Case Number:	Civil Appeal 70 of 2020
Date Delivered:	14 Dec 2021
Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Judgment
Judge:	Rose Edwina Atieno Ougo
Citation:	Mara Tea Factory Limited v Lillian Bosibori Nyandika [2021] eKLR
Advocates:	Mr. Omotto For the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. DO Mac'andere - RM
County:	Kisii
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 70 OF 2020

MARA TEA FACTORY LIMITED...APPELLANT

VERSUS

LILLIAN BOSIBORI NYANDIKA...RESPONDENT

(Being an appeal from the judgment and decree of Hon. DO Mac'andere (RM)

delivered on 9th October 2020)

JUDGMENT

1. This judgment determines the appellant's appeal filed on 6th November 2020 vide Memorandum of Appeal dated 23rd October 2020.This Appeal relates only to the issue of quantum.

2. The respondent who was the plaintiff before the trial court and pleaded that she was injured following a road traffic accident that occurred on 12th October 2019. The accident occurred while she was walking along Kisii-Mirani road near Egesa Upper Hill area. According to the respondent, the accident was caused by the appellant's motor vehicle KCS 026A which was being driven in negligent manner thus knocking down the respondent. The respondent claims that he sustained physical injuries, suffered loss and damage as a result of the accident.

3. The issue of liability was settled by consent in the ratio 70:30 in favour of the respondent. After conducting a hearing, the trial magistrate in her judgment awarded the respondent Kshs 400,000/- for general damages less 30% contribution, special damages of Kshs 82,550/-. The respondent was also awarded costs of the suit.

The Appeal

4. It is that judgment that gave rise to this appeal where the appellant complains that:

1. That the Learned Trial Magistrate erred in law and in fact by failing to critically consider and analyse the medical evidence tendered by the appellant.

2. That the Learned Trial Magistrate erred in law and in fact in failing to analyse the medical evidence, the admission by the plaintiff (Pw1) well as (sic) medical officer (Pw2) on the issue of management of the alleged injuries and thus arrived at erroneous finding that there was no inconsistencies in so far as the injuries are concerned.

3. That the learned trial magistrate erred in law and in fact in failing to consider that the P3 (PEX2) and the medical report (PEX6) were filled by one and the same person and thus not a proper basis to find that the injuries were consistent.

4. That the learned trial magistrate erred in law and in fact in completely failing to consider the report by Dr. Malik (DEX1) and thus arrived at an erroneous finding on the nature of injuries sustained by the respondent.

5. That the learned magistrate erred in law and in fact in failing to critically consider and apply the submissions made by the appellant as well as the authorities cited.

6. That the learned magistrate erred in law and in fact in failing to critically consider and apply the submissions made by the appellant as well as the authorities cited.

7. That the learned trial magistrate erred and misdirected herself in fact and law in the by (sic) awarding general damages to the Respondent that were manifestly excessive in the circumstance and thus failed to appreciate the principles applicable in the award of damages.

8. That the learned magistrate erred in law ad on fact in assessing damages and failed to apply the principle applicable in award of damages of comparable awards made for analogous injuries and failed to consider the authorities cited by the appellant on issue of damages.

9. That the learned magistrate erred in lawn and in fact in failing to consider that the plaintiff admitted that the treatment expenses of Kshs 76,080.00/= were not aid by her but by her advocate under no consideration whatsoever and this erroneously made the award to the plaintiff.

10. That the learned trial magistrate erred in law and in fact in failing to subject the award for special damages to contributory negligence.

5. As observed above, the appeal is against quantum of damages only. The appeal was admitted to hearing on 2nd June 2021. This court gave directions that the appeal be canvassed by way of written submissions. The appellant's counsel filed written submissions on 29th June 2021 whereas the Respondent's counsel filed written submissions on 23rd July 2021.

Analysis and Determination

6. In an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. These conditions were outlined in the case of **Kemfro Africa Limited t/a "Meru Express Services (1976)" & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR** thus:

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage.

7. The first issue for consideration is whether the respondent proved that she suffered the injuries pleaded in her plaint.

8. The appellant in his submissions argue that the trial court failed to critically consider and analyse the medical evidence it tendered before the subordinate court. It advanced that the medical report by Dr. M.S Malik was produced by consent as (DEXH1).

9. The respondent on the other hand submitted that the injuries pleaded in her plaint were confirmed by the discharge summary issued by Kisii Teaching and Referral Hospital, P3 and Medical Report by Dr. Ombati. In dismissing the medical report by Dr. M.S. Malik, the respondent argued that Dr. Malik did not treat the respondent and his report does not add any probative value with respect to the injuries sustained by the respondent.

10. I have carefully gone through the proceedings and the only consent entered into by the parties was on liability. On 7th September 2020 the parties by consent agreed that liability be apportioned in the ratio of 70:30 in favour of the respondent.

