



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO.616 OF 2016

CHIVASTI STEVE.....1ST APPELLANT

WILSON MBURU NYOIKE.....2ND APPELLANT

VERSUS

VA (A minor suing through the father and next friend JOK.....RESPONDENT

(Being an appeal from the judgment and decree of Mr. Orenge Senior Resident Magistrate

delivered on the 14th September 2016 in Milimani CMCC 321 of 2015)

JUDGMENT

1. The respondent (VA) sued the appellants (Chivatsi Steve and Wilson Mburu Nyoike) in Nairobi CMCC 321 of 2015 vide a Plaint dated 23rd January 2015 praying and seeking the following:

- a) General damages for pain and suffering and loss of amenities
- b) Special damages of Kshs. 3,500/=
- c) Costs and Interests

2. The appellants filed a defence dated 11th February 2015 and denied the claims. The matter later proceeded to full hearing and judgment was delivered on 14th September 2016 in favour of the respondent. The appellants were found to be 100% liable and the following awards made:

General damages for pain and sufferingKshs.450,000/=

Special damagesKshs. 3,500/=

Total.....Kshs. 453,500/=

3. Aggrieved by the Judgment, the appellants filed this appeal through Mugambi Mungania & Co advocates raising the following grounds:

- a) *That the learned magistrate erred in law and in fact in awarding the plaintiff general damages of Kshs. 450,000/= which is too high, contrary to established precedent on dependency.*
- b) *That the learned magistrate erred and misdirected himself in law and fact by applying the wrong and or did not apply the correct law, tests, doctrine and principles relating to the injury sustained by the plaintiff.*
- c) *That the learned magistrate erred in law and in fact in by taking irrelevant matters and/or by not taking relevant matters/evidence into consideration.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. The respondent was represented by Waiganjo Wachira & Co. Advocates.

5. A summary of the evidence adduced before the lower court will suffice.

6. The respondent (PW1) testified that on or about 27th May 2012 he was with his daughter walking along Moi's drive near Tena grand supermarket, when the appellant's motor vehicle KAV 365 S veered off the road and hit her. As a result, she suffered severe bodily injuries, loss and damages. She was taken to Victory hospital and a report was made to the police.

7. He produced a police abstract (PEXB1), P3 form (PEXB2), Medical report by Dr. Mwaura (PEXB4a) who charged Ksh. 3,000/= (receipt PEXB4b). A search (PEXB5) showed the 1st Appellant as the owner of the motor vehicle. A statutory notice (PEXB6) was issued by his advocate. He confirmed that the child had healed though she feels numbness when it is cold.

8. The appellants on the other hand, denied the respondent's claim and insisted the accident was contributed to by the respondent. They stated that the injuries and special damages if any were suffered, were not caused by the appellant's motor vehicle. They relied on the medical report by Dr. Wambugu and urged the court to award the plaintiff Kshs. 150,000/= for general damages while apportioning liability equally.

9. On ground (1) Mr. Owade for the appellants submits that the learned magistrate relied on the case of **Agnes Wanjiku Ndegwa v Kenya Power & Lightning Company (2014) eKLR** where the plaintiff suffered very serious injuries with permanent incapacity of 35%. In that case the plaintiff was awarded Ksh. 1,172,000/= for damages. He has therefore submitted that the award of Kshs. 450,000/= was too high.

10. Counsel relied heavily on the case of **Peter Kioko & Another v Hellen Muthee Muema (2018) eKLR** where Justice Meoli stated that:

“29. Although the appellant's submissions at the trial cannot be traced in the lower court file, it appears that the trial court in assessing damages in respect of the respondent's injuries failed to note that they were not exactly comparable to those of the plaintiff in Biryu Fondo, as the latter were more severe. The trial magistrate seemed to have erroneously applied the Fond Biryu case believing that the plaintiff therein had sustained a crush injury to the left toes, as in this case.”

