



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. E013 OF 2021**

**NYAMIRA LUXURY.....APPELLANT**

**-VERSUS-**

**DANIEL HANGAI GEGOYO.....RESPONDENT**

***{Being an Appeal against the Judgment of Hon. B. M. Kimtai (Mr.) - PM Keroka dated and delivered on the 2<sup>nd</sup> day of February 2021 in the original Keroka Principal Magistrate's Court Civil Case No. 60 of 2018}***

**JUDGEMENT**

By a plaint dated 22<sup>nd</sup> May 2018 the respondent sued the appellant herein for compensation for personal injuries sustained in a motor accident that occurred on 31<sup>st</sup> January 2018 along Keroka - Kisii road at Nyakeremo area. It was the respondent's case that he was travelling in motor vehicle registration number KBT 887X which was negligently driven by the appellant's driver, servant, agent or employee that it violently collided with motor vehicle registration number KCD 729 N/ZF 1059 as a consequence of which the respondent sustained grievous injuries.

In its statement of defence the appellant averred that if an accident occurred which was denied, then the same was caused by the reckless, negligent and/or careless acts or omission on the part of the respondent and the owner, servant, driver, agent and/or employee of motor vehicle registration number KCD 729N/ZF 1059. The particulars of the negligence of the respondent and the driver/owner of motor vehicle registration number KCD 729N/ZF 1059 were particularized at paragraph 8 of the appellant's defence.

After hearing and considering the evidence adduced the trial Magistrate entered judgment on liability at 100% in favour of the respondent. On the quantum of damages, the trial Magistrate awarded the respondent Kshs. 400,000/= as general damages and Kshs. 7,700/= as special damages and also awarded him the costs of the suit and interest.

Being aggrieved by the trial Magistrate's assessment of damages the appellant preferred this appeal. The grounds of appeal are: -

- "1. That the learned trial magistrate erred in law and in fact in awarding liability at 100% in favor of the Plaintiff as against the Defendant.**
- 2. That the learned trial magistrate erred in law and in fact in awarding Kshs.407, 700/= as damages which amount was excessive and lacked basis.**
- 3. That the learned trial magistrate erred in law and in fact in awarding Kshs.400, 000/= as general damages which amount was excessive, unjustified and contrary to the evidence on record.**
- 4. That the learned trial magistrate erred in law and in fact in failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.**
- 5. That the trial magistrate erred in law and fact by failing to consider the Appellant's evidence and submissions on record."**

By the appeal, this court is urged to set aside the judgment on liability and quantum by the trial court and substitute it with one dismissing the suit or reducing the damages.

The appeal was canvassed by way of written submissions.

In their submissions, Counsel for the appellant abandoned the ground raising the issue of liability and submitted that they would confine their submissions on the issue of quantum only. Counsel for the appellant submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and hence awarded a sum of Kshs.400, 000/= that was inordinately high and excessive. Counsel submitted that the discretion can be disturbed if the trial court took into account an irrelevant factor, left out of account a relevant factor or if 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 case 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 further submitted that from the documents and pleadings, it is clear that the respondent sustained soft tissue injuries and therefore an award of Kshs. 90,000/= would be adequate compensation. To support this submission Counsel cited the following cases where he submitted the injuries are comparable to those of the respondent herein: -

- **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.**
- **Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next friend) VAA [2019] eKLR.**

On the issue of costs Counsel for the appellant prayed that the appellant be awarded costs of the appeal and relied on **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.

