



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 11 OF 2020**

**YOBESH MAKORI.....APPELLANT**

**VERSUS**

**ELMERICK MOBISA BOTA.....RESPONDENT**

**(Being an appeal from the judgment of Hon. Onjoro (PM))**

**delivered on 6<sup>th</sup> September, 2019 in Kisii Civil Suit No. 239 of 2018)**

**JUDGMENT**

1. The appeal before this court relates a personal injury claim which had been filed by the respondent against the appellant following a road traffic accident that occurred on 26<sup>th</sup> February 2017, along Kisii-Nyamira road. The respondent was travelling as a pillion passenger aboard motorcycle registration number KMDP 353R when the appellant's vehicle registration No. KCJ 247E knocked down the motorcycle causing an accident whereof the respondent sustained injuries which he listed in his plaint thus:

- a. Head injury;
- b. Deep laceration on the scalp;
- c. Left clavicle fracture;
- d. Bruises on the upper limbs ;
- e. Crushed left leg ;
- f. Dislocation of the right tarsal bone; and
- g. Cut wound on the right leg.

2. When the matter came up for hearing before the trial court, Dr. Peter Morebu, a senior medical officer working at Kisii Teaching and Referral Hospital confirmed that the respondent had sustained the injuries listed in his plaint. He stated that the respondent was attended to at Oasis hospital and transferred to St. Luke Orthopedic and Trauma Center. He was given analgesics and his left leg was amputated. An X-ray was done, the fracture was corrected and metal implants were inserted. Dr. Morebu noted that the

respondent had headaches, pain on the amputated stump and was walking with crutches. He assessed the respondent's permanent disability at 50%. He added that the respondent would require an artificial limb which would cost approximately Kshs. 250,000/= and would need to be changed every 3 years. The doctor produced his medical report, the P3 form and a receipt for Kshs. 6,500/=.

3. In cross examination, Dr. Morebu stated that he had been guided by the Workers Injury Benefit Act in his assessment of disability. He also conceded the amounts he had given for the removal of metal implants and artificial limbs were estimates.

4. The respondent told the trial court that he was a teacher by profession and that he taught at Senior Chief Musa Nyandusi Secondary. He testified that when the accident occurred he was knocked unconscious and sustained injuries on his legs, head and shoulder. He was taken to Oasis Hospital for treatment and later transferred to St. Luke hospital in Eldoret where he was admitted from 27<sup>th</sup> February 2017 to 29<sup>th</sup> March 2017. He produced treatment notes from St. Luke's Hospital and added that he had spent Kshs. 1,146,413/= on medication. He produced a bundle of receipts to support his claim. He also testified that he had pain in his shoulder and was not able to do his normal duties as a teacher as he could not stand for a 40 minutes' lesson.

5. During cross-examination, the respondent stated that he taught Geography and Music and had been teaching since 2002. He admitted that he could still communicate eloquently and had resumed his duties at the school after 3 months. He also testified that he had a prosthesis limb which had cost him Kshs. 130,000/=. He added that he did not have any metal implants as the one in his shoulder had been removed.

6. The last witness was PC Paul Mungatia (PW3). He produced the police abstract with respect to the accident after which the respondent closed his case. The parties entered a consent on liability which was apportioned in the ratio of 70:30 in favour of the respondent. The appellant then closed its case without calling any witnesses to testify.

7. On considering the evidence placed before it, the trial court entered judgment in favour of the respondent in the following terms:

General damages	Kshs. 2,000,000/=
Future medical expenses	Kshs. 130,000/=
Special damages	Kshs. 448,310/=
Sub- total	Kshs. 2, 578,310/=
Less 30% contribution	Kshs. 773,493/=
Total	Kshs. 1,804,817/=

8. Being aggrieved by the trial court's assessment of damages, the appellant lodged the instant appeal contesting the award under the head of general damages, loss of amenities, future medical expenses and special damages.

9. The parties took directions to dispose of the appeal by way of written submissions which I have duly considered. The issues arising from the submissions and the record of appeal are as follows:

- a. Whether the assessment of general damages was excessive;
- b. Whether the trial court erred by awarding the respondent future medical expenses which had not been proved;

c. Whether the award of special damages was based on concrete documentary evidence.

10. As I determine this appeal on quantum, I bear in mind the principle that an appellate court will only interfere with the trial court's assessment of damages in certain clear cut circumstances. In **Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** Madan JA laid out the following principles in determining whether to interfere with an award of damages thus;

*“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”*

11. On the first issue, counsel for the appellant submitted that the award given by the trial court for general damages was inordinately high and that an award of Kshs. 800,000/= would suffice. He referred this court to the case of **Prem Gupta & another v Grimley Otieno & 3 others [2018] eKLR** where the court awarded Kshs. 800,000/= as general damages to a plaintiff who, according to counsel, had sustained much more serious injuries than the respondent in this case. The plaintiff in that case had a permanent disability which had been assessed at 22%. He had suffered loss of memory which affected his work and normal day to day activities; chronic headaches; risk of epilepsy; poor dull slurred speech which greatly affected his execution of his duties thus causing him social embarrassment; paralysis on the right side of the face which made his speech and social interaction difficult and poor hearing and sight which also affected his work.

12. Counsel also cited the case of **Mutiga Kamai v Pius Muthuri Mukaria [2020] eKLR** where the appellate court substituted an award of Kshs. 800,000/= with an award of Kshs. 650,000/= where a plaintiff had sustained lacerations to the right side of his face; fractures metacarpal 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> digits and severed extensor tendon with 40% permanent disability.

13. He also referred to the case of **Mass Investments Limited v Stephenson Masila Kyalo [2020] eKLR** where the court maintained an award of Kshs. 800,000/= for a plaintiff who sustained 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> degree burns on the right side of the head and chest; burns on right forearm, right arm, and right hand and burns on the abdomen.

