



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 3 OF 2020

1. MONYORO MONG'ARE SHEM.....1ST APPELLANT

2. NICHOLAS MONG'ARE.....2ND APPELLANT

=VRS=

ROSE KEBAKI.....RESPONDENT

{Being an appeal against the Judgement of Hon. B. M. Kimtai

(Mr.) – PM Keroka dated and delivered on the 17th day of December

2019 in the original Keroka Principal Magistrate’s Court Civil Case No. 104 of 2018}

JUDGEMENT

By an amended plaint dated 15th October 2018 the respondent sued the appellants for compensation for injuries sustained in a motor accident that occurred along the Nyansiongo Kijauri Road on 1st August 2018 involving her as a pillion passenger in a motor cycle Registration No. KMDK 005C and a motor vehicle Registration No. KAR 388X belonging to the appellants. Her prayers in the plaint were for: -

- “(a) General damages, damages for loss of earnings and earning capacity.**
- (b) Special damages.**
- (c) Future medical expenses and operations.**
- (d) Costs and interest of this suit.**
- (e) Interests on (a) and (b) above from the date of judgement and (b) from the date of filing this suit.”**

It was not disputed that the respondent sustained the following injuries as a result of the accident.

- (i) Displaced fracture of the right femur.**
- (ii) Soft tissue injuries on the neck.**
- (iii) Soft tissue injuries of the chest.**
- (iv) Soft tissues injuries of the shoulder joint.**
- (v) Soft tissue injuries of the forearms.**

After hearing and considering the evidence before him the trial Magistrate assessed and awarded the respondent damages as follows: -

“(a)

- (b) General damages – Kshs. 1,500,000/=
- (c) Cost of domestic helper – Kshs. 2,304,000/=
- (d) Future medical expenses – Kshs. 100,000/=
- (e) Special damages – Kshs. 45,650/=
- (f) Costs of the suit.
- (g) Interest on the above.”

The appellant was aggrieved by the quantum of damages hence this appeal. The gist of the appeal is that the quantum of damages is excessive and that some of the damages awarded were not pleaded.

The appeal was to be canvassed through written submissions but those of the respondent were not received despite being granted sufficient time to file and being reminded to do so. Those of the appellant were received on 18th March 2021.

I have carefully considered the submissions on record but as an appellate court I also have a duty to consider and re-evaluate the evidence in the trial court so as to arrive at my own independent conclusion (*See Selle & another v Associated Motor Boat Company Limited & others [1968] EA 123*). I am also alive to the principle that the assessment of damages is discretionary and I ought not to disturb the awards by the trial court unless it is shown that the trial court took into account an irrelevant factor or left out of account a relevant factor or the award was inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage (*See Kemfro Africa Ltd v AM Lubia & another (1982 – 88) 1KAR*). I am also guided by the principle that while no case is exactly like the other comparable injuries should attract comparable awards and that the passage of time and hence inflation should always be taken into account (*see the case of Jabane v Olenja [1986] KLR 661*).

Contrary to the submission by the appellant that the respondent ought not to have been awarded general damages for pain, suffering and loss of amenities as the same were not pleaded, the amended plaint has a specific prayer for general damages. I am however persuaded that that the award of Kshs. 1,500,000/= is inordinately high. Save for the displaced fracture of the right femur the other injuries sustained by the respondent were to the soft tissue. In the case of *Kenya Power & Lighting Co. Ltd & another v Kathuo Muthangya [2018] eKLR* where the respondent sustained a fracture to the left tibia and fracture to the left fibula the court awarded Kshs. 600,000/=. Similarly, in the case of *Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR* the court awarded Kshs. 700,000/= for a respondent whose injuries it classified as multiple serious soft tissue injuries and a compound fracture and who it noted was admitted in hospital for 42 days. The respondent in the instant case spent only 10 days in hospital meaning her injuries were much less severe. In light of the above two awards even were this court to take inflation into account the award of the trial Magistrate is excessive. Comparable injuries must attract comparable awards and in the premises I shall set that award aside and substitute it with one for Kshs. 600,000/= (six hundred thousand shillings only).

In regard to the future medical expenses of Kshs. 100,000/= this case is distinguishable from that of *Tracom Limited and another v Hassan Mohamed Adan [2009] eKLR* cited by Counsel for the appellant in that the medical expenses were specifically pleaded and then proved through the evidence of Dr. Wellington Kianda. The same shall therefore remain undisturbed. The same cannot however be said of the sum of Kshs. 2,304,000/= awarded as cost of hiring a helper. There was no prayer in the plaint at all to support the award of that sum. Such damages would be in the nature of special damages as the same are capable of being ascertained at the time of filing suit and hence they must be specifically pleaded and strictly proved which was not the case here and accordingly the award is set aside in its entirety.

In regard to the special damages Counsel for the appellant submitted that only those that were strictly proved should be awarded and that those whose receipts do not meet the threshold of the **Stamp Duty Act** should be struck out. I note from the judgement of the trial court (*see page 42 paragraph 30 of the record of appeal*) that the plaintiff proved Kshs. 7,000/= for the medical report, Kshs. 3,000/= for crutches, Kshs. 3,500/= as medical expenses and Kshs. 550/= for the copy of records a total of Kshs. 14,050/= which is what the trial Magistrate should have awarded. The sum of Kshs. 45,650/= that was awarded is not based on evidence and it is set aside and substituted with Kshs. 14,050/.

In the upshot this appeal is found to be merited and the assessment of damages by the trial court is set aside and substituted as follows: -

- (a) Liability – 100%.
- (b) General damages for pain, suffering and loss of amenities – Kshs. 600,000/=
- (c) Future medical expenses – Kshs. 100,000/=
- (d) Special damages – Kshs. 14,050/=
- (e) Interest on the above as is usually calculated.
- (f) Costs of the suit in the court below.

The appellants shall as they have succeeded substantially get the costs of this appeal. It is so ordered.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20TH DAY OF
MAY 2021.**

E. N. MAINA

JUDGE