



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. E019 OF 2021**

**CYPRIAN JAIRO ODHIAMBO.....APPELLANT**

**=VRS=**

**ROBIN GITANDA.....RESPONDENT**

***{Being an Appeal against the Judgment of Hon. W. C. Waswa (Mr.) - RM Nyamira dated and delivered on the 22<sup>nd</sup> day of February 2021 in the original Nyamira Chief Magistrate's Court Civil Case No. 59 of 2020}***

**JUDGEMENT**

By a consent of Counsel for the parties recorded on 1<sup>st</sup> February 2021 judgement on liability was entered in favour of the respondent in the ratio 80%:20%. Thereafter the trial court awarded the respondent general damages in the sum of Kshs. 250,000/=, special damages of Kshs. 7,050/=, costs of the suit and interest. The award was in respect to injuries sustained in a motor accident that occurred on 1<sup>st</sup> August 2019 along Kericho - Kisii Road at Nyaramba area involving motor vehicle registration number KCP 247G which the respondent was driving and motor vehicle registration number KCE 894X belonging to the appellant.

Being aggrieved by the trial court's award of damages, the appellant preferred this appeal. The grounds of appeal as contained in the Memorandum of Appeal filed herein on 22<sup>nd</sup> June 2021 are: -

**“1. THAT the Learned Trial Magistrate erred in law and in fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs. 250,000/= that was overly in excess in the circumstances of the case.**

**2. THAT the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.**

**3. THAT the Learned Trial Magistrate's exercise of discretion in assessment of quantum was injudicious.”**

By the appeal, this court is urged to set aside the assessment of damages by the lower court and re-assess the same.

The appeal, which is vehemently opposed, was canvassed through written submissions.

Counsel for the appellant submitted that the trial court failed to exercise its discretion properly by taking into account irrelevant factors and thereby awarded a sum of Kshs.250, 000/= that was inordinately high and excessive. Counsel submitted that this court can properly disturb the award if the trial court took into account an irrelevant factor, left out of account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. Counsel submitted that these principles were set out in the cases of **Kanga v Manyoka [1961] EA 705,709,713 & Lukenya Ranching and Farming Coop Society Ltd v Kavoloto [1979] EA** as cited in the case of **Paul Kipsang & another v Titus Osule Osore [2013] eKLR**. Counsel contended that from the documents and pleadings it is clear that the respondent sustained only soft tissue injuries. Referring to the averments in the plaint, the treatment notes dated 11<sup>th</sup> August 2019 and the medical report by Dr. Morebu dated 30<sup>th</sup> March 2020 Counsel submitted that an award of Kshs.90, 000/= would be adequate compensation. To support his submission Counsel relied on the following cases where in his opinion the injuries sustained are similar to those in this case: -

- **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 Others [2019] eKLR.**
- **Ndungu Dennis v Ann Wangari Ndiragu & Another [2018] eKLR.**
- **Hassan Farid & Another v Saitaiya Ene Mepukori & 6 Others [2018] eKLR.**

On the issue of costs, Counsel for the appellant prayed that the appellant be awarded the costs of the appeal. Counsel cited **Section 27(1) of**

**the Civil Procedure Act** which provides that costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

The respondent on the other hand urged this court to uphold the trial court's award and find that the appeal lacks merit and dismiss the same with costs to the respondent. Counsel for the respondent submitted that the trial court applied correct principles and properly assessed damages payable to the respondent. Further, that regard was given to previous decisions submitted by both parties and the award is neither inordinately high or low. Counsel further submitted that the assessment of damages is discretionary but that the court is supposed to be guided and must apply correct principles to arrive at a reasonable compensation for pain and suffering and therefore, in order to succeed the appellant has to demonstrate that the assessment of damages is based on wrong principles. For that proposition Counsel relied on the following cases: -

- **James Mutungi v David Muasya Ndeleva [2015] eKLR.**
- **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR.**
- **Telkom Orange Kenya Limited v ISO Minor Suing Through His Next Friend and Mother JN [2018] eKLR.**
- **Peter Nyangacha v Nyagaka Bisera Peter [2018] eKLR.**

Counsel for the respondent further submitted that in his submissions before the trial court he had proposed a sum of Kshs. 400,000/= as general damages for pain and suffering and that he had relied on the cases of **Hanish Shah v Sherry Kyang'u [2020] eKLR** and **Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd [2006] eKLR** where Kshs. 400,000/= was awarded for similar injuries. Counsel contended that the award of the Learned trial Magistrate was fair and reasonable taking into consideration the injuries sustained by the respondent and bearing in mind the awards that have previously been made in cases where the plaintiffs had similar injuries. Further, that there is no error that would warrant interference by this court as that award is commensurate with the injuries sustained by the respondent.

