REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 13 OF 2020

JK (A minor suing through father & next friend NKM..... APPELLANT

VERSUS

JASPER NCHONGA MAGARI.....1ST RESPONDENT

JACKLINE DAMA KARANI..... 2ND RESPONDENT

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo Advocates for the appellant

C. B. Gor & Gor Advocates for the respondent

JUDGMENT

On or about 14.7.2018, the appellant minor suing through **NKM** as the father and next friend was travelling along Malindi – Gongoni Lamu Road in motor cycle registration number KTWB 532K when the 2nd respondent negligently drove, managed and or controlled motor vehicle number KTWB 532K that the same lost control and overturned as a result whereof the minor sustained severe injuries.

The appellant sued the respondents at the Lower Court seeking general and special damages for personal injuries suffered as a result of the accident. At the trial, the respondents having been served with the summons to enter appearance failed to do so necessitating entry of Judgment. The suit was set down for hearing and both liability and assessment of damages were in issue for determination.

It followed therefore that the Learned trial Magistrate at the conclusion of the evidence awarded general damages at Kshs.30,000/= and special damages of Kshs.2,550/= plus costs and interest.

Being aggrieved with the decision of the trial Court on assessment of damages, the appellant preferred an appeal. The question of liability of the appellant is not the subject matter of this appeal as none of the grounds of appeal raise this issue. The Court is therefore only concerned with the award of general damages.

On appeal, **Mr. Wambua** for the appellant, argued and submitted that the Learned trial Magistrate erred in Law and fact in awarding damages which were so inordinately low that would be considered as erroneous so far as the guiding principles and similar decisions as such awards are concerned, Learned counsel invited the Court to be guided by the following cited authorities: **Francis Simiyu Waiswa & Another v Samuel Kairo Magadi {2007} eKLR** where the Court awarded Kshs.110,000/= as general damages for pain and suffering for blunt injuries on the eye and left wrist. **Nairobi Visaro Construction Co. Ltd v Benjamin Otuke {2019} eKLR** herein in which the Court upheld an award of Kshs.200,000/= where the respondent suffered blunt trauma to the right wrist joint.

By virtue of the above cases, Learned counsel had taken a stand to the effect that the Learned trial Magistrate should have awarded Kshs.150,000/= for pain and suffering as being fair and reasonable.

Determination

Reverting to the appeal before me, it must be remembered that this is a first appeal. It is the duty of the Court to mirror the principles in **Selle v Associated Motor Boat Co. {1968} EA 123 and Jabane v Ohinja {1986} KLR 661**. In the matter at hand, the one million dollar question is whether the Learned trial Magistrate erred in Law and fact in holding that the appellant was only entitled to an award of Kshs.30,000/= as general damages. Is there a nexus between the injuries suffered and the award assessed by the Learned trial Magistrate.

In compliance with the well settled principles, the appellate Court in exercising the mandate has by way of jurisprudence in deciding the question to anchor the discretion upon the set guidelines in **Kemfro & Another v AM Lubia & Another CA No. 34 of 1982 {1987} KLR, Henry Hidayailanga v Manyema Manyioka {1961} 1 EA 705.** The interesting feature of quest cases on the nature of the interpretative obligation of the appeals court task over the impugned Judgment of the Lower Court is that there are binder boundaries to decide whether to disturb the awarded damages. Here it was stated interalia the appeals Court must be satisfied either that the trial 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 wholly erroneous estimate of the damage. The decision in **West (H) & Son Ltd v Shephard {1964} AC 326** earlier on confirmed thus:

> ***"But money cannot renew a physical frame that has been battered and shattered. All that Judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be endeavor, to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation."***

Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amount which are awarded are to a considerable extent conventional. The application of these principles in Kenyan Courts leads to abroad approach to assessment of damages for what would be permissible under our Law.