Counsel for the respondent urged this court to uphold the decision of the lower court. On the issue of liability, Counsel submitted that the appellant did not call any witness to testify on their behalf and therefore the evidence tendered by the respondent remains uncontroverted. To support his submission Counsel relied on the following cases: -

- **Joseph Kahinda Maina v Evans Kamau Mwaura & 2 Others (2014) eKLR**
- **Interchemie EA Ltd v Nakuru Veterinary Centre Ltd NRB (Milimani) HCCC NO. 1658 OF 2000**
- **Motex Knitwear Mills Ltd v Gopitex Knitwear Mills Ltd NRB (Milimani) HCCC NO. 834 OF 2002 as cited in the case of AUTAR SINGH BAHRA & ANOTHER V RAJU GOVINDJI HCCC 548 OF 1998**

On the issue of general damages, Counsel for the respondent submitted that the P3 form, discharge summary and the 2<sup>nd</sup> medical report confirm that the respondent sustained the injuries pleaded. Counsel relied on the case of **David Kimathi Kaburu v Dionsius Itiari [2017] eKLR** where Kshs. 630,000/= was awarded for injuries similar to those of the respondent and the case of **Kenya Power & Lighting Co. Ltd v Mary Akinyi Civil Appeal No.72 of 2007** where Kshs. 500,000/= was awarded. Counsel urged therefore that taking inflation into account the award of the trial court should be upheld. Concerning the issue of special damages Counsel submitted that a bundle of receipts totaling to Kshs. 7,700/= was produced in support of the same and urged this court to uphold the same.

As the first appellate court I have a duty to reconsider the evidence adduced before the trial court and reevaluate it to draw my own independent conclusion and to satisfy myself that the conclusions reached by the trial Magistrate are consistent with the evidence. (*See the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123* and the Court of Appeal decision in the case of **Peter M. Kariuki v Attorney General [2014] eKLR**).

I shall not delve into the issue of liability as it is this court's finding that the same was abandoned by Counsel for the appellant in his submissions. The apportionment of liability by the trial court at 100% as against the appellant in favour of the respondent shall therefore remain undisturbed.

An appellate court can only interfere with the sum awarded where the appellant demonstrates 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. In the case of **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** the Court of Appeal observed as follows: -

***“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.”***

According to the medical report by Dr. Ezekiel Ogando Zoga dated 12<sup>th</sup> February 2018 the respondent sustained the following injuries: -

- Contusion on the whole chest.
- Subluxation of the left shoulder.
- Blunt trauma to the back.
- Contusion on both upper limbs (forearm).

- Deep laceration on the left hand.
- Deep laceration on the right leg.
- Head injury whereby he lost consciousness.

In his conclusion and/or prognosis the doctor stated that the respondent sustained severe soft tissue injuries which were expected to heal with time. Counsel for the appellant submitted that the trial court failed to exercise its discretion fairly by taking into account irrelevant factors and awarded the respondent an award that was inordinately high and excessive. Counsel further submitted that from the documents and pleadings it is clear that the respondent sustained soft tissue injuries and submitted that an award of Kshs. 90,000/= would be adequate compensation. To support this submission, Counsel cited four cases where he submitted the injuries are almost comparable and similar to those of the respondent. Those cases are: -

- **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.**
- **Elizabeth Wamboi Gichoni v JOO (Minor suing through mother and next friend) VAA [2019] eKLR.**

On the other hand, Counsel for the respondent submitted that the P3 form, discharge summary and the 2<sup>nd</sup> medical report confirm that the injuries pleaded were sustained. Counsel relied on the case of **David Kimathi Kaburu v Dionsius Itiari [2017] eKLR** where Kshs. 630,000/= was awarded for injuries similar to those of the respondent and the case of **Kenya Power & Lighting Co. Ltd v Mary Akinyi Civil Appeal No.72 of 2007** where Kshs. 500,000/= was awarded. The injuries sustained by the respondent are not contested because whereas Counsel for the appellant sought and had permission for the respondent to undergo a second medical examination, that report was not produced in evidence. The injuries sustained by the respondent were in my considered opinion severe even though it was expected they would heal with time.

General damages are intended to compensate for pain, suffering and loss of amenities and it is my finding that based on comparable cases the award of Kshs. 400,000/= was not inordinately high. In the circumstances the award of the trial court is upheld and the appeal is dismissed with costs to the respondent. It is so ordered.

**Judgement signed, dated and delivered (Electronically via Microsoft Teams) at Nyamira on this 29<sup>th</sup> day of July 2021.**

**E. N. MAINA**

**JUDGE**