



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL NO. 117 OF 2017

JOHN MUCHIRI NDERITU.....1ST APPELLANT

JAMES NJOROGE KANANGA.....2ND APPELLANT

VERSUS

GRACE NJOKI NJUGUNA.....RESPONDENT

JUDGMENT

1. On 16th May, 2016, the Respondent/Plaintiff Grace Njoki Njuguna filed suit against the Defendants seeking general and special damages for injuries sustained on 23rd November, 2013 when motor vehicle registration number KBA 353N in which she she alleged that was a lawfully travelling passenger along Ol Kalou – Njabini road at Kariamu Trading Centre when the 2nd appellant so negligently drove, managed and/or controlled the said vehicle as a result of which it was involved in a collision with motor vehicle registration number KBT 636B and subsequently sustained the pleaded injuries.

2. The suit was said to form part of a series of files in which Nyahururu SPMCC No. 276 of 2013 was selected as the test suit for purposes of determining liability whereby judgment on liability was entered at 100% against the 3rd and 4th appellants. The above being the position, the judgment was limited only to the question of quantum of damages payable to the Respondent.

3. On general damages, Dr. Kiamba's report was conclusive of the injuries and medical history of the respondent. In that report dated 14th December, 2013, Dr. Kiamba has stated that the injuries suffered to be:

- ***Soft tissue injuries of the left shoulder joint***
- ***Soft tissue injuries of the chest***
- ***Soft tissue injuries of the back***
- ***Soft tissue injuries of the right wrist joint***
- ***Soft tissue injuries of the left knee joint***
- ***Hematoma on the right thigh***
- ***Bruises on the left leg***

4. As a result of the said injuries, the doctor stated that she had not recovered from most of those injuries though was still suffering from pain and swelling of the left knee joint, pain in the chest and left shoulder and backache. The bruises had healed and the haematoma she had suffered on the right thigh had not subsided though she was still on treatment and would recover within a few weeks. He classified the degree of injuries as harm and awarded a temporary incapacity of 2 months.

5. Her advocate proposed that Kshs.500,000/- as adequate compensation for the injuries suffered. She relied on the decision in the case of ***Devki Steel Mills Ltd v James Makau Kisuli [2012] eKLR*** where the court awarded Kshs.250,000/- as general damages for pain, suffering and loss of amenities.

6. The 3rd and 4th appellants' Counsel proposed that Kshs.45,000/- could be adequate compensation for the injuries she sustained. He relied on the cases of ***Joseph Musee Musa v Julius Mbogo & 3 Others [2013] eKLR*** where it was held that damages for injuries

suffered must be within consistent limits and they should present a fair compensation but should not be excessive.

7. Cecilia Mwangi & Another v Ruth Mwangi, Civil Appeal No. 251 of 1996 where the court held that *in awarding damages, it must be done in appreciation that money cannot renew a tissue that has been injured but that the same should be used in so far as it can be termed as reasonable compensation.*

8. Pamela Ombiyo v Kenya Bus Services, Nairobi HCC No. 1309 of 2002 where the *Plaintiff sustained blunt head injury with loss of consciousness, deep cuts on the forehead and both legs, soft tissue injury to the neck, subluxation of public symphysis and blunt trauma to the right hip an right eye and was awarded a sum of Kshs.50,000/-.*

9. Shalimar Flowers Limited v Noah M. Mathianyi, HCCA No. 175 of 2008 where the *Plaintiff sustained deep cut wound on the left wrist joint which healed leaving a scar, soft tissue to the same joint and blunt injury to the anterior chest and was awarded Kshs.50,000/-*

10. The trial court held that;

“injuries suffered by the Plaintiff and the above stated precedents that have bene relied on by the respective counsels, their ages and inflation and rising cost of living, Kshs.45,000/- may not be fair and reasonable today as requested by the Defendants counsel. In the event, I shall award Kshs.400,000/- as general damages”.

11. Being aggrieved by trial court verdict, appeal was lodged.

Grounds:

i. That the learned trial Magistrate erred in law and fact in making an award of General damages that is excessive in the circumstances.

ii. That the learned trial Magistrate erred in law and fact in misapprehending the law on the award of damages thereby making an award of general damages that is incongruent with the injuries sustained and proved, but also with authority and principle.

iii. That the judgment of the trial court on quantum is unreasonable and contrary to law, principle and facts of the case presented before that trial court.

The parties were directed to canvass appeal via submissions.

APPELLANTS' SUBMISSIONS:

12. The appellants submitted that, trial Magistrate erred in law in totally ignoring the submissions of the Appellants on quantum and thereby making an award of damages that is clearly not compensatory but enriching to the Respondent.

13. Cases relied on were, West (H) & Son Ltd v Shepherd [1964] AC. 326, 345, as cited in Civil Appeal No. 1 of 2014 Odinga Jactone Ouma v Moureen Achieng Odera [2016] eKLR, In Civil Case No. 86 of 2008 Joseph Musee Mua v Julius Mbogo Mugi & 3 Others [2013] eKLR , Ossuman Mohamed & Another v Saluro Bundit Mohamed Civil Appeal No. 30 of 1997 (unreported) quoting the case of Kigaragari v Aya (1982 – 1988) 1 KAR 768, Stanley Maore v Geoffrey Mwenda, Civil Appeal No. 147 of 2002 at Nyeri, as cited in the case of Dickson Ndung'u Kirembé & Another v Theresa Atieno & 4 Others [2014] Eklr, and Zakayo Maingi v Hellen Mukii Kilonzi [2012] eKLR and thus proposed award of Kshs.50,000/-as general damages.

