



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 74 OF 2019**

**SANSORA BAKERS & CONFECTIONERS LIMITED.....APPELLANT**

**VERSUS**

**SOSPETER OTHNIEL OSEMO.....RESPONDENT**

**(Being an appeal from the Judgment and decree of Hon R.M Ndombi (SRM)**

**delivered at Kisumu in Chief Magistrate's Court Case No 594 of 2017**

**on 4<sup>th</sup> June 2019)**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 4<sup>th</sup> June 2019, the Learned Trial Magistrate, Hon R.M Ndombi, Senior Resident Magistrate, entered Judgment in the following terms:-

**a. Liability at 75:25% in favour of the Respondent herein.**

**b. General Damages for pain**

**and suffering and loss of amenities      Kshs 4,000,000/=**

**less 25% contribution                      Kshs 1,000,000/=**

**c. Special damages                          Kshs    22,844/-**

**Kshs 3, 022,844/-**

**Plus costs of the suit and interest thereon at court rates from the date of delivery of Judgment.**

2. Being aggrieved by the said decision, on 27<sup>th</sup> June 2019, the Appellant filed a Memorandum of Appeal of even date. It relied on five (5) grounds of appeal.

3. Parties filed Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein rendered itself as follows:-

**“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”**

6. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that all the grounds of appeal were related and that the question that had been placed before it was to consider of whether or not the quantum that was awarded was against the weight of evidence in the circumstances warranting its interference. The Appellant had not challenged the award on liability which had been recorded by consent of the parties and that of special damages.

7. The Appellant submitted that in appeals against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on the wrong principles of law and as a result awarded an inordinately low or inordinately high figure that is a wholly erroneous estimate of the damages in question. In this respect he relied on the case of **Ephraim Wagura Muthui vs Toyota Kenya Limited & 2 Others [2019] eKLR**.

8. It was categorical that the Learned Trial Magistrate in this case, proceeded on wrong principles when assessing the damages to be awarded to the Respondent and failed to apply the precedents and tenets of law. It pointed out that the award on damages was inordinately high taking into consideration the particulars of the injuries sustained and the circumstances of the case.

9. It placed reliance on the case of **Jesky Enterprises Limited & Another vs Nancy Wachinga Wanjiru & Another [2019] eKLR** where the Court quoted the celebration decision in **Kigaraari vs Aya [1982-88] KAR 768** and held:-

**“Damages must be within limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees”**

10. It stated that according to the Medical Report by Dr Morebu Momanyi Peter dated 2<sup>nd</sup> July 2017, the Respondent suffered severe head injury, periorbital ecchymosis/raccoon eyes, stable fracture on the left pubic ramus, displaced sacro-iliac joint, cut wound on the frontal left side and right occipital haemorrhagic brain contusion.

11. The Appellant submitted that an award of Kshs 350,000/- would have been sufficient to compensate the Respondent for the injuries that he sustained and cited the following authorities as comparable cases:-

1. **Francis Ochieng & Another vs Alice Kajima [2015] eKLR**

The plaintiff therein sustained a cerebral concussion with loss of consciousness for two (2) hours, massive haematoma on the right parietal head, subconjunctival haematoma of the right eye, loss of five (5) anterior lower and two (2) upper teeth, periorbital ecchymosis and cut wound on the right hand and knee. The Court of Appeal reduced Kshs 500,000/= to Kshs 350,000/=.

2. **Cecilia W. Mwangi & Another vs Ruth Mwangi [1997] eKLR**

The Court of Appeal awarded Kshs 350,000/= where the plaintiff therein had sustained a head injury (cerebral concussion), cut wound over the vertex of the scalp, cut wound over the lower left and injury to the pelvis resulting in fractures of the right superior and inferior rami.

3. In **Neelan Mansukhal Shah & Others vs Duncan Linscott Ltd** as cited in the case of **Muthamiah Isaac vs Leah Wangui Kanyingi [2016] eKLR**, the plaintiff therein was awarded Kshs 250,000/= for injuries sustained which are fairly comparable to those suffered by the Respondent herein.

4. **Joshua Mwaniki Nduati vs Samuel Muchiri Njuguna [2005] eKLR**

The court maintained that money cannot review physical frame that has been battered and the courts can only award reasonable compensation.

12. The Respondent also agreed with the Appellant that the appellate court can only interfere with the award of the trial court if it appears that the trial court took into account an irrelevant factor or left out an irrelevant factor so as to arrive at an erroneous estimate as was held in the case of **Kemfro Africa Ltd vs A. M Lubia & Another [1982-1988] 1 KAR**.

13. He argued that he sustained severe injuries as was set out in the Medical Report that was adduced in evidence in the Trial Court, which he stated showed that the doctor opined that the head injuries were very severe and affected his performance of duties and the said head injury was likely to complicate with post traumatic epilepsy.

14. He pointed out that he had submitted that Kshs 5,988,429/= was adequate compensation for pain and suffering, loss of amenities, loss of future earning capacity and special damages. He argued that the Trial Court considered the injuries sustained, the resultant effects and was guided by previous authorities availed to her by the parties herein before awarding him the sum of Kshs 4,000,000/=.

