



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL APPEAL NUMBER 65 OF 2018

NGUKU JOSEPH1ST APPELLANT

CREDIBLE SERVICES LIMITED.....2ND APPELLANT

-VERSUS-

GERALD KIHU MAINA.....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. R. Amwai,

Senior Resident Magistrate, Molo, delivered on 9th May 2018

in Molo CMCC No. 257 of 2015)

J U D G M E N T

1. On 9th May 2018 the learned trial magistrate *R. Amwai RM* delivered her judgment. Liability had been agreed at 15:70:15 whereby the plaintiff and 3rd party would each shoulder 15% and the defendant 70%. She assessed General Damages for pain and suffering at Kshs. 2.5 million, Special Damages at Kshs. 91,000/= and awarded Kshs. 2,202,350/= plus costs and interest.

2. In assessing General Damages. She noted that plaintiff had sustained the following injuries;-

- a) **Mild head injury.**
- b) **Lacerated wound on the left supra orbital region of the face.**
- c) **Blunt injury to the anterior abdominal wall leading to gall bladder laceration and liver laceration.**
- d) **Fracture right humerus.**
- e) **Lacerated wound on the scalp about four (4) cm long.**

She also noted that the plaintiff had submitted for Ksh. 5 million General Damages while the defendant had submitted for Ksh. 350,000/=. The learned trial magistrate relied on the case of ***Nancy Oseko v BOG Maasai Girls High School [2011] eKLR*** where the court cited Lord Denning's decision in ***KIM PHO CHOO Vrs CAMDEN & ISLINGTON AREA HEALTH AUTHORITY(1979) 1, ALLER 332*** that in assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. Guided by the above principles, the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant.

3. She also relied on the medical documents from Provincial General Hospital Nakuru, Thika Level 5 Hospital, PCEA Kikuyu Hospital and medical reports by Dr. Omuyoma and Dr. Malik.

4. The defendants were not pleased with the judgment and filed an appeal on 6th June, 2018 on the following grounds:-

1. THAT the Learned Trial Magistrate erred and misdirected herself as to the nature of injuries and therefore erred in law in her assessment of damages awardable to the Plaintiff which was manifestly excessive.

2. THAT the Learned Trial Magistrate erred in assessing damages and failed to apply the principles applicable in award of damages and comparable awards made for analogous cases hence ended up making an award that is manifestly excessive.

3. THAT the Learned Trial Magistrate failed to take into consideration the cross examination by the defence and the submissions thereto hence failed to take note of the inconsistencies in the respondents case.

5. Parties agreed to dispose of the appeal through written submissions which were filed by respective counsel. For the appellants, it was argued by *Murimi Ndumia Mbago & Muchela & Company Advocates* that the only issue for determination was whether the trial magistrate made an excessive award in awarding the respondents Kshs. 2, 500,000/= General Damages.

6. They placed heavy reliance on Dr. Malik's medical report dated 19th January, 2019. They took issue with the respondent's evidence that his 'gall bladder' was removed as a result of the accident yet it was not pleaded in his plaint. Relying on **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR Civil Appeal 219 of 2013** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself on the importance and place of pleadings:-

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to on issue and must be disregarded..."

...in fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

They urged me to disregard that evidence of the gall bladder.

7. Reminding me of the caution that an appellate court will not disturb the award of damages if the trial unless it was manifestly excessive or has made an irrelevant consideration or the application of wrong principles, they cited **Butt vs. Khan (1978) eKLR Court of Appeal No. 40/1977** where the court said;

"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 is either inordinately high or low."

8. In urging me to make a finding of Kshs. 400,000/= as the appropriate General Damages they submitted a citation of nine (9) cases.

