



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 19 OF 2020**

**GIANCHORE TEA FACTORY CO. LTD.....APPELLANT**

**=VRS=**

**PETER OGAMBA OTAO.....RESPONDENT**

*{Being an appeal against the Judgement of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the 27<sup>th</sup> day of July 2020 in the original Nyamira Chief Magistrate’s Court Civil Case No. 187 of 2017}*

**JUDGEMENT**

This is an appeal against the quantum of damages awarded to the respondent by the trial court. Judgement on liability was the subject of a consent recorded by the advocates for the parties on 6<sup>th</sup> July 2020 and is not therefore challenged.

The genesis of the respondent’s claim was an accident which occurred on 6<sup>th</sup> June 2017 when his motor cycle Registration KMDX 541M and the appellant’s motor vehicle Registration No. KBJ 395E collided and he sustained injuries. The injuries are not disputed and they were:

- (a) Deep cut wounds on the upper limbs.**
- (b) Blunt trauma to the right knee.**
- (c) Traumatic arthrotomy.**
- (d) Right femur fracture.**
- (e) Degloving injury on the right knee with open knee joint exposed patella tendon.**
- (f) Lacerations on the right knee.**

These injuries were confirmed by the discharge summary from Tenwek Hospital produced as Exhibit 4.

After considering the medical reports and the authorities cited by Counsel the trial court assessed and awarded the respondent general damages in the sum of Kshs. 650,000/= and special damages in the sum of Kshs. 7,050/=.

In assessing the general damages, the trial Magistrate took into account past awards in the cases of **Kakuzi Limited v Stephen Njoroge Mungai & another [2020] eKLR** and **Kiru Tea Factory & another v Peterson Watheka Wanjohi [2008] eKLR**.

On the specials the trial Magistrate relied on the principle enunciated by the Court of Appeal in the case of **Hahn v Singh [1985] KLR 216** that: -

**“Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”**

This appeal is premised on grounds that: -

**“1. The learned trial magistrate erred in law and fact in relying on extraneous evidence and thereby arriving at an erroneous conclusion condemning the defendant to General Damages of Kshs. 650,000/= which was manifestly excessive in the circumstances.**

**2. The learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of Kshs. 7,050/= without concrete documentary evidence.**

**3. The learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to net damages of Kshs. 459,935/=.**

**4. The learned magistrate erred in law and fact in failing to appreciate the long established principle of *stare decisis*, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.**

**5. The learned trial magistrate erred in law and fact in failing to appreciate as follows: -**

**(i) That the plaintiff’s pleadings and the evidence tendered in support thereof was incapable of sustaining the excessive award of damages.**

**6. The learned trial magistrate erred in law and fact in entering judgement in favour of the plaintiff against the defendant inspite of the plaintiff’s miserable failure to establish his case more especially on quantum.**

**7. The learned trial magistrate erred in law and fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances.”**

The appeal was canvassed by way of written submissions. It is vehemently opposed.

Counsel for the appellant submitted that the trial Magistrate awarded damages that were inordinately high. Counsel submitted that Kshs. 300,000/= would have sufficed. To support his submissions Counsel relied on two cases: -

· **Damaris Mwangeli Muia v Kenya Wildlife Service [2017] eKLR.** Counsel submitted that in this case a sum of Kshs. 500,000/= was awarded for much more severe injuries.

· **Daniel Otieno Owino & another v Elizabeth Atieno Awuor [2020] eKLR** where an award of Kshs. 600,000/= was substituted with that of Kshs. 400,000/= yet the plaintiff had in Counsel’s estimation sustained much more serious injuries than those of the respondent herein.

In regard to specials, Counsel urged this court to award only the amount that was specifically pleaded and proved by the production of relevant receipts.

For the respondent it was submitted that considering the injuries as well as past awards for similar injuries the award by the trial Magistrate was fair and reasonable. Counsel for the respondent urged this court not to interfere with the awards. For the specials Counsel contended that the same were specifically pleaded and proved and the award was therefore justified. Counsel submitted that the appeal has no merit and the same should be dismissed and costs awarded to the respondent.

It is trite that the assessment of damages is in the discretion of the trial court and an appellate court will not interfere unless it is shown that the trial court took into consideration an irrelevant fact or failed to take into consideration a relevant fact or the sum awarded is inordinately low or high that it must be a wholly erroneous estimate of the damage or that the court misdirected itself on a principle of law – see the case of **Peter Nyangacha v Nyagaka Bisera Peter [2018] eKLR** and also the case of **Kemfo Africa Ltd t/a Meru Express Services [1976] & another v AM Lubia & another (No. 2) [1985] eKLR.**

While the assessment of damages is discretionary the exercise of that discretion is guided by certain principles. Among those principles is that comparable injuries should as far as possible be compensated by comparable awards albeit bearing in mind that no two cases are exactly alike. In the case of **Stanley Maore v Geoffrey Mwenda [2004] eKLR** the Court of Appeal stated: -

**“.....Having so said, we must consider the award of damages in the light of the 0injuries 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.”**

- See also the case of **Simon Taveta v Mercy Mutitu Njeru [2014] eKLR** where the Court of Appeal observed: -

**“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”**

The other principle is that the court must consider inflation and passage of time. This was so held in the case of **Ugenya Bus Service v Gachoki [1982] eKLR** and also in the case of **Jabane v Olenja [1986] KLR 661** where the court stated: -

***“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.”***

I am satisfied that in arriving at the awards the learned trial Magistrate took into account all the above principles. I too have considered the respondent’s case in light of the above principles. The injuries sustained by the plaintiffs in the cases cited by Counsel for the appellant were not as severe as those of the respondent in the instant cases.

The specials were specifically pleaded and strictly proved by production of receipts and were hence properly awarded. I find therefore that the trial Magistrate did not err and that the awards were fair and just in light of the injuries suffered by the plaintiff, past awards and passage of time.

In the premises I see no good reason to interfere with the awards. This appeal is not merited and it is dismissed with costs to the respondent. It is so ordered.

**JUDGEMENT SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF MARCH 2021.**

**E. N. MAINA**

**JUDGE**