



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 86 OF 2019

PATRICK MARIANYA.....APPELLANT

VERSUS

RONALD ONDICHO MOSE.....RESPONDENT

(Being an appeal from the judgment of Hon. Lutta (C.M.)

delivered on 12th June, 2019 in Kisii Civil Suit No. 124 of 2017)

JUDGMENT

1. This appeal emanates from a personal injury claim instituted by the respondent against the appellant following a road traffic accident that occurred on 10th January 2017. The respondent was a pedestrian at the Kisii Township main stage at Sansora area when the appellant caused his vehicle registration number KCJ 923K to veer of the road and hit the respondent causing him to sustain injuries, which he listed in his plaint as follows;

- a. Contusion on the lower back;
- b. Fracture of the malleoli;
- c. Fracture of the right hip;
- d. Dislocation of the right elbow joint; and
- e. Sprain on the right ankle joint.

2. The appellant opposed the respondent's claim in his statement of defence and put him to strict proof of the averments made therein.

3. When the matter came up for hearing before the trial court, Dr. Peter Morebu (PW1), a senior medical officer, confirmed that the respondent had sustained the injuries listed in his plaint. He testified that the respondent had been treated and his fracture had reduced. The doctor added that the respondent had not suffered any disability. He produced his medical report, the P3 form and a receipt for a sum of Kshs. 6,500/=.

4. The respondent adopted his statement as his evidence. He testified that the driver of the subject vehicle had swerved suddenly and knocked him down. He tried to run away in vain. He lost consciousness and found himself in hospital where he was admitted for 18 days. The respondent produced a clinic attendance card, and medical receipts to support his claim.

5. At the close of the respondent's case, the parties entered a consent on liability which was apportioned in the ratio of 70:30 in favour of the respondent. The appellant then closed its case without calling any witnesses to testify.

6. The trial court, awarded the respondent a sum of Kshs. 86,356/= as special damages and Kshs. 800,000/= as general damages less 30 % contribution. The trial court's decision was informed by the case of *Gerald Ileri Harrison & 2 Others v Danson Ngari [2018] eKLR* where the plaintiff had sustained a compound depressed fracture of the skull on the right frontal region of the head and mild traumatic brain injury. The high court set aside an award of Kshs. 2,000,000/= and substituted it with an award of Kshs. 800,000/=.

7.—The court also made reference to the case of *Kiru Tea Factory & Another vs Peterson Watheka Wanjohi [2008] eKLR*, where the plaintiff was awarded Kshs. 800,000/= for a degloving injury on the right hand with extensive skin and muscle loss on the forearm, fracture of the radius and ulna bones, fracture of the right iliac bone in the pelvis and generalized pains over most of the chest.

8. The appellant has challenged the trial court's assessment of damages which he contends was based on wrong principles and a misapprehension of evidence. The appeal was disposed of by way of written submissions which I have duly considered.

9. The main issue in this appeal is whether the award made by the trial court was excessive and inordinately high.

10. As I determine this appeal on quantum, I bear in mind the principle that an appellate court will not be quick to interfere with the trial court's discretion in assessing damages unless the following factors laid out in the case of **Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR** are met;

"An appellate court will not disturb an award of 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."

11. The authorities cited by learned counsels are good law on the factors that a court must consider in awarding damages. The appellant's counsel referred to the case of **Stanley Maore vs Geoffrey Mwenda Nyeri CA No. 147 of 2002** where the court held;

"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."

12. The respondent's counsel referred to the case of **Jackline Syombua vs BOG and Ekalakala Secondary School, Embu HCC No. 118 of 2006 (U.R.)** where the court held;

"That a court must bear in mind relevant precedents and that damage ought to be reasonable. The trial magistrate also considered the nature of the injuries as well as the passage of time. I am not persuaded that she acted on the wrong principle or misapprehended the evidence in some material aspect."

13. I also concur with the decision of the court in **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** where the court held;

"General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR"

14. The learned Judge added;

"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 v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661."

15. The nature and gravity of the injuries sustained by the respondent are not disputed. The injuries sustained by the respondent were confirmed to be a contusion on the lower back; a fracture of the malleoli; a fracture of the right hip; a dislocation of the right elbow joint; and a sprain on the right ankle joint.

16. In his submissions before the trial court, the appellant argued that a sum of Kshs. 300,000/= would adequately compensate the respondent for his injuries. He relied on the case of **Johnson Mose Nyaundi (Minor suing through next friend and father Wilfred Wadibe Nyaundi v Petroleum Industries Ltd [2014] eKLR** where the court upheld an award of Kshs. 180,000/= for bruises on the face, chest contusion, cerebral concussion, bruises on the elbows and the fracture of the right tibia and fibula bones.

