



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL APPEAL NO. 51 OF 2017**

**(CORAM: F.M. GIKONYO)**

*(From the Judgement of HonT. Gesora (SPM) delivered on 31st October in Narok CMCC No. 74 of 2015)*

**JOHNSTONE KOECH.....APPELLANT**

**-VERSUS-**

**IBRAHIM ABDI MAALIM.....RESPONDENT**

**JUDGMENT**

**Appeal on quantum**

[1] Liability in the primary suit, Narok PMCC no. 74 of 2015 was settled by consent of parties on the ratio of 80%:20% in favour of the Respondent in respect of the road traffic accident which occurred on 10<sup>th</sup> January 2015 and involving motor vehicle registration number KBK 801 J. The respondent was injured as a result.

[2] The Appellant's only quarrel in this appeal is that the award of general damages of Kshs. 400,000 made by the trial court in its judgment dated 31<sup>st</sup> October 2017 is manifestly excessive. See the memorandum of appeal dated 21<sup>st</sup> November 2017.

**Arguments by the appellant**

[3] In support of the appeal, the appellant argued in his submissions filed pursuant to order of court made on 5<sup>th</sup> November 2020, that the trial court erred when it took into account injuries not sustained by the Respondent specifically the head concussion in the assessment of damages herein. According to the Appellant's counsel, the injuries pleaded were soft tissue. Thus, the award in damages of Kshs. 400,000/= for soft tissue injuries can only be on the basis of speculation. The Appellant relied on the case of *Denshire Muteti Wambua V Kenya Power & Lightning Co. Ltd (2013) e KLR* to support argument that assessment of damages is guided by damages awarded for comparable injuries. To the Appellants, the award herein was inordinately high compared to the injuries suffered and is founded on wrong principles.

[4] According to the appellant the stated cases show that appellate courts made awards in the range of between 90,000/= to 109,890/=. In that connection, he proposed a sum of Kshs. 90,000 to be reasonable compensation for injuries sustained herein.

[5] The Appellant cited the following cases in support of the appeal:

- a) **GEORGE MUGO & ANOTHER vs. AKM (Minor suing through next friend and mother) (2018) eKLR.**
- b) **GEORGE KINYANJUI T/A CLIMAX COACHES & ANOR vs. HUSSEIN MAHAD KUYALE (2016) eKLR**
- c) **NDUNGU DENNIS vs. ANN WANGARI NDIRANGU & ANOTHER (2018) eKLR.**

**Arguments by respondent**

[6] The Respondent submitted that the injuries suffered were confirmed by both doctors. According to the respondent, the minor sustained mild head injury but which was expected to heal well. The respondent urged that, whereas the doctor appointed by the appellant contested the head injury on the basis that there was no mention of head injury in the initial treatment notes, the treatment notes from Narok district hospital are clear evidence that the Respondent was complaining of a painful head at the time of admission to the hospital and even skull X-

ray was taken. The Respondent referred to pages 15 -17 and 20-21 of the record of appeal. The Respondent has referred to two medical reports showing injuries he suffered.

[7] In the upshot, the Respondent submitted that the award of damages made by the trial court was commensurate with the injuries. They urged the court to dismiss the appeal.

[8] The Respondent's counsel has relied upon the following authorities: -

**a) FRANCIS OCHIENG & ANOTHER vs. ALICE KAJIMBA (2015) eKLR**

**b) CATHERINE WANJIKU KINGORI & 3 OTHERS vs. GIBSON THEURI (2005) eKLR; where courts awarded Kshs. 350,000/=**

## **ANALYSIS AND DETERMINATION**

### **Issues**

[9] The court should determine: -

1) ***Whether the award herein is inordinately high.***

### **Injuries suffered**

[10] The contest is around the injuries to the head. The appellant's doctor says the respondent did not suffer injury to the head. Settlement of this issue is of preliminary importance as assessment of damages largely depends on the injuries sustained. Thus, I will determine this question first.

[11] The Respondent in his plaint pleaded that he sustained the following injuries:

***i. Head concussion***

***ii. Right shoulder joint laceration***

***iii. Right hip joint laceration***

***iv. Right knee laceration***

***v. Right ankle laceration***

[12] The injuries pleaded match with those stated in the medical report by the Respondent's doctor. The medical report by the doctor appointed by the Appellant classified the injuries as soft tissue injuries, except, she strongly contested the head injuries. The reason for her conclusion was that the injuries to the head were not included in the initial treatment notes.

