



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'UJ.)

CIVIL APPEAL NO. 117 OF 2019

DG (Minor suing through her next friend MOR ...APPELLANT

VERSUS

RICHARD OTIENO ONYISI.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. S.K. Onjoro (SRM) dated and delivered on 4th October 2019 in Kisii CMCC No. 337 of 2018)

JUDGEMENT

1. The suit giving rise to this appeal was commenced by the appellant following a road traffic accident that occurred on 26th January 2018 along Kisii – Nyamira road near Timsales Jogoo area. The respondent's motor vehicle registration mark KBV 424 U was being driven along that road when it knocked down the minor occasioning her injuries which were particularized in the plaint as a chest contusion, left tibia fracture, bruises on the left foot and bruises on the left leg. The appellant sought damages for pain and loss and costs of the suit.
2. The respondent filed a statement of defence traversing all the allegations of fact set out in the plaint. In the alternative, he claimed that the minor or her guardian substantially contributed to the accident.
3. The minor's mother MOR (PW1), testified before the trial court. She blamed the owner of the vehicle for causing the accident and stated that the minor had sustained a fracture on the left leg and pain on her chest which had not healed. She produced a copy of her National Identification Card, treatment notes, P3 form, demand letter, medical report, receipt for Kshs. 5,200/=, copy of records for the vehicle and a bundle of receipts.
4. On being probed during cross-examination, PW1 stated that the minor was 6 years old when the accident occurred. She admitted that she did not witness the accident and that no one was supervising the child. She testified that she had been told that the minor was not crossing the road and was waiting for her older sisters. She also added that the minor was at first taken to Oresi Hospital and later to Kisii Teaching and Referral Hospital and was not admitted.
5. PC Paul Mung'atia (PW2), who was attached to Kisii police station and performing traffic duties at the time, produced a police abstract issued on 9th February 2018 with respect to the accident involving the respondent's vehicle and the minor. He testified that 2 reports had been made. The first report was by a teacher of the minor which did not indicate whether the point of impact was in the middle or side of the road.
6. Edna Kwamboka Kenyatta (DW1) testified that she was in her motor vehicle registration no. KBV 424 U when the minor ran in front of her car and she hit her. She testified that the minor was crossing the road from right to left and that the accident happened on the left side of the road. She took the child to Oresi Health Center and later to Kisii Level 6 hospital where they left the child with the parents. She testified that they had paid all the expenses which were over Kshs. 1,000/= and reported the accident at Kisii police station.
7. On analyzing the evidence placed before it, the trial court found that the appellant had not proved any negligence on the part of the respondent and dismissed the claim against her. It however proceeded to indicate that it would have awarded the appellant a sum of Kshs. 350,000/= as general damages for pain and suffering and special damages of Kshs. 5,500/= if she had been successful at proving her case.
8. Dissatisfied with the finding of the trial court, the appellant instituted this appeal contesting the trial court's finding on both liability and quantum. The respondent conceded the appeal on liability and the parties recorded a consent before this court in the ratio of 80:20 in favor of the appellant on 6th October 2020.

