3. In its defence, the Appellant denied the Respondent's particularized injuries, loss suffered and damages and urged the Trial Court to dismiss the suit with costs. The initial proceedings having been set aside the hearing started afresh before **Hon. C.N Ondieki (SRM)** whereby the Respondent and PW2 were recalled.

4. According to the Respondent, the fracture in the wrist still pained. He stated that there was a plate that was put but removed after six months. In his evidence, his right eye does not see clearly and he still had hearing problems though he had been informed by the doctor that that 80% of the ear was useful now. He produced receipts from Universal Health Services.

5. In cross-examination, the Respondent stated that the motor vehicle hit him on his right side of the body. He stated that the Consultation request form from Kenyatta National hospital dated 23/7/2018 indicate 'impaired hearing due to an old injury' but stated that he has suffered a hearing loss before the accident but on the left ear. According to the Respondent, the old head injury affected the left ear but this accident affected the right ear. He stated that the injuries he has suffered are fractures on the hand and right ear.

6. The Appellant's case was closed without the defence calling any evidence in rebuttal.

7. The appeal is against the general damages in the sum of Kshs.1, 400,000/- awarded to the Respondent by the Trial Magistrate, **Hon. C.N Ondieki** in his judgment delivered on 30<sup>th</sup> April, 2020 in Machakos CMCC No.668 of 2018.

8. In his Judgment, the Trial Magistrate found that the Appellant was 100% liable. On quantum of damages, the Trial Magistrate found that injury to the right ear existed before the accident hence it should be discounted from the catalogued injuries by **Dr. John Mutunga**. The Trial Magistrate found the injuries suffered by the Plaintiff in **P.N Mashru vs. Omar Mwakoro Makenge Civil Appeal No.9 of 2017** were similar injuries to the injuries sustained by the Respondent herein and awarded the Respondent general damages of Kshs. 1,400,000/-, Special damages of Kshs. 27,265/- plus costs of suit and interest.

9. Aggrieved by the Judgment, the Appellant has appealed citing the following grounds:-

- (1) **THAT the Learned Trial Magistrate erred in law and in fact in awarding general damages that was excessive in the circumstances.**
- (2) **THAT the Learned Trial Magistrate erred in law and in fact in not considering that the Plaintiff had sustained previous injuries from a previous accident.**
- (3) **THAT the Learned Trial Magistrate erred in law and in fact in mixing up the injuries the Plaintiff sustained and mode of treatment as per medical report on record.**
- (4) **THAT the Learned Trial Magistrate erred in law and in fact in not considering the injuries sustained by the Plaintiff could not have warranted an award of Kshs. 1,400,000/-.**
- (5) **THAT the Learned Trial Magistrate erred in law and in fact in not considering the submissions and authorities cited by the Defendant.**

10. The Appellant urged the court to set aside the judgment of the Trial Court and re-assess damages awardable to the Respondent and sought for the costs of the appeal and before the Trial Court.

#### **Appellant's submissions**

11. It was submitted that the Trial Court ought not to have relied on the old head injury and its after-effect. According to the Appellant, the Consultation Request from Kenyatta Hospital dated 3<sup>rd</sup> July, 2018 indicated that the Respondent's impaired hearing was a result of an old head injury. According to the Appellant, the Trial Court ought only to have considered the mild head injury and the fracture of the radius as per the discharge summary from Kenyatta National Hospital which considered that the Respondent's hearing loss was as a result of an old head injury. According to the Appellant the court inflated the injuries sustained by the Respondent which was not supported by the medical reports and treatment notes produced by the Respondent.