14. Reliance was also placed on the case of **Gerald Ileri Harrison & 2 others v Danson Ngari [2018] eKLR** where the court substituted an award of Kshs. 2,000,000 with an award of Kshs. 800,000/= where a plaintiff sustained compound depressed fracture of the skull on the right frontal region of the head and mild traumatic brain injury.

15. Counsel further urged that no evidence was adduced to show that the respondent was either working or engaged in any kind of business or earning any given amount per month. He submitted that there was no demonstration whatsoever on loss of amenities and that in any case, the respondent had indicated that he had resumed his normal duties as a teacher.

16. Before the trial court, counsel had proposed an award Kshs. 800,000/= where he relied on the case of **Prem Gupta & another (supra)** and the case of **Gerald Ileri Harrison (supra)**.

17. For his part, counsel for the respondent maintained that the award made by the trial magistrate was fair and reasonable taking into consideration the injuries sustained by the respondent and bearing in mind the awards made previously bearing similar injuries. He had proposed a sum of Kshs. 5,000,000/= before the trial court. His suggestion was based on the case **Sofia Yusuf Kanyare v Ali Abdi Sabre & Another [2008] eKLR** where the plaintiff was awarded a sum of Kshs. 1,970,000/= as compensation for a head injury; loss of 10 teeth, amputation of the right upper limb; cuts over left upper limb and stitching of a few cuts. He also cited the case of **James Joseph Rughendo v Kenya Power and Lighting Co. Ltd [2011] eKLR** where the plaintiff suffered bilateral electrical damage to the upper limbs radial, ulna and median nerve, third degree electrical burns involving the palms of both hands; amputation of right leg below the knee and gangrene left foot dorsal aspect, big toe and the 2<sup>nd</sup> toe.

18. Counsel referred to the case of ***Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR*** which is apposite in this case. In that matter Majanja J. held;

*"General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*** that: '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.'"*

19. The learned Judge further held;

*"In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (See ***Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR*** and ***Jabane v Olenja [1986] KLR 661.***"*

20. The nature and gravity of the injuries sustained by the respondent was not in issue. The injuries particularized in the plaint were corroborated by the P3 form and medical report prepared and produced by Dr. Morebu. The doctor indicated that the respondent's injuries were severe particularly the crushed left tibia fibula bones which had led to amputation of the leg below the left knee. The respondent also had a left clavicle fracture, mild head injury, dislocation of the right tarsal bone and multiple soft tissue injuries that had healed with permanent scars. The doctor assessed permanent disability at 50% and stated that the respondent would require a prosthesis every two years.

21. When he testified, more than 2 years after the accident, the respondent complained that he still experienced pain in his shoulder and was not able to carry out his normal duties. He testified that he had fallen unconscious when the accident occurred and produced an inpatient discharge summary which showed that he had been admitted at St. Luke's Orthopedic and Trauma Hospital for more than a month. He however stated that he did not have any implants in his shoulder as they had been taken out.

22. The parties referred the trial court to the cases of ***Prem Gupta & another (supra)***, ***Gerald Ileri Harrison (supra)***, ***Sofia Yusuf Kanyare (supra)*** and ***James Joseph Rughendo (supra)*** in support of their proposals for general damages. I have read those authorities as well as those cited by the appellant in this appeal. In my view, the injuries in the case ***Sofia Yusuf Kanyare (supra)*** were the most similar to those sustained by the respondent, as the plaintiff in that case also had a limb amputated.

23. In the case of ***Joseph Seremani & Julius Otachi v Stella Bosibori Moreka Civil Appeal No. 100 of 2018 [2019] eKLR***. The court sustained an award of Kshs. 2,500,000/= where the respondent had multiple fractures and an amputation of the left leg.

24. In ***Akwaba Olubuliera Nicodemus v Dickson Shikuku [2020] Civil Appeal No. 169 of 2018 eKLR*** the court upheld general damages of Kshs. 2,000,000/= where the plaintiff had suffered a fracture of the right clavicle leading to internal fixation of the clavicular fracture; crush injury to the right leg leading to below knee amputation of the right leg and sprained left elbow joint.

25. Although the injuries sustained by the respondent may not have a disastrous effect on his livelihood as a teacher, they were clearly severe and will have long term consequences on his life. Taking into account the foregoing authorities and principles, I cannot say that trial court erred in its assessment of general damages.

26. On future medical expenses, the appellant contended that whereas the plaint and medical reports alluded to metal implants being fixed in the body of the respondent, the respondent denied the existence

of the metal implants during cross examination. The appellant's counsel urged this court to award a sum of Kshs. 150,000/= as opposed to the sum of Kshs. 250,000/= sought by the respondent.

27. The trial court awarded the respondent a total of Kshs. 130,000/= in future medical expenses based on the respondent's testimony that he had spent that amount to purchase his prosthesis. Evidently, the appeal on future medical expenses is misplaced and is hereby dismissed.

28. As to special damages, the appellant argued that they not only needed to be specifically pleaded but also needed to be strictly proved. The respondent claimed a total of Kshs. 1,146,413/= for the medical report, copy of records, medical expenses and travelling expense. He produced receipts amounting to Kshs. 448,310/= which is what the trial court awarded in line with the principles on the award of special damages.

29. In the end, I find the appeal to be lacking in merit. It is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kisii this 26<sup>th</sup> day of March, 2021.**

**R.E. OUGO**

**JUDGE**

**In the Presence of;**

**Mr. Wesonga                      For the Appellant**

**Miss Ndemo                      For the Respondent**

**Ms. Rael                              Court Assistant**