



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO.76 OF 2019

(CONSOLIDATED WITH CIVIL APPEAL NO. 81 OF 2019)

MAW (suing as the mother and next friend to)

IM (MINOR).....APPELLANT

VERSUS

SOLOMON KABIRIRI MWANGI.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. TA Odera, Senior Principal Magistrate in Mumias SPMCCC No. 53 of 2018, of 19th July 2019)

JUDGMENT

1. The appeal herein arises from the judgment and decree of the Senior Principal Magistrate's Court at Mumias in Civil Suit No. 53 of 2018, delivered on 19th July 2019. Liability was settled at 80 %: 20% in favor of the appellant against the respondent. General Damages were awarded as follows: pain and suffering at Kshs. 700,000.00, special damages at Kshs. 45,920.00, making a total of Kshs. 745,920.00, less 20% agreed liability, which works out to Kshs. 149,180.00, with the final total being Kshs. 596,740.00.
2. The appellant being dissatisfied with the judgment on the quantum, lodged an appeal, vide a memorandum of appeal herein, dated 19th July 2019, setting forth the following grounds: that the trial court failed to quantify the suit based on evidence and submissions together with the case law attached on record thereby arriving at an inordinately low award, and that the trial court did not consider the evidence on the extent of injuries the appellant sustained as outlined in the medical report the appellant produced as evidence in court.
3. The respondent was also dissatisfied with the judgment, and filed Kakamega HCCA No. 81 of 2019, vide a Memorandum of Appeal, dated 1st August 2010, on grounds: that the award of Kshs. 700,000.00 general damages were not consistent with the evidence tendered, submissions of the all the parties and legal precedents; that the trial court considered extraneous issues; and that the award was manifestly excessive in the circumstances;
4. The two appeals were consolidated.
5. The factual background is that on 8th February 2016, IM, the minor appellant, was involved in a road accident while coming from school. He was rushed to Matungu Hospital for medical treatment. Due to the nature of his injuries, he had to be transferred to St. Mary's hospital where he was found to have suffered severe head injuries, a segmented fracture of the left femur, a segmented fracture of the right femur, and a fracture right radius and ulna. In his testimony at the trial court, the minor appellant testified that he was walking off the road, when the suit vehicle hit him. He testified that after treatment and discharge from hospital, and as at the date of his testimony, he could not walk or run, and could not use his arm well due to the accident.
6. Directions on the disposal of the consolidated appeals were given on 3rd December 2020.
7. The nature and extent of the appellant's injuries are not in dispute. What is in dispute is the quantum of general damages awarded to the appellant.
8. The only written submissions on record are by the appellant minor. He submits on the two grounds. Firstly, he argues that the award was inordinately low, and was not commensurate with the injuries sustained. He cites the decision in *Mbaka Nguru and another vs. James George Nyakwar* [1998] eKLR (Omolo, Tunoi and Shah JJA), to make the point that the award ought to reflect a trend of the previous, recent

and comparable awards. It is submitted that the trial court did not do that. He submits that the authorities cited at the trial court, being *James Thiongo Githiri vs. Nduati Njuguna Ngugi* [2012] eKLR (Emukule J), supported the award he was seeking, of Kshs. 2, 200, 000.00, as the said court had in 2012 awarded a sum of Kshs. 1, 800, 000.00 for comparable injuries. He submitted that the authorities cited by the respondents were for lesser injuries, where a lower amount of damages were awarded. For the purpose of the appeal, the appellant cites *Mwaura Muiruri vs. Suera Flowers Limited & another* [2014] eKLR (Emukule J), where the plaintiff has suffered multiple lacerations on the face, soft tissue injuries on the chest, communitated fractures on the upper and lower limbs, and compound fractures of the lower limb, and an award of Kshs. 1, 750, 000.00 was awarded. *James Gathirwa Ngungi vs. Multiple Haulers Limited (EA) Limited & another* [2015] eKLR (Ougo J), was also cited, where the victim had sustained compound communitated fractures of the right tibia and fibula, fractures of the radius and left ulna, head injury, deep cut wound on the parietal region, soft tissue injuries to the hands, bruises, cuts and lacerations., and an award of Kshs. 1, 500, 000.00.

9. The appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence. See *Kemfro Africa Ltd t/a Meru Express & Another vs. A. M. Lubia and Another* [1982-88] 1 KAR 727 (Kneller, Nyarangi JJA, Chesoni Ag. JA), *Peter M. Kariuki vs. Attorney General* [2014] eKLR (Kiage, M'Inoti, Mohammed JJA) and *Bashir Ahmed Butt vs. Uwais Ahmed Khan* [1982-88] KAR 5 (Madan, Wambuzi, Law JJA). In *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (supra), the court set out the parameters under which an appellate court will interfere with an award in general damages, where it said:

“An appellate court will not disturb an award for general 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...”

10. In the instant suit, the trial court awarded Kshs 700,000.00 as damages for pain and suffering, which amount the appellant regards as inordinately low. While the respondent claims that the award by the trial court is too high. The trial court, in deciding on the quantum evaluated the injuries pleaded by the appellant at that time. It considered the P3 forms, the discharge summary as well as the medical report from Jamia Medical Centre. According to the doctor's prognosis the injuries were grievous; however, after treatment there were signs that there was some improvement though still some limping and recurrent headache that needed management. In awarding the general damages, the trial court considered the authority in *Agroline Hauliers Limited & another vs. Edwin Ochieng* [2015] eKLR (Majanja J), where the defendant was awarded Kshs. 450,000.00, where the court thought that the injuries were comparable to those suffered by the plaintiff, although the case was 4 years older. The court considered the age of the case cited, as well as the inflation factor on the Kenya shillings at the time of the judgment.

11. I have looked at the authorities cited at the trial court by both sides, and note that the trial court evaluated both sets. I have also looked at the decisions that the appellant has cited before me. It would appear that the injuries reflected in the authorities relied on by the appellant were far more serious than those sustained by him. It would also appear that the authorities cited by the respondents reflected injuries that were closer to those suffered by the appellant. The trial court took into account the ages of the decisions relied on, as well as the effect of inflation on the Kenyan currency, before awarding the sum of Kshs. 700, 000.00. I am not persuaded that the trial court fell into any error in arriving at the figure that it did.

12. Consequently, it is my finding that the appeal in HCCA No. 76 of 2019 has no merit and it is hereby dismissed. The appeal in HCCA No. 81 was not prosecuted, and it is also accordingly dismissed. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6th DAY OF AUGUST, 2021

W. MUSYOKA

JUDGE