



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 8 OF 2021

GEORGE RAINI ATUNGU.....APPELLANT

VERSUS

MOFFAT ONSARE AUNGA.....RESPONDENT

(Being an appeal from the judgment and decree of Hon. P.K. Mutai (S.R.M.)

dated 18th November, 2020 in Kisii CMCC No. 977 of 2019)

JUDGMENT

1. This is an appeal against the assessment of quantum by the trial court in Kisii Civil Suit No. 977 of 2019. General damages were assessed at Kshs. 650,000/= and special damages at Kshs. 36,520/=. The parties agreed to settle liability at a ratio of 70:30 in favour of the respondent. Being aggrieved by the trial court's assessment of quantum, the appellant lodged an appeal vide a memorandum of appeal dated 3rd February 2021 raising the following grounds of appeal;

- a. That the award of general damages awarded to the Respondent was manifestly and inordinately excessive in the circumstance;
- b. That the learned trial magistrate acted in error when the same failed to properly evaluate the evidence on record thus reaching erroneous decision;
- c. The learned trial magistrate erred when the same misapprehended the principle applicable in assessment of damages in personal injuries claims thus occasioning miscarriage of justice;
- d. The learned trial magistrate erred in law and fact when the same relied on extraneous issues as a basis of his determination on liability.

2. In a first appeal such as this, it is the duty of the court to reevaluate the evidence afresh and come to its own conclusion bearing in mind that it did not see or hear the witnesses testify. The respondent's case before the trial court was that on 11th November 2019 while he was travelling in motor vehicle registration No. KBY 947H along Kisii-Nyamira road at Getare area or thereabouts, the appellant's driver negligently drove motor vehicle registration no. KCQ 205 U causing it to collide with the vehicle he was travelling in. Due to the accident, the respondent sustained injuries which he listed in his plaint as follows;

- a. Chest contusion;
- b. Fracture of the left radius and ulna;
- c. Pelvic contusion;
- d. Contusion to the right leg; and
- e. Fracture of the right tibia/fibula bones.

3. He averred that due to the accident, he had suffered loss. He therefore prayed for general damages and a total of Kshs. 37,200/= in special damages. He produced as evidence copies of a clinical appointment card, discharge summary, P3 form, police abstract, a medical report by Dr. Daniel Nyameino, a receipt from the doctor for Kshs. 6,500/= and medical receipts for Kshs. 30,000/=. He stated that he was still on

medication and was still experiencing pain on the chest, waist and right leg.

4. The appellant did not call any witnesses but a medical report prepared by Dr. Kumenda was produced by consent.

5. In his submissions before the trial court, the respondent urged the trial court to award him a sum of Kshs. 1,500,000/= in general damages. He relied on the case of *Alphonse Muli Nzioki vs Brian Charles Ochuodho Civil Appeal No. 141 of 2011* and the case of *Peter Namu Njeru vs Philemon Mwangoti Civil Appeal No. 132 of 2012* in support of his proposition. The appellant proposed a sum of Kshs. 500,000/= as reasonable compensation. To support his proposal, he cited the cases of *Gabriel Kariuki Kigathi & another v Monica Wangui Wangeci [2016] eKLR* and the case of *David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR*.

SUBMISSIONS

6. Parties took directions to canvass the appeal by way of written submissions. The appellant's counsel submitted that the award made by the trial magistrate was excessive as the respondent's injuries could heal well without permanent disability. He maintained that an award of Kshs. 500,000/= would suffice. He submitted that in the case of *Gabriel Kariuki Kigathi & another v Monica Wangui Wangeci [2016] eKLR* which he had cited before the trial court, the plaintiff had sustained injuries similar to those sustained by the respondent in this case while the plaintiff in the case of *David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR* had suffered injuries that were more serious as compared to those suffered by the Respondent.

7. He referred this court to the case of *David Kiplagat Sang vs Richard Kipkoech Langat & Another [2006] eKLR*. He also cited the case of *Joseph Mwangi Thuita v Joyce Mwole HCCA No. 177 of 2011 [2018] eKLR* where the plaintiff had sustained fractures of the right femur, compound fracture (r) tibia, compound fracture right fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support. He was awarded Kshs. 700,000/=.

8. The respondent's counsel countered that the trial court had considered the evidence and properly assessed damages at Kshs. 650,000/=. He referred to the case of *Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR* where the plaintiff had sustained a mild head injury, tenderness on the neck, dislocation of the left shoulder, tenderness on the back, deep lacerated cut wounds on the forearms and a fracture of the tibia and fibula and had been awarded Kshs. 700,000/=.

