



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 6 OF 2021

GEORGE RAINI ATUNGU..... APPELLANT

VERSUS

JARED OGWOKA ONDARIRESPONDENT

(Being an appeal from the judgment and decree of Hon. P.K. Mutai (S.R.M.) dated 18th November, 2020 in Kisii CMCC No. 979 of 2019)

JUDGMENT

1. This is an appeal against the assessment of quantum by the trial court in Kisii Civil Suit No. 979 of 2019. General damages were assessed at Kshs. 800,000/= and special damages at Kshs. 93,600/=. Liability was settled at a ratio of 70:30 in favour of the respondent. Aggrieved by the trial court's decision on 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. The respondent's case was that on 11th November 2019 while he was travelling in motor vehicle registration no. KBY 947H along Kisii-Nyamira road at Getare area, 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 thus;

- a. Head injury with cut wounds on the left parietal region of the head;
- b. Chest contusion;
- c. Fracture of the ribs on the right side;
- d. Multiple bruises on the upper limbs bilaterally;
- e. Fracture of the right tibia/fibula bones;
- f. Fracture of the pelvis; and
- g. Multiple bruises of cut wounds on the lower limbs.

3. He averred that due to the accident, he had suffered loss and prayed for general damages and a total of Kshs. 94,400/= in special damages. He produced as evidence, copies of a discharge summary, P3 Form, police abstract, demand notice, medical report by Dr. Ombati, a receipt for Kshs. 6,500/= and receipts for Kshs. 87,200/=. He added that he had been admitted in hospital for 21 days. He complained of pain on the waist, chest and leg and stated that he could not bend.

4. The appellant closed its case without calling any evidence. A medical report prepared by Dr. Kumenda was however produced by consent, after which the parties proceeded to file their respective submissions on quantum.

5. The respondent urged the trial court to award him a sum of Kshs. 2,500,000/= in general damages. He relied on the case of **Peace Kemuma Nyangera vs Michael Thuo & Anor HCCC No. 209 of 2013** in support of his proposition. On the other hand, the appellant proposed a sum of Kshs. 800,000/=. He cited the cases of **Joseph Kimanathi Nzau v Johnson Macharia [2019] eKLR** and **DPL Festive Limited vs Rose Akinyi Ochola HCCA No. 25 of 2018** in support of his proposition.

6. Parties canvassed the appeal by way of written submissions. In his submissions, the appellant argued that the award made by the trial magistrate was excessive. While he did not oppose the nature of the injuries as stated by the respondent in his pleadings, he argued that the injuries had healed well without permanent disability. He maintained that an award of Kshs. 800,000/= would suffice and the trial court's assessment of damages at Kshs. 1,000,000/= should be set aside for being excessive. To buttress his argument, he referred to the cases of **Joseph Kimanathi Nzau v Johnson Macharia [2019] eKLR**, **David Kiplagat Sang vs Richard Kipkoech Langat & Another [2006] eKLR** and the case of **Joseph Mwangi Thuita v Joyce Mwole HCCA No. 177 of 2011 [2018] eKLR**.

7. The respondent countered that the trial court had considered the evidence and properly assessed damages at Kshs. 1,000,000/=. He relied on the cases of **Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs Naomi Gaima Galgalo [2019] eKLR**, **Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR** and **Blue Horizon Travel Co. Ltd vs Kenneth Njoroge [2020] eKLR** to support his argument that the trial court's decision should be upheld.

8. The main issue for determination in this appeal is whether the trial court made an excessive award of general damages. 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; 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**)

9. 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 had the following to say 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.”

10. I have considered the decision of the trial court alongside the evidence and submissions placed before the court. I find that the trial court properly addressed itself to the evidence and the applicable principles in assessing damages. The trial court held;

“The plaintiff submitted that the plaintiff should be awarded Kshs. 2,800,000/= as general damages relying on the case of Peace Kemuma Nyang'era vs Michael Thuo & Anor [2014] eKLR. In this case the plaintiff sustained fracture of the right ischium/inferior pubic ramus of the pelvic bone, hematoma on both thighs and lumbo-sacral haematoma. General damages were assessed at Kshs. 2,500,000/=.

On the other hand the defendant was of the opinion that award of Kshs. 800,000/= suffice as General damages. The defendant relied on the following cases:

(1.) Joseph Kimanathi Nzau vs Johnson Macharia [2019] eKLR. In this the appellant sustained fracture of right clavicle, fracture of the 1st and 2nd ribs and blunt haematoma to the head. He was awarded Kshs. 800,000/= on appeal.

(2) DPL Festive Limited vs Rose Akinyi Ochola HCCA No. 25 of 2018. The plaintiff suffered fracture of the distal femur and right tibia fibula and a cut wound on the right elbow. On appeal he was awarded Kshs. 750,000/= as general damages.

I find the case of Joseph Kimanathi Nzau vs Johnson Macharia [2019] eKLR as cited by Defendant more applicable. Injuries in the case cited by plaintiff were more extensive.

Considering injuries suffered by the plaintiff, comparable awards and inflation, I award the plaintiff Kshs. 1,000,000 as general damages.”

11. The appellant referred this court to the case of **David Kiplagat Sang (supra)** which had been decided in 2006, more than a decade before the decision of the trial court was made. That authority would not be of much assistance due to the passage of time. He also referred to the case of **Joseph Mwangi Thuita v Joyce Mwole HCCA No. 177 of 2011 [2018] eKLR**. The plaintiff in that case 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/=.

12. On the other hand, the respondent referred to the case of **Board of Trustees Anglican Church of Kenya Diocese of Marsabit vs Naomi Gaima Galgalo [2019] eKLR** where on appeal, the court substituted an award of Kshs. 2,000,000/= with an award of Kshs. 1,400,000/=. The plaintiff in that matter had sustained a pelvic fracture and open back facial bruises. She complained of pain while walking or running but had been admitted in hospital for 3 days and had no permanent disability.

13. The plaintiff in the case of **Dennis Matagaro vs NKO (Minor suing through next friend and father WOO) [2021] eKLR** 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 fracture of the left tibia fibula. On appeal, the court upheld the trial court's assessment of damages at Kshs. 700,000/=.

14. In *Blue Horizon Travel Co. Ltd vs Kenneth Njoroge [2020] eKLR* the court awarded the respondent Kshs. 400,000/= for cut wounds on the head, cut wounds on right forearm, bruising on both head and right forearm, fractured ribs L1-6 and R 11-12, right haemothorax, fracture dislocation of the right hip and fracture dislocations of right shoulder joints.

15. The nature and gravity of the injuries as pleaded by the respondent were not disputed. Dr. Ombati assessed permanent disability at 20% whereas Dr. Kumenda found that the respondent's right ribs and right leg were healing well without permanent disability. Dr. Kumenda also noted that the respondent had been using crutches since his discharge. Evidently, the injuries sustained by the respondent were quite severe and had substantially affected his lifestyle.

16. I agree with the trial court's decision that the injuries in the case of *Joseph Mwangi Thuita* were comparable to the respondent's case. In the cases cited by the respondent's the claimants were awarded between Kshs. 1,400,000/= and Kshs. 400,000/= for injuries that were more or less similar to those sustained by the respondent. Considering the authorities cited by the parties both in the lower court and in this court, I find the trial court's assessment of quantum at Kshs. 1,000,000/= reasonable. The appellant has failed to demonstrate that the 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 27TH DAY OF OCTOBER 2021.

R.E. OUGO

JUDGE

IN THE PRESENCE OF:

MR. OTIENO FOR THE APPELLANT

OMOTTO FOR THE RESPONDENT

MS. RAEL COURT ASSISTANT