



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 95 OF 2019**

**ACACIA VENTURES LIMITED.....APPELLANT**

**VERSUS**

**NELLIE BELINDAH OSOK.....RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon Ndombi (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 197 of 2016 on 5<sup>th</sup> February 2019)**

**JUDGMENT**

1. In her decision of 5<sup>th</sup> February 2019, the Learned Trial Magistrate, Hon R. Ndombi, Senior Resident Magistrate, entered Judgment in favour of the Respondent as against the Appellant in the following terms:-

**a. Liability at 90%-10% in favour of the Respondent herein**

**b. General Damages Kshs 1,000,000/=**

**c. Special damages Kshs 255,082/-**

**Plus cost of the suit and interest thereon at court rates.**

2. Being aggrieved by the said decision, on 31<sup>st</sup> July 2019, the Appellant filed a Memorandum of Appeal dated 23<sup>rd</sup> April 2019. It relied on five (5) grounds of appeal.

3. Parties filed Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

**“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

6. Having looked at the grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it was to consider of whether or not the quantum that was awarded was excessive in the circumstances warranting its interference. The Appellant had not challenged the award on apportionment of liability and that of special damages.

7. The Appellant submitted that the award of Kshs 1,000,000/= for the injuries that the Respondent herein sustained was unfair, unjustified and manifestly high. It referred the court to the case of **Kemro Africa Limited t/a “Meru Express Service (1976)” & Another vs Lubia & Another (No. 2) [1985] e KLR** where it was held that an appellate court will interfere in an award if the amount awarded was so inordinately high or inordinately low so as to have been a wholly erroneous estimate of the damages awarded.

8. It was categorical that these principles for assessing damages were in line with those set out in the case of **Denshire Muteti Wambua vs Kenya Power & Lighting Co Ltd [2013] e KLR** where it was held that the general method of approach for assessing damages was that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases. It also relied on the case of **Millicent Atieno Ochuonyo vs Katola Richard [2015] e KLR** to buttress its point.

9. The Respondent placed reliance on the cases of **Peters vs Sunday Post Limited [1958] EA 424** and **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** where the common thread was that an appellate court will only interfere if the quantum awarded is so inordinately high and/or inordinately low leading to an entirely wrong estimate of the quantum the plaintiff was entitled to.

10. The Appellant urged this court to disturb the award of quantum and award a sum of Kshs 250,000/=. In this regard, it referred this court to the cases of **Washington Mukunya Karanja & Another vs Margaret Wambui Maina [2020] eKLR** and **Simon Taveta vs Mercy Mutitu Njeru [2014] eKLR** where the courts awarded Kshs 300,000/= and Kshs 250,000/= for similar injuries that the Respondent herein sustained.

11. On her part, the Respondent submitted that the Trial Court did not error in Law and or fact for the reason that it fully considered the pleadings, evidence on record and submissions by parties in assessing general damages. She reiterated the authorities she relied on in the trial court, **Kenya Wildlife Service vs Godfrey Kirimi Mwiti [2018] eKLR** and **Uziel Cohen vs Kenya Power & Lighting Co. Limited Mombasa HCCC No 111 of 2006** (eKLR citation not provided) where the Learned Judges awarded the Plaintiff Kshs 2,000,000/= and Kshs 1,200,000/= respectively in general damages for pain, suffering and loss of amenities for injuries comparable to the ones she sustained herein.

12. A perusal of the Judgment showed that the Learned Trial Magistrate considered the submissions and authorities that were tendered by parties, the nature of the injuries that the Respondent sustained and the time that the Respondent spent in hospitals for treatment. The said Learned Trial Magistrate found that the Appellant’s proposal of an award of Kshs 200,000/= to have been on lower side and awarded the Respondent general damages in the sum of Kshs 1,000,000/=.

13. Notably, it must be understood that money can never really compensate a person who has sustained any sort of injury. It is merely an assessment of a sum of money that a court deems to be reasonable in the circumstances to assuage a person who has suffered an injury. However, this assessment must be reflective of the prevailing inflationary trends and is not without limits because a court must be guided by precedents.

14. Further, this court had due regard to the case of **Kigaraari vs Aya (1982-88) 1 KAR 768** where it was held that:-

**“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”**

15. This court perused the treatment notes from Kisumu District Hospital dated 19<sup>th</sup> August 2015, Discharge Summary from Aga Khan Hospital Kisumu with an admission date of 19<sup>th</sup> August 2015 and the Discharge Summary from Fountain Healthcare dated 14<sup>th</sup> September and noted that the Respondent herein suffered bruises on the forehead, upper lip cut wound, nose bleeding, loss of four (4) lower teeth, complex soft tissue injuries and anterior maxillary dental alveolar fracture following the said accident. Her injuries were termed as “grievous (sic) harm” in the P3 Form dated 19<sup>th</sup> August 2015.

16. She was admitted at Aga Khan Hospital Kisumu on 19<sup>th</sup> August 2015 and discharged on 20<sup>th</sup> August 2015. She was then admitted to Fountain HealthCare on 20<sup>th</sup> August 2015 and discharged on 25<sup>th</sup> August 2015.

17. Having considered the injuries the Respondent sustained vis-a-vis decided cases where plaintiffs suffered similar and/or comparable injuries, it was the considered opinion of this court that the quantum that was awarded was manifestly excessive as to warrant interference by this court. Taking inflationary trends and the impact of huge awards on quantum into consideration, this court came to the conclusion that a sum of Kshs 500,000/= would be reasonable compensation.

## **DISPOSITION**

18. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 31<sup>st</sup> July 2019 was merited. The effect of this is that the Judgment of the sum of Kshs 1,155,082/- that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgment that be and is hereby entered against the Appellant herein for the sum of Kshs 679,573.80 made up as follows:-

**a. General Damages           Kshs 500,000.00**

**b. Special Damages           Kshs 255,082.00**

**Kshs 755,082.00**

**Less 10% contributory negligence Kshs 75,508.20**

**Kshs 679,573.80**

Plus costs and interest thereon at court rates. Interest on special damages will be from date of filing suit while interest on general damages will be from the date of judgment.

19. Although the Appellant was successful in its Appeal in which case costs should follow the event, this court deviated from the general principle that costs follow the event for the reason that the financial might between the Appellant and the Respondent was so huge. The Appellant was a company while the Respondent was seventy five (75) years of age. She had suffered a reduction of the quantum that she had been awarded by the Trial Court. For the said reasons, this court hereby directs that each party bear its own cost of this Appeal.

20. It is so ordered.

**DATED and DELIVERED at KISUMU this 27<sup>th</sup> day of July 2021.**

**J. KAMAU**

**JUDGE**