An appellate court can only interfere with the award of a trial court where it is demonstrated that the trial court took into account an irrelevant factor or left out a relevant one or that the award is so inordinately high or low that it must be a wholly erroneous estimate of the damage. (*See the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5* where the Court of Appeal stated: -

***“An appellate Court will not disturb an award of 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.”***

The principles which ought to guide a court in the assessment of damages for personal injuries were enunciated in **Kigaragari v Aya [1985] KLR 273** where it was held that: -

***“1. In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public....”***

A trial court is also enjoined to consider the passage of time and the effect of inflation on the Kenya shilling. Counsel for the appellant submitted that the trial court failed to exercise its discretion properly by taking into account irrelevant factors and awarding a sum that was inordinately high and excessive. Counsel submitted that the respondent sustained soft tissue injuries which could not attract an award of Kshs. 400,000/= and submitted that an award of Kshs. 90,000/= would be adequate. To support his submission Counsel cited the following cases and submitted that the injuries therein were comparable and similar to those in this case: -

- **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] eKLR.**
- **Ndungu Dennis v Ann Wangari Ndiragu & Another [2018] eKLR.**
- **Hassan Farid & Another v Saitaiya Ene Mepukori & 6 others [2018] eKLR.**

I have carefully considered the submissions and the cases cited by Counsel for both parties. According to the medical report by Dr. Morebu Peter Momanyi dated 30<sup>th</sup> March 2020 the respondent sustained the following injuries: -

- **Blunt trauma to the lower back**
- **Bruises on the right leg**
- **Blunt trauma to the right knee**

The above injuries are also reflected in the P3 Form filled by the same Dr. Morebu on 11<sup>th</sup> September 2021 where they are classified as harm which is the least degree of injury. In the treatment notes taken on the day of the accident, the injuries noted were back pain and pain in the right leg. In effect the injuries sustained by the respondent were minor soft tissue injuries. This court notes that in the case of **Vincent Cheruiyot Rono v Mombasa Maize Millers Ltd [2006] eKLR** where an award of Kshs. 400,000/= was upheld by the appellate court the injuries were much more severe and included a 20% degree of disability. In the instant case, there was no disability noted. Similarly, in the case of **Hanish Shah v Sherry Kyang'u [2020] eKLR** Kshs.400, 000/= was awarded for severe soft tissue injuries which included trauma to the spine. It is my finding that the injuries sustained by the respondent herein cannot compare to those of the plaintiffs/respondents in the above cases. Therefore, it is my finding that the trial Magistrate acted on a wrong principle by basing his assessment on cases where the injuries were much more serious and in no way comparable to those of the respondent hence arriving at an award that is inordinately high.

In the case of **Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd [2015] eKLR**, Kshs.150, 000/= was awarded as general

damages for multiple severe soft tissue injuries including **soft tissue injuries to the left elbow, pelvic region, lower back and left knee; on account of the injuries to her back, the appellant could not carry heavy things and she had to wear a spinal cossette to support her back. Further, the appellant was still undergoing physiotherapy.** Similarly, in the cases of **Ahmed Said Amadi v Jacob Fundi Mugo [2021] eKLR** and **Techpack Industries Limited v Idah Gakii Meme [2021] eKLR**, Kshs.150, 000/= was awarded for soft tissue injuries. Doing the best I can therefore and bearing in mind that a court ought also to take inflation into account I assess the damages awardable to the respondent at **Kshs.150, 000/=**. In the premises the trial court's award of **Kshs. 250,000/=** is set aside and the same is substituted with an award of **Kshs. 150,000/= (one hundred and fifty thousand shillings)** which award is reasonable, adequate and fair in the circumstances. The special damages awarded shall remain undisturbed as they were not contested.

This appeal therefore succeeds to the extent that the award of **Kshs. 250,000/=** is set aside and substituted with an award of **Kshs.150, 000/= (one hundred and fifty thousand shillings)** with interest from the date of judgment in the court below. Costs follow the event and therefore the costs of this appeal shall be to the appellant. It is so ordered.

**JUDGEMENT SIGNED, DATED AND DELIVERED (ELECTRONICALLY VIA MICROSOFT TEAMS) AT NYAMIRA ON THIS 29TH DAY OF JULY 2021.**

**E. N. MAINA**

**JUDGE**