



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 70 OF 2019

DENNIS MATAGARO.....APPELLANT

VERSUS

NKO (Minor suing through next friend and father WOO)

*(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 8th February 2016 along the Kisii – Migori road when motor vehicle registration KBK 483V Toyota Matatu driven by the appellant’s driver veered off the road and hit the respondent. The issue of liability was settled by consent and was apportioned in the ratio 80:20 against the appellant. The trial magistrate assessed general damages at Kshs. 700,000/- which award has precipitated this appeal.
2. The injuries sustained by the respondent as pleaded in the plaint were as follows: mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the left tibia and fibula. In support of the case, the respondent produced a report by Dr Ezekiel Oganda Zoga who examined her on 13th April 2016 confirming the above outlined injuries. He noted that the respondent was in the process of recovery and no permanent injury was anticipated.
3. Although the appellant made no submissions on quantum before the lower court, they now propose that an award of Kshs. 180,000/- would be sufficient. They cited the case of **JMN (Minor Suing through Next Friend and Father WWN v Petroleum & Industrial Service Ltd [2014] eKLR**.
4. The respondent submitted that the trial court’s award was not inordinately excessive to warrant this court’s intervention. They cited the case of **Francis Ndungu Wambugui & 2 Others v VK a minor suing through next friend and mother MCWK (2019) eKLR** where the plaintiff was awarded Kshs 1,000,000/- after sustaining the injury of compound fracture of tibia fibula and **Clement Gitau v GKK [2016] eKLR** where the plaintiff was awarded Kshs 600,000/- upon sustaining a fracture in the tibia.
5. 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...'

6. 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.”

7. The trial court having considered the plaintiff’s authorities more particularly the **Clement Gitau v GKK case (supra)**, where the plaintiff suffered a fracture of the left tibia and bruises on the neck and was awarded Kshs 600,000/-. In the circumstance the award by the trial court was thus not inordinately high. The appellant was afforded the opportunity to file its submissions and cite authorities to guide the trial court on the award of damages failed to do so.

8. In **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR** the court stated as follows: -

“It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance ...”

9. For the reasons set out above, the Appellant has failed to satisfy this Court that the Learned Trial Magistrate applied the wrong principles and/or arrived at a figure that was inordinately high.

10. In the circumstances the Appeal is dismissed with costs.

DATED, SIGNED and DELIVERED at KISII this 22nd day of APRIL, 2021.

R. E. OUGO

JUDGE

In the presence of:

Mr. Omotto For the Applicant

Mr. Nyambati h/b Miss Nyanaro For Respondents

Ms Rael Court Assistant