



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO 105 OF 2019

REAMIC INVESTMENT LIMITED.....APPELLANT

VERSUS

JOAZ AMENYA SAMUEL.....RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable S.K. Onjoro (SRM) Kisii Law Courts delivered on the 17th May 2019)

JUDGMENT

1. This appeal is against quantum only. The respondent was injured in a road traffic accident which took place on 7th December 2015 along Ogembo – Ikoba road when motor vehicle registration KCD 084H collided with the motor cycle registration number KMDC 303J driven by the respondent and as a result the respondent suffered injuries. The issue of liability was settled by consent in the ratio 70:30 in favour of the respondent. The trial magistrate assessed general damages at Kshs. 600,000/-, special damages of Kshs 165,750 and future medical expenses of Kshs 150,000/- which award has precipitated this appeal.

2. The appellant in his memorandum of appeal raises the following grounds;

1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high erroneous, oppressive and punitive and amounts to miscarriage of justice.
2. The Learned trial Magistrate ignored the Appellant's submissions, paid lip service and made no reference to all the precedent on general damages cited before her, thus coming to a wrong decision on the quantum.
3. The Learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards, and ignoring completely the appellant's submissions thereon.
4. The Learned trial magistrate erred in law and in fact in making an award of Kshs 600,000/- without giving any reason for such an award and thus made an award that was arbitrary, capricious and inordinately high, erroneous, and which amounts to a miscarriage of justice.
5. The Learned trial Magistrate erred in law and in fact in awarding damages for future medical expenses at Kshs 150,000.00 when such damages had neither been pleaded nor proved as required by law.
6. The Learned trial Magistrate erred in law and in fact in awarding special damages for sums that were larger than pleaded ad/or that were neither pleaded nor proven as required by law.

3. According to the plaint the respondent sustained the following injuries: open left femur fracture, abrasion on the left knees, face, neck, right upper lip and left upper lip as well as a contusion on the anterior chest.

4. The appellant submitted that in awarding damages the trial court ought to have considered damages awarded for similar injuries. They contend that the trial court did not consider their authorities where various plaintiffs had sustained a fracture of the femur and soft tissue injuries. They argued that the court should therefore set aside the judgment on general damages and substitute it with an award of Kshs 350,000/-.

5. It was also submitted that future medical expenses must only be pleaded but must also be proved and the case of **Simon Taveta v Mercy Mutitu Njeri (2014) eKLR, (CACA No 26 of 2013)** was cited in support of its position. They contend that the respondent in his plaint did not seek for expenses for future medical attention and that there was no basis granting the award.

6. Finally, they submitted that the respondent pleaded special damages of Kshs 158,700 and produced receipts totaling to Kshs 158,700/- which was conceded by the appellant. However, the trial magistrate in her judgment awarded the respondent special damages of Kshs 165,750.

7. The respondent submitted that the trial court's award on general damages was reasonable and a fair estimate of damages pursuant to the injuries suffered by the respondent. It was further submitted that as long as the injured party proves that he is bound to incur future medical expenses as a result of the negligence of the other party, then the same shall be awarded. He advanced that according to the medical report by Dr Morebu, he noted that there will be need to remove metal implants which will cost Kshs 150,000/-. The respondent finally submitted that it pleaded and proved that it was entitled to special damages of Kshs 165,750/-.

8. The parameters under which an appellate court will interfere with an award in general damages was stated by the Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR** as follows:

'An appellate court will not disturb an award for general 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...'

9. The Court of Appeal observed in **Simon Taveta vs. Mercy Mutitu Njeru [2014] eKLR** that-

"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."

10. In this instant case it is not disputed that the respondent sustained a fracture of the femur and soft tissue injuries. The respondent maintains that the trial court made no error in awarding Kshs 600,000/- and has cited the case of **David Kimathi Kaburu v Dionisuis Mburugu Itirai [2017] eKLR**. In the said case the plaintiff sustained two fractures, fracture mid shaft femur and intertrochanteric fracture and was awarded Kshs 630,000/-. In my view his injuries were severe considering that the plaintiff in **David Kimathi Kaburu v Dionisuis Mburugu Itirai (supra)** suffered two fractures.

11. The appellant cited the cases of 6 cases where the courts had awarded general damages ranging from Kshs 200,000/- to Kshs 300,000/-. They therefore proposed that an award of Kshs 300,000/- would be sufficient. They cited the case of **CIVIL APPEAL NO. 82 OF 2008, T A M (Minor suing through her father and next friend JOM) Richard Kirimi Kinoti and Another (2015) eKLR** where the Plaintiff sustained fracture of the left femur and laceration on the right temple, and blunt chest injuries. A metal plate was inserted in the fractured leg. He was awarded general damages of Kshs 250,000/= in November 2015. In **Ibrahim Kalema Lewa vs Esteele Company Limited (2016) eKLR**, the Appellant sustained intertrochanteric fracture of the left femur and physical and psychological pains and was awarded Kshs.300,000/=. The plaintiff in **Kisii HCCA No. 66 of 2017, Erick Ratemo vs Joash Nyakweba Ratemo(2018)Eklr** sustained abrasion and deep cut wound on the face, cut wound on the upper lip, contusion on the anterior chest wall, dislocation on the right shoulder, bruises on the right hand, blunt injury on the left and right knee, epistaxis and fracture of the right femur and the High Court upheld an award of Kshs. 300,000/= as general damages in September 2018. He also cited the cases of **ELDORET CIVIL APPEAL NO. 106 OF 2013 Hashim Mohamed Said & another v Lawrence Kibor Tuwei[2018]Eklr**, **MURANG'A HIGH COURT CIVIL CASE NO 193 OF 2013 Thomas Mwangi & another [2017] eKLR**, and **KAKAMEGA CIVIL APPEAL NO. 85 OF 2016 John Shikuku Keya v Lubao Jaggery Limited [2018] Eklr**.

12. The cases cited by the appellant had more comparable injuries to those sustained by the respondent and I find that an award of Kshs 350,000/- would be more appropriate as general damages.

13. I now turn to consider the award of future medical expenses. *A claim for future medical treatment was part of general damages and thus did not need to be specifically pleaded (see Thomas K. Ngaruiya & 2 Others Vs David Chepsiror [2012] eKLR)*. The trial thus erred in awarding the respondent future medical expenses as the same was not sought in the plaint. Similarly, special damages must be strictly pleaded and proved and the amount pleaded in the plaint was Kshs 158,700, thus the trial court erred in awarding special damages of Kshs 165,750/-.

14. For the reasons set out above, I find that the sum of Kshs. 350,000 for general damages and 158,700/- for special damages was proved. The award of Kshs. 600,000 and Kshs 165,750 for general and special damages respectively, is hereby set aside. Consequently, the award in favour of the respondent is as follows:-

a) General damages	Kshs 350,000
b) Special damages	Kshs. 158,700
c) TOTAL	Kshs. 508,700
Less 30% contribution	Kshs 152,610

356,090/-

15. The appellant shall have the cost of this appeal. It is hereby ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF APRIL, 2021

R. E. OUGO

JUDGE

In the Presence of;

Mr. Karanja For the Applicant

Miss Osebe For the Respondent

Ms. Rael Court Assistant