12. It was further submitted that the award was excessive as the Respondent did not sustain a hearing loss as a result of the accident that was subject to the Trial Court proceedings. According to the Appellant, the Trial Court appreciated that the injury to the right ear resulted from a previous accident but did not consider that the injury resulted into a hearing loss from the previous

accident. It was submitted that based on the evidence on record, the hearing loss was as a result of previous accident hence the court misdirected itself to award Kshs. 1,400,000/- as general damages based on the injury. The Appellants asserted that based on the enumerated injuries in the discharge summary from Kenyatta National Hospital, such injuries cannot attract an award of Kshs. 1,400,000/- hence the award is excessive to warrant it being set aside. Reliance was placed on the case of **Specialized Aluminium Renovators Limited & Another vs. Stephen Mutuku Musyoka [2021] eKLR** where the Trial Court award of Kshs. 800,000/- from a fracture to the radius sustained before the subject accident was set aside by **Sergon J.** and substituted with Kshs. 500,000/-.

13. According to the Appellant, the Respondent fully recovered and went back to work as an electrical engineer after the accident hence an award of Kshs. 350,000/- was adequate compensation. Reliance was placed on the case of **Entertainer Trucks Company Limited vs. George Karanja Maina [2020] eKLR** where the Plaintiff sustained a mild head injury, deep cut wound, dislocation of the right shoulder, post traumatic osteoarthritis of the shoulder joint and 10% permanent disability, an award of Kshs. 750,000/- was substituted with Kshs. 200,000/- and in **Nguku Joseph & Another vs. Gerald Kihiu Maina [2020] eKLR** where the Plaintiff sustained mild head injury, lacerated wound on the left supra orbital region of the face, blunt injury to the anterior abdominal wall leading to gall bladder laceration and liver laceration, fracture right humerus, lacerated wound on the scalp about four(4) cm long with no permanent disability assessed, the High Court set aside Kshs. 2,500,000/- and substituted the award with Kshs. 500,000/-. The Appellant also cited **Joseph Njuguna Gachie vs. Jacinta Kvuu Kyengo [2019] eKLR** where the Plaintiff sustained blunt temporal injury with swelling, facial bruises, blunt injury to the left forearm, comminuted fracture of the left radius and dislocated left ulna joint, the High Court substituted an award of Kshs. 1,000,000/- with Kshs. 600,000/-

14. The Appellant urge this court to allow the appeal and vary the award on quantum of damages to the extent of the Appellant's submissions costs or as this court deems. The Appellant pleaded for costs of the appeal.

#### **Respondent's submissions**

15. In opposing the appeal, it was submitted on behalf of the Respondent that the that loss of hearing on the right ear was one of the injuries pleaded in the Plaint and that according to **Dr. Mutunga's** report and the head CT scan prepared after the accident indicated loss of hearing is on the right ear. It was submitted that the Respondent testified during the hearing that the loss of hearing before the accident was on the left ear hence the injury on the left ear is not in question in this suit but the right ear. According to him, he was on medication for the left ear which he had sustained earlier. The Respondent disputed that the injuries were inflated by the Trial Magistrate.

16. In response to the Appellant's submissions that the award was excessive on the basis that the Respondent did not suffer a hearing loss, the Respondent submitted that the award was fair and just since the Respondent suffered a hearing loss of the right ear as established by the medical report, treatment notes, discharge summary, head CT Scan and the evidence was not controverted by any other opinion.

17. Reference was made to **Kyoga Hauliers (K) & Another vs Philip Mahiu Nyingi alias Philip Mburu Mahiu Civil Appeal No.21 of 2013** where the Plaintiff sustained comminuted depression of skull at the occipital bone, intracerebral haematoma right occipital area, Deep Cut wound on the right occipital region, soft tissue injuries right ankle joint and severe soft tissue right side of chest. The court gave an award of Kshs. 1,000,000. In **P.N Mashru vs. Omar Mwakoro Makenge Civil Appeal No.9 of 2017** where Plaintiff sustained Concussion of the brain, fracture of the femur, fracture of a temporal bone with haematoma, head injury with brain oedema and left subdural haematoma. The court awarded Kshs. 1,200,000/-.

18. The Respondent pointed out that the second opinion by the Appellant's doctors' report confirmed that the Respondent was incapacitated. It was submitted that the injuries sustained by the Respondent are not disputed and the Court was urged to dismiss the appeal with costs.