9. He also referred to the case of *Third Engineering Bureau China City Construction Group Ltd v Evalyne Kerubo Rangi [2020] eKLR* where, the court held that an award of Kshs. 800,000/= would suffice where the plaintiff had sustained a chest contusion, compound right radio fracture, compound right ulna fracture, bruises on the hands, bruises on the right elbow, bruises on the buttock, right tibia fracture and right fibula fracture.

ANALYSIS AND DETERMINATION

10. The sole issue for determination in this appeal is whether the trial court's assessment of general damages was excessive. The assessment of damages is a discretion that an appellate court will not lightly interfere with unless the award is inordinately high or low as to represent an entirely erroneous estimate; or, it is shown that the court proceeded on wrong principles, or that it misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. (See *Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR*)

11. The nature and gravity of the injuries as pleaded by the respondent were not disputed. Dr. Nyameino, who examined the respondent 10 days after the accident, classified the injuries sustained by the respondent as grievous harm but indicated that they were likely to heal well. Dr. Kumenda, examined the respondent 8 months after the accident. He found that the respondent's fractures had healed well without permanent disability.

12. The trial court analyzed the authorities cited before it by the parties thus;

“The plaintiff submitted that the plaintiff should be awarded Kshs. 1,500,000/= as general damages relying on the following authorities;

(i) Alphonse Muli Nzuki vs Brian Charles Ochuodho [2014] eKLR In this case the Respondent sustained compound comminuted fracture of right tibia and fibula and degloving injury medial aspect of right leg and foot. The Respondent was awarded Kshs. 800,000 general damages.

(ii) Peter Namu Njeru vs Philemon Mwangoti (2016) eKLR. In this case the plaintiff suffered:

(i) Comminuted crush fracture of the distal ½ of the right radius.

(ii) Avulsion fracture of the right ulna styloid process

(iii) Fracture of the right 6th rib on the posterior aspect. Plaintiff was awarded Kshs. 700,000 as general damages

On the other hand, the defendant was of the opinion that award of Kshs. 500,000 suffice as general damages. The defendant relied on the following cases:

1) Gabriel Kariuki Kigathi & another v Monica Wangui Wangeci [2016] eKLR. In this case the plaintiff suffered fracture of the

neck, bilateral rib fractures, bilateral lung contusion and injuries to both hands and both legs. Plaintiff was awarded Kshs. 400,000 as general damages

2) *David Kimathi Kaburu v Dionisius Mburugu Itirai [2017] eKLR*. The plaintiff sustained a plated fracture mid shaft femur, intertrochanteric fracture, wobbly gait and severe pain on the right hip and entire hip. He was awarded kshs. 630,000 as general damages.”

13. The trial court then reached the following finding;

“I find the case of *Alphonse Muli Nzuki vs Brian Charles Ochuodho [2014] eKLR* and *Gabriel Kariuki Kigathi & another v Monica Wangui Wangeci [2016] eKLR* relevant and applicable here.

Taking into account injuries sustained and inflations I award the plaintiff kshs. 650,000 as General damages.”

14. The factors that a court considers in determining the award to give in damages include the nature and extent of the injuries, the awards made for comparable injuries as well as inflation rates. A court must however bear in mind that no two cases are exactly the same. In the case of *Stanley Maore vs Geoffrey Mwenda Nyeri CA No. 147 of 2002* the Court of Appeal held as follows on the assessment of general damages;

“It has been stated now and again that in assessment of damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable award keeping in mind the correct level awards in similar cases.”

15. I have considered the trial court’s decision in light of the evidence adduced before it, the authorities cited by the parties and the foregoing principles. I find that the trial court took into account the relevant principles in arriving at its decision on quantum.

16. Regarding the authorities cited by the parties in this appeal, I find the case of *David Kiplagat Sang (supra)* irrelevant due to the passage of time. The claimants in the cases of *Joseph Mwangi Thuita (supra)* and the case of *Third Engineering Bureau China City Construction Group Ltd (supra)* were awarded higher sums for injuries that were more severe than those sustained by the respondent. On the other hand, the court in the case of *Dennis Matagaro(supra)* upheld an award that was higher than that of the respondent for injuries that were less severe. I find that the trial court’s award was reasonable and within the appropriate level for similar cases. The appellant has failed to demonstrate to the satisfaction of this court that the trial court failed to evaluate the evidence on record or proceeded on the wrong principles in its assessment.

17. Accordingly, I find the appeal to be lacking in merit. I hereby dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF OCTOBER 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Otieno For the Appellant

Mr. Omotto For the Respondent

Ms. Rael Court Assistant