A purposive approach in relation to matters on compensatory damages was also stated in the case of **Lim Pho Choo v Camder & Ishington Aarea Health Authority {1979} 1 ALL ER 332** which resulted in the approach taken in the case of **Tayab v Kinamu {1982 – 1988} IKAR 90**

Collectively these decisions serve to underline the nature of jurisprudence surrounding the application in the **West CH v Shephard principle.** Thus the two Courts were in agreement that in considering damages in personal injury claims, it is often said:

> ***"The defendants are wrongdoers, so make them pay up in full. They do not deserve consideration that is a tedious way of putting the case all accident. Like this one, may have been due to a pardonable error much as may be fall any of us. I stress this so as to remove the misapprehension, so often repeated for all the loss and detriment she has suffered. That is not the Law. She is only entitled to what is in the circumstances a fair compensation, fair both to her and the defendants. The defendants are not wrong doers. They are simply the people who foot the bill."***

These decisions reflect the development of our Law in this area on assessment of general damages in the tort of negligence. In the case at bar, the record confirms that **(PW1) – NK** told the Court that the minor was injured on 14.7.2018 while travelling as a passenger with Tuk-Tuk (No. KWTA 532A). The accident which ensued resulted in injuries to the wrist and leg. He produced the treatment notes, the P3 Form, Police Abstract and medical-legal report as documentary exhibits in support of the injuries and the claim against the respondents it becomes suite apparent from the evidence as corroborated by **Dr. Adede's** medical report, the minor sustained injuries classified as soft tissue in nature. There were no major complaints or partial/permanent disability in respect of the injuries.

At this stage, it becomes relevant to quote more from past decisions made on similar injuries suffered by the minor to this appeal. In the case of **Ndungu Dennis v Ann Wangari Ndirangu & Another CA No. 54 of 2016 {2018} eKLR**, the Court awarded Kshs.100,000/= for soft tissue injuries to the lower right leg and the back. In **Godwin Ireri v Franklin Gitonga CA No. 47 of 2015 {2018} eKLR** the appellate Court varied an award of Kshs.130,000/= to Kshs.70,000/= for injuries suffered by the claimant to the left foot which was tender on touch.

In addition, the case of **Kipkere Limited v Peterson Ondieki Tai {2016} eKLR** the claimant suffered soft tissue injuries to the left leg, chest centrism and bruises on left shoulder. The High Court on appeal awarded Kshs.30,000/=.

In assessing damages for pain and suffering the Learned trial Magistrate took account the evidence by **(PW1)** and the medical report by **Dr. Adede**. From that stand of evidence the minor claimant suffered blunt object injury to the right wrist. According to **Dr. Adede** the right wrist is no longer tender. From the authorities read on the awards assessed by the various Courts soft tissue injuries attract an award in the requin of Kshs.20,000 – Kshs.300,000/=.

However, it has been repeatedly held that award of damages is in the discretion of the trial Court. Nevertheless, it is settled Law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of that discretion unless it has been stretched ultra vires. The principles in **KEMFRO v Lubia (supra) case Obongo v Municipal Council of Kisumu {1971} EA91, Butt v Khan {1981} KLR 345.** That in assessing damages the Learned trial Magistrate's decision was based on some wrong principles or so manifestly excessive or inadequate to deny the claimant a fair compensation.

Taking into account all the injuries suffered by the claimant minor and keeping in record the principles of assessment of such damages as instructive in the case of **West (H) v Shephard (supra)** there are eminently no reasons advanced by the appellant to persuade this Court to interfere with the award of Kshs.30,000/=. In other words, the task of trial Courts is to fix a figure which represented the loss of a measure to the injuries suffered. Despite all these undisputed facts, the expression pain and suffering means the physical harm, or discomfort attributable to the injury or injuries suffered by the minor claimant it also includes the pain that may have been experienced by any medical treatment administered to the plaintiff as a result of the injuries sustained.

By this definition suffering denotes the mental or emotional distress which the minor may have felt as a consequence of the injury. In **Doughey v North Staffordshire Health Authority {1992} 3 Med L. R. 81:**

> ***"Suffering is an inherently objective and subjective head of non-pecuniary loss, in the sense that it is dependent on the plaintiff's awareness of it."* (See also West v Shephard) for the objective element."**

To the extent of the challenged posited by the appellant even taking into account the subjective and objective test, the Learned trial Magistrate addressed her mind to the circumstances surrounding this case and appropriately assessed damages at Kshs.30,000/= for pain and suffering.

For this reasons, I do not find any merit in this appeal and hereby dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Kiponda advocate for the appellant