



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. E009 OF 2020

FRANCIS OMARI OGAROAPPELLANT

VERSUS

JAO (minor suing Through next friend and father GOD).....RESPONDENTS

(Being an appeal from the judgment of the Honourable W.C Waswa, Resident Magistrate Nyamira delivered on 30th November 2020 in Nyamira CMCC No. 119 of 2019)

JUDGEMENT

1. This appeal arises from the judgment delivered on 30th November 2020 in Nyamira CMCC No. 110 of 2019 where the appellant was held liable, for the injuries sustained by the respondent and ordered to pay him general damages in the sum of Kshs. 230,000/= and special damages of Kshs. 7,050/=.

2. The Memorandum of Appeal contains ten grounds the gist of which is that considering the nature of the injuries suffered by the respondent the general damages for pain, suffering and loss of amenities are inordinately excessive, disproportionate and unfair and the same should be set aside and substituted with a sum of Kshs.90,000/=.

3. In so stating Counsel for the appellant relied on the case of **Kim Pho Choo V Camden & Islington Area Health Authority (1979) I, Aller 332** cited in the case of **Nancy Oseko V Board of Governors Masai Girls' High School [2011] eKLR** where the court stated:-

“In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant.”

4. Counsel also relied on the case of **Cecilia Mwangi & another Vs Ruth Mwangi CA 251 of 1996** cited in the case of **Nancy Oseko Vs Board of Governors Masai Girls High School (supra)** where Lord Morris stated:-

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

5. Counsel invited this court to interfere with the award and urged it to also consider the following cases:-

(a) **HB (minor suing through mother & next friend DKM) V Jasper Nchonga Magari & another [2021] eKLR** where **Nyakundi J** uphold the lower court award of Kshs. 60,000/= for blunt injury to the head, neck, thorax, abdomen and limbs.

(b) **Ephraim Wagura Muthui 2 others V Toyota Kenya Limited & 2 others [2019] eKLR** where **Majanja J** set aside the lower court award of Kshs. 55,000/= for cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back and substituted it with an award of Kshs. 100,000/=.

(c) **Nyambati Nyaswabu Erick Vs Toyota Kenya Limited & 2 others [2019] eKLR** where **Majanja J** set aside an award of Kshs. 55,000/= for a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs and substituted it with one of Kshs. 90,000/=.

6. Counsel submitted that this court has jurisdiction to set aside the award of the lower court based on the dicta in the case of **Kemfro Africa**

Limited t/a Meru Express Services (1976)” & another Vs Lubia & another (No.2) [1985] eKLR. Counsel also urged this court to award the appellant the costs of this appeal as this would accord the express provisions of **Section 27(I) of the Civil Procedure Act.**

7. Counsel for the respondent vehemently opposed the appeal and submitted that this is not an appropriate case for this court to interfere; that the award of damages was reasonable in light of comparable cases and that the learned trial magistrate took into account the law and evidence in assessing the damages. Counsel contended that the award is commensurate with past awards and the nature of injuries sustained by the respondent and the award should therefore be upheld by this court. Counsel submitted that the court was also enjoined to consider inflation and cited the case of **Telkom Orange Kenya Limited Vs S O (minor suing through his next friend and mother [2018] eKLR** where Majanja J stated:-

“In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service Vs Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] KLR 661).”

8. Counsel contended therefore that the award was fair and reasonable and that whilst this court has jurisdiction to interfere with the award no basis had been laid in this case. He urged this court to dismiss this appeal with costs to the respondent.

9. It is trite that while an Appellant court has jurisdiction to interfere with the assessment of damages by a trial court it can only do so if it is demonstrated that the trial court:

- **Took into account an irrelevant factor or**
- **Left out of account a relevant factor or,**
- **The award is so inordinately high that it must be a wholly erroneous estimate of the damage – (see the case Kemfro Africa Limited t/a “Meru Express Services (1976)” another Vs Lubia & another (NO.2) [1985] eKLR).**

10. The issue for determination in this appeal is whether taking into account the nature of the injuries sustained by the respondent, comparable awards and inflation or passage of time the award of the trial magistrate was inordinately excessive as to warrant this court to interfere.

11. The injuries sustained by the respondent were:-

- (i) **Multiple cut wounds on the right lower limb.**
- (ii) **Bruises on the right lower limb.**
- (iii) **Bruises on both elbows.**
- (iv) **Bruises on the right iliac region.**
- (v) **Bruises on the frontal region.**
- (vi) **Bruises on the temporal region.**
- (vii) **Lacerations on the frontal region.**
- (viii) **Cut wounds on the left iliac region.**
- (ix) **Cut wounds on the frontal region.**
- (x) **Cut wounds on the temporal region.**
- (xi) **Blunt trauma to the abdomen.**

The prognosis by **Dr Morebu** who examined the respondent on **17th September 2019** was that **“the respondent suffered multiple severe bodily injuries that were in the process of healing with permanent ugly scars”**. Notably **Dr. Ombati Mokua** who examined the respondent on **1st August 2019** approximately one week after the accident stated that her injuries were:-

- (i) **Cut wound with bruises on the temporal region.**
- (ii) **Laceration with inflammation of the frontal part of the head.**
- (iii) **Right umbilical region tenderness; left iliac region cut wound with bruises.**
- (iv) **Bruises on the posterior aspect of the elbow joint bilaterally.**

(v) Right lower limb (lateral ankle joint) cut wound with bruises and inflammation.

12. Dr. Mokuia noted that the respondent was in stable general condition. It is instructive that he classified the injuries as harm which is the lowest degree of injury. While the two doctors agreed that the respondent sustained multiple soft tissue injuries Dr Morebu's prognosis that the injuries had healed with ugly scars is significant.

13. The trial magistrate relied on the case of **Peter Njuguna Vs Francis Njuguna Njoroge [2015] eKLR** to arrive at the award of Kshs. 230,000/=. In that case the injuries were:-

- Bruises on the occipital region of the scalp.
- Deep cut on the forehead.
- Bruises on the chest and lower back.
- Bruises on the right elbow.
- Bruises on both hands.
- Tender left knee joint.
- Broken tooth.

14. In my view the deep cut on the forehead and the broken tooth in the case of **Peter Njuguna V Francis Njuguna Njoroge (supra)** render the injuries in that case much more serious than those of the respondent herein. The respondent's injuries being soft tissue injuries which merely amounted to harm are similar to those of the respondent in the case of **Ephraim Wagura Muthui & 2 others V Toyota Kenya Limited & 2 others [2019] eKLR**, where the court assessed damages at Kshs. 100,000/=. The award of Kshs. 230,000/= is therefore excessive. The award of Kshs. 90,000/=proposed by Counsel for the appellant is on the other hand much on the lower side and would in my view amount to an erroneous estimate of the damage. The award in the case of **Ephraim Wagura (supra)** was made three years ago and as this court must take passage of time and inflation into account I find that an award of Kshs. 180,000/= would suffice. In the premises the award of Kshs. 230,000/= is set aside and substituted with one for Kshs. 180,000/=.

15. The award for special damages was not contested and I shall therefore not disturb it. The appellant has succeeded only partially and whereas costs follow the event they are also in the discretion of the court and in this case the order that best commends itself to me is that the appellant is entitled to half the costs.

It is so ordered.

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

E.N. MAINA

JUDGE