



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. E006 OF 2020**

**RETCO EAST AFRICA LIMITED.....APPELLANT**

**=VRS=**

**WYCLIFF KENNEDY MAKORI.....RESPONDENT**

*{Being an appeal against the Ruling of Hon. M. O. Wambani (Mrs.) – CM Nyamira*

*dated and delivered on the 17<sup>th</sup> day of November 2020 in the original Nyamira*

*Chief Magistrate’s Court Civil Case No. 144 of 2017}*

**JUDGEMENT**

This appeal is against the assessment of general damages for pain, suffering and loss of amenities awarded to the respondent by the trial court. The appellant was aggrieved by the award of Kshs. 500,000/= for injuries which were agreed to be: -

- (i) Bruises on the left knee.**
- (ii) Blunt trauma on the left cheek.**
- (iii) Loss of two lower pre-molar teeth.**
- (iv) Blunt trauma to the back.**

A consent judgement on liability was recorded in the ratio 50%:50% leaving assessment of the damages to the trial Magistrate. The grounds of appeal are that:-

- “1. The quantum of general damages for pain and suffering and loss of amenities is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.**
- 2. The Learned Trial Magistrate ignored the appellant’s submissions, paid lip service and made no references to all of the precedents of 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. 500,000/= 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.”**

The appeal proceeded by way of written submissions.

By this appeal this court is urged to interfere with the trial court’s assessment of damages. It is trite that the assessment of damages is discretionary and there is a long line of authorities to the effect that an appellate court can only interfere if it is shown that the trial court took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded is so inordinately low or so inordinately

high as to be a wholly erroneous estimate of the damage (*see for instance Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No. 2) [1985] eKLR*).

This court is likewise alive to the principle that while the assessment of damages is discretionary a court must take into account the general principles that comparable injuries ought to attract comparable awards (*see Morris Mugambi & another v Isaiah Gituru [2004] eKLR*) and that it is also important to take inflation or the passage of time into consideration (*see Jabane v Olenja [1986] KLR 661* where the Court of Appeal stated: -

**“1. Among the points that the Court of Appeal should consider in approaching an award of damages made by a trial judge are that:**

- (a) Each case depends on its own facts;**
- (b) For the sake of those who have to pay insurance premiums, medical fees or taxes, the awards should not be excessive;**
- (c) Comparable injuries should attract comparable awards;**
- (d) Inflation should be taken into account; and**
- (e) Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence. Or is so low as to be an erroneous estimate, it should be left alone.”)**

The gist of this appeal is that in assessing the general damages the trial magistrate did not take past awards into account. This is however not correct as in her judgement the trial magistrate expressed that she relied on the cases of **Henry Mbogo Gitau v Edwin Irungu Mukera [2016] eKLR** and **Vincent Cheruiyot Rono v Mombass Maize Millers Limited [2006] eKLR** where in her considered view the appellants who had similar injuries to those of the respondent were awarded a similar amount. The trial Magistrate also made it clear that she was alive to and that she had considered the submissions of Counsel for both sides. This can be seen on pages 22 and 23 of the judgement which is found on page 98 of the Record of Appeal. Grounds 1, 2 and 3 of the memorandum of appeal cannot therefore hold.

Be that as it may I have considered the award in light of the injuries sustained and I am persuaded that the award was excessive even taking all the above principles into account. Counsel for the appellant has proposed an award of Kshs. 200,000/= and has cited several cases to support their submissions. On their part Counsel for the respondent have submitted that the award of Kshs. 500,000/= was reasonable and this court should not interfere with it. Counsel for the respondent cited several cases in support of their submissions. I have perused the cases cited by both sides and whereas I agree that the trial Magistrate misdirected herself in relying on cases in which the injuries therein were in no way comparable to those of the respondent herein due to their nature and severity, I find the award of Kshs. 200,000/= proposed by Counsel for the appellant too low. This is in view of the fact that most of the cases cited by Counsel for the appellant were decided in 2017 hence more than two years before the judgement the subject of this appeal. As we have seen the court assessing the damages must also consider inflation. It is also instructive that the respondent herein lost two lower premolars and may require artificial ones in future. Doing the best I can therefore I would reduce the award to Kshs. 400,000/=. The special damages shall remain undisturbed as the same were not contested and the total award shall be subject to the agreed ratio of contribution. As the appellant has succeeded only minimally he shall be entitled to only half the costs of this appeal. It is so ordered.

**SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA THIS 24TH DAY OF JUNE 2021.**

**E. N. MAINA**

**JUDGE**