15. He placed reliance on the case of **Florence Hare Mkaha vs Pwani Tawakal Mini Coach & Another [2012] eKLR** and the case of **Kirinjit Singh Magon vs Bonanza Rice Millers Ltd [2009] eKLR** where the court awarded Kshs 3,658,133/= and Kshs 5,392,635

respectively for injuries closer in impact with those sustained by himself. It was his contention that the range for such awards therefore was cumulatively Kshs 3,000,000/= and 5,000,000/= and that the Trial's court award in the sum of Kshs 4,000,000/= was thus well within the range and was in fact reduced by the contribution on liability.

16. Notably, of greater significance is the acknowledgment that an appellate court does not have the jurisdiction to interfere with the assessment of damages merely by substituting a figure of its own to that awarded by the trial court, even though it could have awarded a higher or lesser sum itself.

17. The rationale is both constitutional and statutory; where a judgment has been made by a competent court, an appellate court is estopped from asserting the contrary position unless on the well settled principles as propounded in **Butt vs Khan [1981] KLR 470** and **Kitavi v Coastal Bottlers Ltd [1985] KLR 470** that “...**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 a figure which was either inordinately high or low.**” (emphasis court)

18. This court reviewed both parties' submissions before the Trial Court and case law relating to comparable injuries as those that were sustained by the Respondent herein to satisfy itself if the Learned Trial Magistrate applied the correct principles to award damages in the sum of Kshs 4,000,000/= for general damages and loss of amenities.

19. There was no indication of the Respondent's medical condition and/or incapacity and/or if a second medical examination at the instance of the Appellant herein was done as at the time that he testified. All that the court noted from the lower court record was that counsel for the Appellant informed the Learned Trial Magistrate that they had written to the Respondent to undergo a second medical examination.

20. In the absence of any second medical report by the Appellant and no mention of the same at all as to whether the Respondent submitted himself for a second medical examination, this court drew an adverse reference regarding that purported second medical report, if all the same was prepared. As this was purely speculative, this court found it prudent not to say further but to limit itself to the said Medical Report of Dr Morebu Peter Momanyi.

21. Notably, the Respondent sustained injuries on 5<sup>th</sup> June 2017. He was examined on 2<sup>nd</sup> July 2017. This was slightly more than a month after the accident when the injuries were still healing. He testified on 5<sup>th</sup> July 2018. This was one (1) year and one (1) month after he sustained the injuries.

22. Similarly, in the absence of any recent Medical Report by the Respondent or any other evidence showing that he had had post traumatic epilepsy, this court was more persuaded to find and hold that despite the severe injuries that the Respondent sustained, a sum of Kshs 4,000,000/= general damages for loss of amenities was far too excessive warranting interference by this court.

23. Notably, an award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained. As correctly submitted by the Appellant similar injuries should attract comparable awards. However, in the quest for consistency, courts must also recognise that no case is exactly the same as another and therefore each case must be decided with its own peculiar circumstances in mind but keeping in mind that any monies awarded must be sustainable. Indeed, this court took judicial notice that the higher the awards on quantum, the more likely insurance premiums are likely to rise causing hardship to insurers and insureds.

24. Accordingly, this court had due regard to the following cases:-

**1. Artan Hussein & 2 Others vs Said Hamadi Upepo [2017] eKLR**

In this case, the plaintiff therein sustained a head injury, temporary loss of consciousness and haematoma.

In 2017, the court awarded Kshs 900,000/= general damages for loss of amenities.

**2. Jecinta Wanjiku vs Samson Mwangi [2006] eKLR**

The plaintiff therein sustained a head injury with cerebral concussion, a wound on the forehead and scalp, fracture of acetabular rim right hip, fracture of the right knee and post traumatic osteoarthritis right knee.

In 2006, the court therein awarded a sum of Kshs 1,000,000/= as general damages.

25. Taking into account the serious injuries that the Respondent herein sustained vis- a- vis the damages in comparable cases, this court came to the firm conclusion that a sum of Kshs 2,000,000/= was sufficient compensation.

**DISPOSITION**

26. For the foregoing reasons, the upshot of this Court's decision was that the Appellant's Appeal lodged on 27<sup>th</sup> June 2019 was partly merited and the same be and is hereby allowed. The effect of this is that the Judgment of the sum of Kshs 3,022,844/- that was entered by the Learned Trial Magistrate be and is hereby set aside and/or vacated and the same be and is hereby replaced with a Judgement entered against the Appellant herein in favour of the Respondent for the sum of Kshs 1,517,133/= made up as follows:-

**General Damages**

**Kshs 2,000,000/=**

**Special Damages** Kshs 22,844/=

**Kshs 2,022,844/=**

**Less 25% contributory negligence** Kshs 505,711/=

**Kshs 1,517,133/=**

Plus costs and interest thereon at court rates. Interest on special damages will be from date of filing suit while interest on general damages will be from the date of judgment of the lower court.

27. Since the Appellant was partly successful in its Appeal, each party will bear its own costs of the Appeal.

28. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2021**

**J. KAMAU**

**JUDGE**