*“30. Ideally, comparable injuries ought to attract comparable damages. In light of this erroneous application, and considering the authority in **Tawakal Bus Company** and the inflation factor, this court feels justified to interfere with the award of Kshs. 300,000/= as general damages for the crush injury to the left toe. The court reduces the said award from Kshs. 300,000/= to Kshs. 200,000/=.”*

11. He therefore submitted that the award of Ksh. 450,000/= was too high for the kind of injuries suffered by the respondent.

12. Mr. Waiganjo for the respondent submitted that the assessment of general damages is the discretion of the trial court and not the appellate court. That the appellate court can justifiably interfere with quantum of damages if it is satisfied that the trial court applied the wrong principles or misapprehended the evidence and arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.

13. He went on to submit that the trial court before reaching its decision applied the correct principles and did not leave out of consideration any relevant factor. He further submitted that on the assessment of damages by courts in personal injury cases they are guided by the principles stated in **Boniface Waiti & Another v Michael Kariki Kamau (2007) eKLR** as follows:

a) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

b) The award should be commensurable with the injuries sustained.

c) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

d) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

e) The awards should not be inordinately low or high.

14. Counsel submitted that the respondent while submitting that Kshs. 600,000/= would be adequate compensation at the trial court relied on the following authorities;

a) **Rivatex Ltd vs Philip Mochache Nyabao (1999) eKLR** where the plaintiff was awarded Kshs. 240,000/= for bruises on the right leg and fracture of the 1st toe metatarsal bone.

b) **Tarmal Wire Products Ltd vs Ramadhan Fondo Ndegwa {2014} eKLR** where the plaintiff sustained a fracture of the index finger and was awarded Kshs. 500,000/=

c) **Crstal industries Ltd vs Sevvas Mutunga Kilonza (2015) eKLR** where the plaintiff was awarded Kshs. 400,000/= in the year 2015 for fracture of the fingers among other injuries.

d) **Habiba Abdi Mohammed vs. Peter Maleve (2000) eKLR** where the Plaintiff was awarded Kshs.400, 000/= for soft tissue injuries.

15. Counsel contends that it's the duty of the parties to cite relevant case law to guide the court in making decisions and the court is not bound to rely only on the cited precedents. He further submits that the trial court did not misdirect itself as it clearly noted that the injuries in the **Agnes Wanjiku Ndegwa (supra)** were severe making the award higher than what was awarded in this case.

16. He relied on the case of **Lothike Lukolunjo v Kuyia Ludaam & Another (2019)** where the court upheld the trial magistrate's award of KShs. 600,000/= for injuries relatively similar to those occasioned to the respondent herein. He therefore urges the court to dismiss this appeal with costs.

Analysis and Determination

17. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

18. Section 78(2) of the Civil Procedure Act gives an appellate court the same powers to those of the lower court. It provides:

“Subject as aforesaid the appellate court shall have the same powers and shall perform as nearly as may be same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein”

19. Having considered the grounds of appeal, evidence on record, the rival submissions and the authorities cited, I find two issues falling for determination names.

i) Whether liability should be apportioned.

ii) Whether the quantum of damages should be disturbed.

20. The appellants in their defence dated 11th February 2015 denied the claims by the respondent. In the alternative they pleaded that the respondent was wholly and substantially responsible for the occurrence of the accident. However, when the matter came for hearing they did not adduce any evidence to rebut the respondent's evidence. PW1 **JO** testified on oath and explained how the accident had occurred. PW1 is the respondent's father and he was with the respondent on this date of accident. Upon scrutinizing PW1's evidence and the cross examination I am satisfied by the finding that the 2nd appellant was wholly to blame for the accident.

21. On the second issue of the award of damages the position in law is that this is largely an exercise of Judicial discretion. Instances where an appellate court will interfere with that discretion are well established.

22. In **Butt –vs Khan (1977)1KAR** it was held that;

“An appellate court will not disturb an award for damages unless it is 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.”