9. The only issue that now remains for determination is the assessment of damages.
10. The appellant's counsel proposed an award of Kshs. 800,000/= in his submissions before the trial court. This proposal was based on the case of **David Kimathi Kaburu vs Dionisius Mburug Itiari [2017]eKLR** where the court upheld an award of Kshs. 630,000/= where the respondent had suffered fragmental fracture mid shaft femur and intertrochanteric fracture.
11. In her submissions before this court, an award of Kshs. 1,200,000/= has been suggested as adequate compensation for the appellant. In support of his submissions the appellant's counsel relied on the case of **Kornelius Kweya Ebitchet Vc & P Shoe Industries Ltd [2008] eKLR** where the plaintiff who had sustained a blunt trauma to the forehead and compound fracture of the left tibia and fibula bones was awarded Kshs. 1,000,000/=.
12. The appellant's counsel also cited the case of **Fred Mohinga Kipkigiya vs David Agreey Zimbiru [2011]eKLR** where the court reduced an award of Kshs. 800,000/= to an award of Kshs. 650,000/=. The plaintiff in that matter had sustained a fracture of the right femur and fracture of the distal femur in addition to soft tissue injuries.
13. On the other hand, the respondent proposed an award of Kshs. 300,000/= before the trial court. She relied on the case of **Harun Muyoma Boge v Daniel Agulo [2015]eKLR** where the court increased the lower court's award from Kshs. 150,000/= to Kshs. 300,000/= for the appellant who had sustained a compound fracture with permanent effects.
14. She also relied on the case of **Jitan Nagra v Abidnego Nyandusi Oigo [2018]eKLR** where the respondent was awarded a sum of Kshs. 450,000/= in general damages for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.
15. Reliance was also placed on the case of **Rayan Investments Limited v Jeremiah Mwakulegwa Kasha [2017]eKLR** where the court awarded the claimant a sum of Kshs. 300,000/= as general damages for a fracture of the right fibula, severe blunt trauma on the left ankle joint, bruises on the right elbow and blunt trauma on the right wrist.
16. In this appeal, the respondent's counsel maintained that a sum of Kshs. 300,000/= would be adequate compensation under the head of general damages. The case of **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR** and the case of **Mbithi Muinde William v Rose Mutheu Mulatia [2019] eKLR** were relied on to buttress the proposal.
17. In the case of **Daniel Otieno Owino (supra)** the court awarded the respondent a sum of Kshs. 600,000/= as compensation for a compound fracture of the tibia/fibula bones on the right leg, deep cut wound on the right leg, head injury with cut wound on the nose, blunt chest injury, soft tissue injury on the left lower limb involving the high and ankle region.
18. In **Mbithi Muinde William (supra)** the respondent was awarded a sum of Kshs. 400,000/= as compensation for a swollen, tender left wrist and left leg, fracture of the left 5th metacarpal bone and fracture of the right tibia.
19. I concur with the exposition of the court in the case of **Harun Muyoma Boge (supra)** on the assessment of damages in personal injury claims. The court held:
- “The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”
20. The guiding principle in the award of damages is that whereas no two injuries are exactly alike, comparable injuries should, as far as possible, be compensated by comparable awards. (See **Stanley Maore vs Geoffrey Mwenda Civil Appeal No. 147 of 2002 [2004]eKLR** and **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR**)
21. The nature and extent of the minor's injuries is not in contest. It is agreed that the minor sustained a chest contusion, left tibia fracture, bruises on the left foot and bruises on the left leg.
22. In the cases referred to by the appellant, the plaintiffs had sustained multiple fractures in addition to soft tissue injuries. PW1 testified that the minor was still in pain but there was no assessment of permanent disability in the medical documents produced before the court. The cases she referred to were more severe and inapplicable in the circumstances.
23. Other than the case of **Rayan Investments Limited (supra)** the other authorities referred to by the respondent also involved compound or multiple fractures which were more severe as compared to the injuries sustained by the appellant in this case.
24. In September 2017, the court in **Rayan Investments Limited (supra)** awarded the respondent a sum of Kshs. 300,000/= for more or less the same injuries as those suffered by the appellant herein. Taking into account the principles set out above, the totality of the circumstances and the rate of inflation, I find that a sum of Kshs. 400,000/= will suffice as general damages for pain and suffering.
25. Next, I turn to the appellant's claim for special damages which must not only be pleaded but must also be proved with a degree of certainty and particularity. The appellant claimed and was able to prove that Kshs. 5,000/= was spent on preparing the medical report, Kshs. 550/= was spent on acquiring the copy of records from the registrar of motor vehicles and Kshs. 105/= was spent on sending the demand letter via registered post. She is therefore entitled to a sum of Kshs. 5,655/= in special damages.

26. For the reasons given above, this appeal is found to have merit. The decision of the trial court is hereby set aside and substituted with an award of **Kshs. 324,524/=** made up as follows:

a. General damages for pain and suffering- Kshs. 400,000 /=

b. Special damages Kshs. 5,655/=

Less 20%

Total 324,524 /=

27. Interest on the award above shall be at court rates from the date of this judgment.

28. As the respondent conceded to the appeal on liability, she shall bear 2/3 of the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL 2021

A.K. NDUNG’U

JUDGE