14. It was also submitted on special damages on reliance of the case of Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the learned Judge of Appeal – Kneller, Nyarangi JJA and Chesoni Ag. JA –where it was held: the court expressed itself as follows with respect to special damages:

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves.”

15. However, there was no ground set out in memorandum of appeal challenging award on special damages.

RESPONDENT'S SUBMISSIONS:

16. Submitted that, the factors that court considers in awarding damages as outlined in Charles Oriwo Odeyo v Apollo Justus Andabwa & Another [2017] eKLR. Also cited the case of Mbaka Nguru & Another v James George Rakwar NRB CA Civil Appeal NO. 133 of 1998 [1988] Eklr. PLUS (See Kigaraari v Aya [1982-88] 1 KAR 768, Ugenya Bus Service v Gachiki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).

17. It was submitted that the trial court correctly took into account the age of the authorities cited by both counsels and also took into account the inflation rate and rising cost of living in arriving at the award.

18. Further cited were the case of Catherine Wanjiru King'ori & 3 Others v Gibson Theuri Gichubi [2005] eKLR where the High Court at

Nyeri awarded the 1st and 3rd Plaintiff's Kshs.300,000/- and Kshs.350,000/- respectively for soft tissue injuries. Also the case of Francis Ochieng & Another v Alice Kajimba [2015] eKLR where the court awarded Kshs.350,000/- for severe soft tissue injuries. Also relied on was a case of Lake Naivasha Growers v Muigai Thuka [2020] Eklr.

ANALYSIS AND DETERMINATION

19. The only issue herein is, whether *The award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision.*

20. It is not contested that the respondent sustained soft tissue injuries namely; *Soft tissue injuries of the left shoulder joint, Soft tissue injuries of the chest, Soft tissue injuries of the back, Soft tissue injuries of the right wrist joint, Soft tissue injuries of the left knee joint, Hematoma on the right thigh, Bruises on the left leg.*

21. The court after considering the nature of injuries, age and cited authorities awarded respondent Kshs.400,000. in Charles Oriwo Odeyo v Apollo Justus Andabwa & Another [2017] eKLR the court said that:

“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler v Butler (1984) KLR 225)”

22. Appellants relied on below cited cases and proposed an award of Kshs.50,000 namely; Stanley Maore v Geoffrey Mwenda, Civil Appeal No. 147 of 2002 at Nyeri, as cited in the case of Dickson Ndung'u Kirembe & Another v Theresa Atieno & 4 Others [2014] eKLR the Respondent suffered injury to the right shoulder, chest, back and left leg with hematoma and had been awarded Kshs.300,000/- by the High Court. The Court of Appeal found that those were soft tissue injuries and reduced the amount to Kshs.50,000/- was issued as compensation.

23. Lastly in the case of Zakayo Maingi v Hellen Mukii Kilonzi [2012] eKLR the Respondent's injuries were soft tissue in nature and involve a blunt injury to the right hip with deep muscle injury and swelling and another blunt injury to the lower abdomen. The Plaintiff complained of pains in the injured muscles and hematoma caused by a bruise was found to be exuding (sic) fluid from time to time. The hematoma was organized into a hard dark mass which was of cosmetic significance to a young girl. An award of Kshs.180,000/- was awarded.

24. While the respondent cited the below cases to urge court to uphold trial court award namely; The case of Catherine Wanjiru King'ori & 3 Others v Gibson Theuri Gichubi [2005] eKLR the High Court at Nyeri awarded the 1st and 3rd Plaintiff's Kshs.300,000/- and Kshs.350,000/- respectively for soft tissue injuries.

25. The case of Francis Ochieng & Another v Alice Kajimba [2015] eKLR where the court awarded Kshs.350,000/- for severe soft tissue injuries.

26. In the case of Mbaka Nguru & Another v James George Rakwar NRB CA Civil Appeal NO. 133 of 1998 [1988] eKLR that:

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant facts this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant. (See Kigaraari v Aya [1982-88] 1 KAR 768, Ugenya Bus Service v Gachiki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).

27. Am persuaded by the case of Maore Vs Mwenda [2004]eKLR where the Court of Appeal allowed the appeal and entered judgment for Kshs.100,000/= reducing the award from Kshs. 300,000/=. In that case, the Respondent, according to the Medical Report by Dr. Sala Kwera, sustained injuries involving; injury to the right shoulder, injury to the chest, Injury to the back, and injury to the left leg with haematoma.

28. He was given tetanus toxoid, the bruises were cleaned and dressed then he was discharged on anti-inflammatory drugs. On examination, he complained of back pain and pain on the left hip. The above decision was made over 16 years ago. No doubt there is inflation and time lapse.

29. Thus taking into consideration of all factors of the case, I reduce trial court award to Kshs.150,000 as general damages.

30. Thus the appeal succeeds partially and thus court makes the orders that;

i. The appeal is allowed on general damages partially that the award is reduced to Kshs.150,000.

ii. Parties to bear their costs.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 16TH DAY OF DECEMBER, 2021.

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CHARLES KARIUKI

JUDGE