Also see: Arrow car Ltd Vs Bimomo & 2 others (2004) 2KLR 101; Deshire Muteti Wambua Vs KPLC {2013} eKLR

23. In **Halsbury's Laws of England 4th Ed, vol. 12(1) page 348**, the justification for the award of damages for pain and suffering is explained as follows;

“883. Pain and suffering: Damages are awarded for the physical and mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the plaintiff's condition may deteriorate.”

24. Further the court in assessing damages in the case of **WESTCH & SONS LTD VS SHEPARD (1964) A.C AT P.G** stated thus:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and court can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent award must be reasonable and must be assessed with moderation. Further, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable award. When all this is said it still must be that amount which is awarded are to a considerable extent conventional.”

25. The injuries sustained were pleaded as per the plaint were as follows;

a) Bruises –forehead

b) Crushed small toe and subsequent amputation of the same.

c) Bruises both legs

d) Blunt chest injury.

26. The respondent produced a medical report by Dr. G.K Mwaura and it indicated the injuries as above. It was done on 13th January 2015.

27. The appellant relied on the medical report by Dr. Wambugu (DEXB1) who examined the respondent on 23rd of September 2015. In his report he stated that the respondent had a permanent disability of 2%. She had sustained skeletal and soft tissue injuries from which she has made adequate recovery. He stated that the respondent lost the distal phalanges of the small toe and assessed her permanent incapacitation to be at 2%.

28. As correctly observed by the trial magistrate, there was a dispute about the injuries sustained by the respondent. The point of contention by the appellants is the award of Kshs. 450,000/= for damages and the authority the trial magistrate had used to award the respondent the general damages. They found the plaintiff in the authority cited to have suffered more severe injuries.

29. In the trial court the respondent relied on several authorities to back his proposal of Kshs. 600,000/= some of them are:

i) **Rivatex Ltd vs Philip Mochache (1999) eKLR** (supra)

ii) **Tarmal wire products vs Ramadhan Fondo HCC 243 of 2010** supra.

30. On the other hand the appellant relied on the case of **Kennedy Mutinda vs Basco Product (k) Ltd (2013) eKLR** where the plaintiff suffered crush injury with a fracture of the middle phalanx right index finger and was awarded Kshs. 210,000/=.

31. Considering at the degree of disability in all cases cited by the parties, it is quite evident that the injuries therein were more or less the same as those sustained by the respondent herein. The respondent sustained bruises to the forehead, amputation of the toe and bruises to the legs as per Dr. Mwaura's report (PEXB4a) and the appellant's medical report by Dr. Wambugu assessed incapacity at 2%.

32. Besides the authorities cited I have considered other decisions. In the case of **Agroline Hauliers Limited and Another v Michael Abongo Kisemba MGR CA Civil Appeal No. 6 of 2015 [2015] eKLR** the claimant sustained a contused neck, chest and left hand and a fracture of the left patella. He was awarded Kshs. 400,000/- in 2015.

33. In the case of **Njora Samuel v Richard Nyang'au Orechi [2018] eKLR** which the respondent cited before this court, an award of Kshs. 500,000/ was made in the instance of a plaintiff who had suffered a closed fracture right 5th metatarsal. Likewise, in the case of **Vincent Mbogholi v Harrison Tunje Chilyalya [2017] eKLR** the High Court on appeal upheld an award of Kshs. 500,000/ made to a plaintiff who had a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe.

34. The injuries suffered in the cases cited above were more serious compared to those suffered by the respondent, who was aged nine (9) years at the time of accident on 27th May 2012. The impugned Judgement was delivered on 14th September 2016 which is about five years ago.

35. After taking into account all relevant factors I find the award of ksh. 450,000/= to have been abit on the higher side. I therefore set aside the Judgment and substitute it with an award of kshs. 340,000/=. The special damages of Ksh. 3,500/= remain the same. I therefore enter Judgment for the respondent against the appellants jointly and severally in the sum of kshs 343,500/= (Three hundred and forty-three thousand, five hundred only) plus costs and interest from the date of Judgment. The appellants are awarded half (1/2) costs of the appeal.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 28TH DAY OF JULY, 2021 NAIROBI.

H. I. ONG'UDI

JUDGE