



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 588 OF 2018

MARTIN MUTUKU.....1ST APPELLANT

SIMON MATHENGE.....2ND APPELLANT

-VERSUS-

SN (Suing through his

mother and next friend DC).....RESPONDENT

(Being an appeal against the judgment and decree delivered by E. K. Usui (Ms.)

(Senior Principal Magistrate) on 16th November, 2018 in Milimani CMCC No. 6946 of 2016)

JUDGEMENT

1. The respondent who is a minor filed a suit against the 1st and 2nd appellants through his mother and next friend DC by way of the plaint dated 25th February, 2016 and sought for both general and special damages in the amount of Kshs.119,500/= plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that sometime on or about the 11th day of November, 2015 while crossing the road on Waiyaki Way at Mountain View area in Nairobi, the motor vehicle registration number KBL 354K (“the subject motor vehicle”) being owned by the 2nd appellant at all material times and being driven by the 1st appellant, knocked down the respondent, causing him to sustain various injuries as particularized in the plaint.
3. The respondent attributed the accident to negligence on the part of the appellants, by setting out the particulars in his plaint.
4. Upon service of summons, the appellants entered appearance and filed their statement of defence dated 16th December, 2016 to deny the allegations set out in the plaint.
5. At the hearing of the suit, the parties herein recorded a consent on liability in the ratio of 90:10 in favour of the respondent, and the matter proceeded on quantum, with the respondent calling one (1) witness while the appellants closed their case without calling any witness.
6. Upon filing of submissions, the trial court delivered judgment in favour of the respondent and against the appellants in the following manner:

a) General damages	<u>Kshs.600,000/=</u>
b) Special damages	<u>Kshs.119,000/=</u>
Gross total	<u>Kshs.719,000/=</u>
Less 10% contribution	<u>Kshs.71,900/=</u>
Net total	<u>Kshs.647,100/=</u>

7. The aforementioned judgment has precipitated the appeal now before this court. To challenge the judgment, the appellants have put

forward the following grounds of appeal in their memorandum of appeal dated 13th December, 2018:

i. THAT the learned trial magistrate erred in law and fact in awarding the respondent Kshs.113,838/= as part of special damages even though the respondent did not actually incur the said amount.

ii. THAT the learned trial magistrate erred in law and fact by misdirecting herself on the extent and nature of the respondent's injuries in her assessment of general damages for pain and suffering and loss of amenities thereby awarding an amount which was manifestly excessive.

iii. THAT the learned trial magistrate erred in law in failing to apply the trite principle of law in awarding general damages for pain and suffering that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the level of awards in similar cases.

8. This court directed the parties to file written submissions on the appeal. On the part of the appellants, it is submitted *inter alia*, that the award of general damages made by the trial court is manifestly excessive and therefore ought to be interfered with.

9. The appellants suggest that this court awards a more reasonable sum of between Kshs.120,000/= and Kshs.300,000/= on appeal and relies on the case of **H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR** where the court awarded a sum of Kshs.250,000/= for degloving injury to the left leg with loss of skin over the calf muscles and blunt injury to the left ankle joint; and the case of **Easy Coach Limited v Emily Nyangasi [2017] eKLR** in which the court upon considering injuries in the nature of facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wounds, awarded a sum of Kshs.700,000/= on general damages for pain and suffering and loss of amenities.

10. It is the contention of the appellants that the respondent was equally not entitled to an award of special damages for the reason that the respondent's witness did not prove the medical expenses incurred.

11. For the above reasons, the appellants urge this court to interfere with the awards made by the trial court.

12. In reply, the respondent submits that medical evidence was tendered at the trial to prove the expenses incurred and hence the award made on special damages is proper and ought not to be interfered with.

13. The respondent further submits that the trial court arrived at a reasonable assessment on general damages in line with the relevant principles associated with an award of damages.

14. Consequently, the respondent is of the view that the award of the trial court ought not to be disturbed.

15. I have considered the rival written submissions on appeal. Moreover, I have considered the evidence which the trial court had the opportunity to look at. It is apparent from the grounds set out in the memorandum of appeal that the appeal relates to quantum.

16. The legal position on this is that the award of a trial court ought only to be interfered with on appeal under the following circumstances as articulated in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR**:

i. Where an irrelevant factor was taken into account.

ii. Where a relevant factor was disregarded.

iii. Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

17. It is apparent that the appellants are challenging the awards made on general and special damages. I will therefore address the damages under the two (2) heads.

a) General damages for pain and suffering and loss of amenities

18. DC who was PW1 testified at the trial that the respondent who is her son suffered injuries to the leg thereby resulting in his admission at Kenyatta National Hospital for two (2) months.