11. The appellant did not at any point before the subordinate court produce the medical report by Dr. M.S Malik. At the end of the respondent's case, the appellant simply closed its case. The evidence of the respondent thus remained unchallenged. In the case of **John Wainaina Kagwe v Hussein Dairy Ltd [2013] eKLR,** the Court of Appeal held as follows: -

"The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident…."

12. The respondent who testified as Pw1 adopted her statement dated 23rd December 2019 as her evidence in chief. According to the evidence of Pw1 she sustained head injury, deep cut wound on the head, bruises on the frontal part of the head, tenderness on the chest, dislocation on the left wrist joint, dislocation on the left shoulder joint, multiple cut wounds in the upper limb and lower limps. The injuries were consistent to those pleaded in the plaint.

13. I agree with the appellant that the P3 form and the medical report were prepared by Dr. Ombati Timothy Mokua. He concluded in his medical report that the respondent sustained multiple injuries and dislocations that are under management.

14. Dr. Nyameino (Pw2) produced the discharge summary (PEXH1) and testified that Pw1 that the injuries suffered by Pw1 were head injury, dislocation of left shoulder, dislocation of the left wrist joint and deep cut wound on the head.

15. The appellant argued that the respondent did not table any evidence indicative of the treatment received at the hospital. I however find that the discharge summary gave a clear picture of what transpired after Pw1 was admitted. The document being a 'discharge summary' simply gives a brief statement on the provisional diagnosis of the patient on admission, management of Pw1's injuries and the diagnosis upon discharge of the patient. Pw2 explained that the comprehensive details on the treatment plan are in Pw1's personal file held by the hospital.

16. The respondent suffered no fractures according to her evidence and it is clear from the discharge summary that surgery was not necessary for the management of her injuries. This is because the respondent suffered two dislocations, on the left shoulder and wrist joint, as well as soft tissue injuries. I therefore find that the respondent proved that she sustained the following injuries: head injury, dislocation of the left shoulder joint, dislocation of the left wrist joint and a deep cut wound on the head.

17. I now turn to consider whether the general damages awarded by the trial court were excessive. The guiding principle in the assessment of damages is that an award must reflect the trend of previous, recent and comparable awards. This position finds support in the case of **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** where the Court of Appeal held:

"Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

18. The appellant in its submissions proposed an award of Kshs 100,000/- on the grounds that the respondent sustained no fractures or dislocation. They cited the cases of **PF (Suing as next friend and father of SK (Minor)) v Victor O Kamadi & Another 2018 eKLR; George Mugo & Another v A K M (Minor suing through next friend and mother of AM K [2018] eKLR;** and **Kenya Nut Company Limited v Sarah Najala Wambogo [2019] eKLR** in support of its case. In my view, the injuries are less serious than those sustained by the respondent herein noting that he suffered two dislocations.

19. Although the respondent before the trial court proposed an award of Kshs 600,000/- they now support the finding of the trial court of the award of general damages. She cited the case of **Veronicah Mkanjala Myapara v Patrick Nyasinga Amenya [2021] eKLR**, however argued that the injuries of the plaintiff therein were less serious as she only suffered a single dislocation.

20. In the case of **Veronicah Mkanjala Mnyapara v Charles Kinanga Babu [2020] eKLR** the plaintiff had quite similar injuries compared to those sustained by the respondent herein. In the **Veronicah Mkanjala Mnyapara v Charles Kinanga Babu (supra)** case the plaintiff sustained the following injuries: *dislocation of the left ankle joint, dislocation of the left wrist joint, deep cut wound on the forehead, chest contusion as well as bruises on the face, hands and ankle joints.*

21. Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR the court affirmed an award of Kshs 300,000/- for a plaintiff that had suffered a dislocation of the shoulder. In the case of **Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR** the plaintiff was awarded Kshs 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth.

22. After taking into consideration the injuries sustained by the respondent, the awards by courts on similar injuries and the issue of inflation, I find the award of 300,000/- would reasonable in the circumstances.

23. On the award of special damages, the appellant faulted the trial magistrate for failing to subject special damages to the apportionment of liability. The award of special damages does not need to be subjected to apportionment of liability. I agree with the holding of the court in **Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR** where the court stated that special damages should not be subjected to the apportionment.

24. In the end, I allow the appeal on quantum set aside the award of Kshs 400,000/- general damages awarded to the respondent by the trial court and substitute it with an award of Kshs 300,000/- less 30% contribution. For avoidance of doubt the award shall be made up as follows:

General Damages less 30% contribution	Kshs 210,000/-
Special Damages	Kshs 87,000/-
TOTAL	**Kshs 297,000/-**

25. The appellant shall have half the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF DECEMBER, 2021

R. E. OUGO

JUDGE

In the presence;

Appellant Absent

Mr. Omotto For the Respondent

Kevin IsinduCA

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