



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. E231 OF 2020

NG'ANG'A JOHN.....1ST APPELLANT

LUCAS OMONDI OKEYO.....2ND APPELLANT

-VERSUS-

DAVID OGOT AGOLA.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable P. Muholi (Mr.) (Senior Resident Magistrate) delivered on 15th November, 2017 in Milimani CMCC no. 8816 of 2016)

JUDGMENT

1. The respondent in this instance instituted a suit against the 1st and 2nd appellants by way of the plaint dated 14th October, 2016 and sought for both general and special damages in the sum of Kshs.6,700/= plus costs of the suit and interest thereon, arising out of a road traffic accident.
2. In his plaint the respondent pleaded that sometime on or about 30th September, 2015 he was aboard the motor vehicle registration number KAQ 495C ("the subject motor vehicle") as a fare paying passenger when the subject motor vehicle being at all material times owned and driven by the 1st and 2nd appellants respectively, lost control and veered off the road, causing the respondent to sustain bodily injuries which are particularized in the plaint.
3. The respondent attributed his injuries to negligence on the part of the appellants by setting out their particulars in the plaint.
4. Upon service of summons, the appellants entered appearance and filed their statement of defence on jointly on 1st February, 2017 to deny the respondent's claim.
5. At the trial of the suit, the respondent testified and called an additional witness, whereas the appellants closed their case without relying on any witness testimony.
6. Upon close of submissions, the trial court entered judgment in favour of the respondent and against the appellants jointly and severally in the following manner:

Liability	100%
a. General damages for pain, suffering and loss of amenities	Kshs.600,000/=
b. Special damages	<u>Kshs. 3,170/=</u>
Total	Kshs.603,170/ =

7. The appellants have now lodged an appeal challenging the trial court's assessment of damages by way of the memorandum of appeal dated 24th September, 2020 constituting the following grounds:

i. **THAT the learned trial magistrate erred in fact and in law in finding that the respondent was entitled to general damages of Kshs.600,000/=.**

ii. **THAT the learned trial magistrate erred in fact and in law in failing to consider the appellants' submissions on quantum.**

iii. **THAT the learned trial magistrate erred in fact and in law in awarding damages that were so inordinately high in view of the circumstances of the case.**

iv. **THAT the learned trial magistrate erred in fact and in law by failing to consider conventional awards for similar cases.**

v. **THAT the learned trial magistrate erred in fact and in law by unduly disregarding the judicial authorities cited by the appellants and by instead relying on the authorities cited by the respondent.**

8. At the directions of this court, the parties put in written submissions on the appeal. In their submissions dated 16th September, 2021 the appellants contend that the award made on general damages is manifestly excessive and therefore urge this court to reduce it to a more reasonable award in the sum of Kshs.150,000/= while citing among others, the case of **James Nganga Kimani & another v Giachagi Njoroge & 2 others [2019] eKLR** where the High Court sitting on appeal awarded the sum of Kshs.200,000/= in view of injuries categorized as a scar on the nasal bridge and lower limb, broken upper incisor tooth and missing lower incisor of teeth and multiple dental carries; and the case of **Washington Mukunya Karanja & another v Margaret Wambui Maina [2020] eKLR** in which the High Court sitting on appeal upheld the sum of Kshs.300,000/= awarded on general damages to a plaintiff with swelling of upper part of mouth, alveolar fracture of both incisor teeth, soft tissue injuries on right leg and a superficial wound.

9. The appellants also urge this court to award them costs of the appeal.

10. In his reply submissions, the respondent pleads with this court to find that the award made by the trial court is reasonable and comparable to awards previously made in respect to similar or related injuries.

11. The respondent cites the case of **Easy Coach Limited v Emily Nyangasi [2017] eKLR** in which an award was made in the sum of Kshs.700,000/= at the instance of a plaintiff with facial injuries, injury to chest, injury to back, injury to right hand with cut wound and injury to right leg with cut wounds; and the case of **Acacia Ventures Limited v Nellie Belindah Osok [2021] eKLR** where the plaintiff was awarded general damages in the sum of Kshs.500,000/= for bruises on the forehead, upper lip cut wound, nose bleeding, loss of four (4) lower teeth, complex soft tissue injuries and anterior maxillary dental alveolar fracture.

12. Consequently, the respondent is of the view that there is no reasonable basis for interfering with the award made by the trial court.

13. I have considered the rival submissions and authorities cited on appeal. I have also re-evaluated the evidence which was tendered at the trial of the suit.

14. It is noted that the appeal lies purely against quantum, specifically the award made under the heads of general damages for pain, suffering and loss of amenities. I therefore deem it fit to address the five (5) grounds of appeal under that head.

15. The legal position on assessment of damages is that a court sitting on appeal can only interfere with the award of a trial court in instances where an irrelevant factor was taken into account, a relevant factor was disregarded or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

16. The foregoing principles were enunciated by the court in the renowned case of **Kemfro Africa Ltd t/a Meru Express Services & Another v Lubia & Another (No. 2) [1985] eKLR** cited in the appellants' submissions.

17. It is noteworthy that the appeal is based on the grounds that the award made in general damages is manifestly excessive and was made in disregard of the submissions and authorities presented by the appellants.

18. The respondent on the one hand suggested an award in the sum of Kshs.750,000/= while placing reliance on the case of **Silper Okoko & Another v F. Radido & Another [2000]eKLR** where the court awarded a sum of Kshs.700,000/= for loss of teeth, and the case of **Bildad Onditi & Another v Belinda Atieno Onyuka [2013] eKLR** in which an award of Kshs.750,000/= was made for loss of teeth in the upper jaw, fracture of the tooth and multiple soft tissue injuries.

19. In his judgment, the learned trial magistrate made mention that as at the time of writing the judgment, the submissions by the appellants had not been availed. In the end, the learned trial magistrate awarded a sum of Kshs.600,000/= under that head.

20. Upon my study of the record, I observed that the submissions by the appellants were filed on 28th September, 2017 which is well before the time of delivery of the impugned judgment. The learned trial magistrate ordinarily ought to have had a copy of the same for his reference. It is therefore apparent that the submissions put forth by the appellants were not taken into account in making the award.

21. That notwithstanding, from my re-evaluation of the pleadings, material and evidence tendered at the trial, I note that the respondent