[13] I do note that the injuries described in the treatment notes and P3 form included several bruises on the face/head, right side right knee, head pain, chest right hand and right ankle.

[14] I do note also that the Appellant's doctor on physical examination noted in her medical report that there was healed scar on the left side of the forehead approximately 4 cm.

[15] Both doctors noted that there were present complains of chest pain.

[16] The above recapitulation of salient aspects of injuries noted in the medical notes and reports herein supports the following observations and inferences, namely: -

1) Treatment notes are the basic documents in such cases as they are made immediately after the accident by the treating medical practitioner on the injuries sustained;

2) The treatment notes indicate a head pain;

3) In light of the initial treatments notes, the healed scar on the head observed by the appellant's doctor is an indication of an injury on the head; and

4) The medical report by Dr. Ogando Zoga is not inconsistent with the initial treatment notes.

[17] Taking into account the medical treatment notes, P3 Form and medical reports, the injuries pleaded are proved to be the injuries sustained by the respondent. With that hurdle out of the way, I will determine the question on quantum of damages.

**Legal threshold**

[18] Assessment of damages is at the discretion of the trial court. Accordingly, the appellate court will not be quick to interfere with the exercise of the discretion by the trial court, except where it is shown that the trial court, in assessing the damages acted on wrong principle, or that the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the case of **Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini Versus A.M. Lubia And Olive Lubia**, where it was held inter alia that:-

*“...the principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are 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, he amounts is so inordinately high that it must be wholly erroneous estimate of the damages”.*

[19] See also the case of **Bhutt -Vs- Khan (1982 – 88) 1 KAR 1** where it was stated that:-

*“a court of appeal will normally not interfere with a finding of a 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 principle” - see Ephantus Mwangi And Geoffrey Nguyo Ngatia -Vs- Duncan Mwangi Wambugu (1982 – 1988) 1 KAR, 278.*

[20] To begin: I should state that: general damages are damages at large and not girded by mathematical precision. Therefore, in awarding general damages, the court exercises best judgment to arrive at an award which is fair compensation of and reflects the nature and gravity of the injuries. I should also state that, although no two cases of personal injuries are exactly the same, previous decisions on comparable injuries offer a superb guide. See **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**. See also the Court of Appeal in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that: -

*“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”*

[21] The court should also consider inflation; the value of the shilling and the state of the economy. These principles ensures that astronomical awards are not made that will stifle the insurance industry or punish the person paying. Here, the overall objective is fair compensation to the claimant. See **Kigaraari v Aya [1982-88] 1 KAR 768, Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

[22] I have considered the authorities cited by both parties in support of their positions. Some of the cases cited by the Respondent in this appeal made high awards; but, others are within reasonable range for soft tissue injuries. Those cited by the appellants made awards that are way too low.

[23] In the present case, both medical reports by Dr. Zoga and Dr. Kahuthu were in agreement that the Respondent suffered soft tissue injuries. These are not serious injuries or there is no anticipation of disability. The brain concussion was also a temporary injury. These factors were not taken into account by the trial court. I find the case of **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014]** and **Devki Steel Mills Ltd v James Makau Kisilu [2012] eKLR**, to be quite apt; in both an award of Kshs 250,000/= general damages was made for soft tissue injuries. In light thereof, an award of Kshs. 250,000 is fair compensation. Accordingly, I set aside the award of Kshs. 400,000 for being excessive and in lieu thereof award a sum of Kshs. 250,000 in general damages. This is subject to the liability ratio agreed between the parties. Everything else remain as was awarded by the trial court.

**[24] Each party to meet its own costs of this appeal.**

**Dated, signed and delivered at NAROK through Microsoft Teams Online Application this 25<sup>th</sup> day of February 2021**

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**F. GIKONYO**

**JUDGE**

**In the Presence of:**

- 1. Mr. Kasaso – Court Assistant
- 2. Ouma for the Respondent
- 3. Kimondo Gachoka for the appellant - absent

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**F. GIKONYO**

JUDGE