19. At the submission stage, the respondent suggested a sum of Kshs.850,000/= and cited *inter alia*, the case of **Tononoka Rolling Mills Ltd v James To Boso Were [2015] eKLR** in which the court awarded a similar sum for fractured left femur, degloving injury left thigh and pain, blood loss and soft tissue injuries.

20. The appellants proposed an award of Kshs.120,000/= and relied upon the case of **H. Young Construction Company Ltd v Richard Kyule Ndolo** (supra) also cited on appeal, among other cases.

21. The trial court awarded the sum of Kshs.600,000/= but did not make reference to any specific guiding authorities.

22. Upon my re-examination of the evidence, I observed that the medical evidence and more specifically the two (2) medical reports dated 11th February, 2016 and 10th March, 2017 are consistent with the injuries particularized in the plaint as follows:

i. Abrasions on the scalp

ii. Blunt injuries to the chest

iii. Blunt injuries to the abdomen

iv. Degloving injuries on the left foot

23. Both medical reports also classified the injuries as soft tissue in nature.

24. Upon considering the authorities referenced by the parties, I find that those cited by the respondent contained injuries of a more serious nature in comparison to those suffered in this instance, while those relied upon by the appellants; though constituting comparable injuries; were decided a few years back.

25. I therefore turn to the case of **Francis Ndungu Wambui & 2 others v Purity Wangui Gichobo [2019] eKLR** in which the High Court sitting on appeal assessed downwards an award in the sum of Kshs.450,000/= to one in the sum of Kshs.250,000/= in the instance of a plaintiff with a laceration to the left foot as well as a degloving injury to the base of the thumb which healed well leaving scars. I have also considered the case of **Michael Okello v Priscilla Atieno [2021] eKLR** where the plaintiff who sustained various blunt injuries to the head, forehead, neck, bruises to the left shoulder and upper/lower limbs, was awarded a similar sum of Kshs.250,000/=.

26. Taking the above comparable authorities into account as well as the nature and extent of the injuries sustained and the inflationary trends, I find that the award made by the learned trial magistrate falls on the higher side and ought to be interfered with. In my view, an award of Kshs.300,000/= would be more reasonable in the circumstances.

b) Special damages

27. Under this head, the respondent sought for a total sum of Kshs.119,500/= whereas the learned trial magistrate awarded a sum of Kshs.119,000/=.

28. Upon my re-examination of the evidence, I observed that PW1 testified that she spent a sum of Kshs.175,000/= on medical treatment for the respondent and produced an invoice issued by Kenyatta National Hospital as P. Exh 1.

29. However, she then stated that she paid a small part of the amount and signed an agreement that she would clear the balance, thereby producing a credit form signed by herself to that effect as P. Exh 2. She added that as at the time of giving her testimony, she was yet to clear the outstanding balance of the hospital bill.

30. In cross-examination, it was the evidence of PW1 that whereas the hospital bill amounted to Kshs.175,000/= she only paid the sum of Kshs.5,000/=.

31. The law on special damages is clear that special damages ought to be specifically pleaded and strictly proved.

32. In this instance, the evidence tendered before the learned trial magistrate shows that the hospital bill amounted to the sum of Kshs.117,838/= and that the sum of Kshs.4,000/= was paid as a deposit, leaving an outstanding balance of Kshs.113,838/= which it would appear was settled by the Hospital according to the averments made by the appellants at the trial.

33. The evidence tendered by the respondent before the trial court clear show that the respondent established that he incurred the sum of kshs.119,000/=. The trial magistrate therefore cannot be faulted in making the award.

34. Consequently, the appeal partially succeeds. The trial court's award of Kshs.600,000/= made under the head of general damages for pain, suffering and loss of amenities is hereby set aside and is substituted with an award of Kshs.300,000/=. The appeal as against the award on special damages is dismissed.

35. For the avoidance of doubt, the judgment on appeal is as follows:

a) General damages for pain and

Suffering and loss

of amenities **Kshs.300,000/=**

b) Special damages **Kshs.119,000/=**

Gross Total **Kshs.411,900/=**

Less 10% contribution Kshs. 41,190/=

Net Total **Kshs.370,710/=**

The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of judgment until payment in full. In the circumstances, I hereby order that each party bears its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants

..... for the Respondent