17. He also cited the case of **Morris Miriti vs Nahashon Muriuki & Another [2018] eKLR** where the plaintiff who had sustained tender chest posterior and anterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula was awarded a sum of Kshs. 300,000/=.

18. In his submissions before this court, the appellant maintained that an award of Kshs. 300,000/= would be reasonable compensation for the respondent. He relied on the case of **Stanley Kirwa Arusei v John Mkwafu Wanjofu [2020] eKLR** where the court substituted an award of Kshs. 1,800,000/= with an award of Kshs. 500,000/= where the plaintiff had sustained blunt injury with bruises to the right hand, fracture of left femur proximal and open segmental fracture of the right tibia fibula (proximal with knee dislocation). In that case permanent disability was assessed at 10 % unlike the present case where there were none.

19. He also referred to the case of **Maina Onesmus v Charles Wanjohi Githome [2019] eKLR** where the court substituted an award of Kshs. 650,000/= with an award of Kshs. 350,000/= for a plaintiff who had sustained a fracture of the mid shaft humerus, fracture of the condyles; fracture of the shoulder gird and pain and psychological trauma.

20. The respondent proposed an award of Kshs. 3,000,000/= before the trial court. He relied on the case of **Devna Pandit v Kennedy Otieno Obara & Another [2016] eKLR** where the plaintiff, who had sustained a fracture dislocation left hip with fracture head of femur, fracture left tibia comminuted and fracture right face/maxilla was awarded a sum of Kshs. 2,000,000/=.

21. Before this court, he cited the case of *Patrick Kamuya & Another v Asaph Gatundu Wanjiku [2016] eKLR* where the court upheld an award of Kshs. 500,000/=. The respondent in that case had sustained a closed fracture; lost the 1st and 2nd incisor teeth on the lower right jaw and broke the 1st and 2nd incisor teeth on the lower left jaw; and also sustained a blunt injury to the 1st and 2nd incisor teeth on the upper right jaw. He maintained that the award award in his favour was not excessive or based upon wrong principles of law.

22. I have given careful consideration to the trial court's decision in light of the principles, the parties submissions and the foregoing authorities. From my analysis, I note that the trial court did not review any of the decisions cited by the parties before it or give reasons for the award it had made in favour of the respondent.

23. A comparison of the injuries sustained by the respondent with the injuries sustained in the case of *Devna Pandit (supra)* cited by the respondent before the trial shows that the plaintiff in that case sustained more serious injuries than the respondent in this case. The injuries sustained in the case of *Patrick Kamuya (supra)* were hardly comparable to the injuries he had sustained.

24. The appellant relied on the case of *Johnson Mose Nyaundi (supra)* which had been decided several years before the impugned judgment of the trial court and related to less severe injuries. The cases of *Morris Miriti (supra)*, *Stanley Kirwa Arusei (supra)* and *Maina Onesmus (supra)* were however, more recent and comparable examples.

25. Although the respondent had no permanent disability, his injuries were serious and the nature of injuries assessed as "grievous harm" in the P3 form. He sustained multiple fractures and severe soft tissue injuries which led to his hospitalization for more than 2 weeks in-patient. However, other than some pain on the leg, chest and a headache, the respondent was recovering well at the time of his examination. All things considered, I find that an award of Kshs. 450,000/= takes into account the general trend of awards for similar injuries.

26. I find no reason to interfere with the award of special damages. Contrary to the appellant's contention, the claim for special damages was clearly pleaded and adequately proved. The respondent sought a sum of Kshs. 83,356/= in his plaint and proved his claim through the evidence of Dr. Morebu who produced a receipt for Kshs. 6,500/=. He also produced receipts totaling to Kshs. 76,856/= for medical expenses.

27. In the end, I find the appeal against the assessment of general damages to be merited. The trial court's award of Kshs. 800,000/= is hereby set aside and substituted with an award of Kshs. 450,000/=. For the avoidance of doubt, judgment is entered in favour of the respondent against the appellant for the sum of Kshs. 373,349.2/= computed as follows;

- a. Liability 70%
- b. General damages Kshs. 450,000/=
- c. Special damages Kshs. 83,356/=

28. The respondent shall bear $\frac{2}{3}$ rds of the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER 2021.

R.E. OUGO

JUDGE

In the presence of:

Miss Kerubo For the Appellant

Respondent Absent

Ms. Rael Court Assistant