#### **Determination**

19. I have considered the evidence on record as well as the submissions filed and cases relied upon by respective parties.

20. The Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

21. A similar view was held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 where it was pronounced that:

**“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made”” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”**

22. In awarding damages, the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 set out the following principles:

**“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”**

23. The Appellant’s bone of contention is that the Trial Magistrate inflated the injuries sustained by the Respondent. According to the Appellant, the Trial Court in its judgment combined the injuries sustained by the Respondent in an earlier accident with those the subject of the instant case and thereby inflated injuries that were not supported by the medical reports and treatment notes produced by the Respondent.

24. In his judgement, the Trial Magistrate found that the injury to the right ear as catalogued by **Dr. Mutunga** had been displaced by the defence. The Trial Magistrate stated that it was sufficiently demonstrated during cross-examination that the injury to the right ear existed before the accident. He discounted the injury from the catalogue of injuries pleaded by the Respondent. His judgement was therefore based on what he factually found to have been the injuries sustained as a result of the accident in question. These were all findings of fact by the learned trial magistrate. Based on the evidence adduced before the Court the Learned Trial Magistrate was entitled to make findings of fact on the basis of the material presented before him and his observation of the witnesses who testified in the case. In Sheldon Shadora vs. Stanley S. Shadora Civil Appeal No. 210 of 1995, the Court of

Appeal held that:

**“Although in a first appeal the Court is entitled to rehear the dispute, it must be remembered that the trial court had the advantage of hearing and seeing the witnesses testify before him...A Court of Appeal will not normally interfere with the finding of 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 principles in reaching the findings he did...An appellate court will be slow to interfere with a Judge’s findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him.”**

25. As was held by the Court of Appeal in **Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja Civil Appeal No. 2 of 1986 [1986] KLR 661; Vol. 1 KAR 982; [1986-1989] EA 183:**

**“Unless it is shown that the learned Judge took into account facts or factors which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, that he misapprehended the effect of the evidence, or that he demonstrably acted on wrong principles in making his findings, the appellate court will not interfere with the findings of facts.”**

26. In his judgement, the Trial Magistrate discounted the injury to the right eye. According to him, the injury to the right ear existed before the accident. In my view, based on the evidence that was adduced before the Learned Trial Magistrate, he was entitled to arrive at the findings of fact in the manner he did.

27. According to **Dr. John Mutunga’s** report, the documents relied upon were the P3 Form, discharge summary from Kenyatta National Hospital, Consultation Request form from KNH, CT Scan of the head report from Machakos Imaging Centre and Audiogram Report from Machakos Level 5 Hospital. I find that the head injuries were not mild as claimed by the Appellant but severe which according to the Respondent led to his admission at Kenyatta National Hospital for one (1) week.

28. In reaching at his decision, the Trial Magistrate placed reliance on the case of **PN Mashru vs. Omar Mwakoro Makenge Civil Appeal No.9/2017** cited by the Respondent where the court assessed general damages at Kshs.1, 400,000/-. I agree with the Trial Magistrate that the decision establish similar injuries to the injuries sustained by the Respondent herein. The decision cited by the Appellant, in my view, arose from less severe injuries than those sustained by the Plaintiffs.

29. This appeal and those decisions were based on the contention that the Learned Trial Magistrate, as a result of combining the pre-existing injuries with the injuries arising from the accident the subject of these proceedings, arrived at an erroneous decision in his assessment of damages. Having found that the Learned Trial Magistrate’s decision regarding the injuries sustained by the Respondent from the subject accident cannot be faulted, I find that the Trial Magistrate’s award of Kshs.1, 400,000/- as general damages was not based on application of wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehension of the evidence. I am therefore unable to find that the resultant figure was so inordinately high as to represent an entirely erroneous estimate.

30. In the result, this appeal fails and is dismissed with costs to the Respondent.

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD DAY OF MARCH, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Obwoye for Miss Kamau for the Appellant**

**CA Susan**



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