1. **John Mutisya Ngile v Nthambi Paul Mutisya (a child) MKS HCCA No. 94 of 2004 [2006] eKLR** where the plaintiff sustained a traumatic extraction of the upper left incisor, blunt abdominal trauma to the liver and gall bladder, laceration wound on perineal region and bruises on the lower limbs. The court reduced an award of Kshs. 340,000/= awarded by the trial court and awarded Kshs. 200,000/= in 2006. The Injuries in this case are analogous to the injuries in the instant suit and determination in the cited case ought to be applied in the instant case.

2. **Angeline Akinyi Odhiambo v Teresia Mbaika Kanyo & Another [2016] eKLR Civil Appeal 123 of 2013**

In which the High Court upheld the Trial Court's award of Kshs. 200,000/= in General Damages where the Appellant sustained a liver rupture and other injuries on the left ear, right hand and shoulders, back and chest. The examining doctor found that her general condition was good. He concluded that the Appellant would need further treatment and that the injury to her abdomen led to rupture of the liver which was repaired through open surgery and that the condition would need follow up to ensure full recovery.

3. **Maina Onesmus v Charles Wanjohi Githome [2019] eKLR Civil Appeal 3 of 2018** in which the High Court revised the Trial Court's award of Kshs. 600,000/= to Kshs. 350,000/= where the Respondent suffered a fracture of the midshaft humerus, a fracture of the condyles, a fracture of the shoulder gird and pain and psychological trauma.

The Respondent in the above-mentioned suit suffered multiple fractures for which the Court awarded Kshs. 350,000/=. The Respondent in the instant suit suffered a single fracture of the right humerus which ought to attract Kshs. 150,000/= in General Damages.

Consequently, an award of General Damages of Kshs. 400,000/= ought to be reasonable in the instant suit, taking into account the soft tissue and laceration injuries suffered by the Respondent herein.

4. **Fast Choice Co. Ltd & Another vs Hellen Nungaru Ngure [2011] eKLR Civil Appeal No. 6 of 2010** where the plaintiff who had suffered a fracture of the shaft of the humerus, bruised right small finger and soft tissue injuries to the chest anterior walls was awarded Kshs. 180,000/=. The Respondent in the instant suit suffered a single fracture of the right humerus which ought to attract Kshs. 150,000/= in General Damages.

Consequently, an award of General Damages of Kshs. 350,000/= ought to be reasonable in the instant suit, taking into account the soft tissue and laceration injuries suffered by the Respondent herein.

5. **Kiwanjani Hardware Ltd & Another v Nicholas Mule Mutinda [2008] eKLR Civil Appeal No. 16 of 2008** in which the Court upheld the Trial Magistrate's Court of Kshs. 150,000/= where the Respondent has suffered a blunt injury to the head without loss of consciousness, blunt injury to the neck, a cut to the throat, blunt injury to the left shoulder and back, blunt injury to the chest, blunt injury to the right forearm, deep penetrating wound on the left leg with cuts and bruises on the same leg.

6. **David Okoka Odera v Kilindini Tea Warehouse Limited HCCA 2008 (eKLR) Civil Appeal 78 of 2006** where the court in awarding a sum of Kshs. 40,000/= for bruises that healed without any permanent incapacity cited the case of Nairobi HCCC No. 2164 of 1991: Vincent Oduor – vs – K.P. & L Company Limited where the plaintiff suffered soft tissue injuries involving bruises and cuts.

7. **Gilbert Odhiambo Owuor v Nzoia Sugar Company Limited [2012] eKLR Civil Appeal 46 of 2010** the Court proceeded to award the appellant Kshs. 50,000.00 in General Damages for soft tissue injuries on his left leg accompanied by pain on the leg. The injuries in the said case are analogous to the injuries in the instant suit and we submit that the awards should be similar.

8. **Josephine Angwenyi v Samuel Ochillo [2010] eKLR Civil Appeal 125 of 2008** where the Plaintiff/Appellant was awarded Kshs. 70,000.00 for soft tissue injuries she had suffered.

9. **Sokoro Saw Mills Limited v Grace Nduta Ndungu [2006] eKLR Civil Appeal 99 of 2003** where the High Court awarded the Plaintiff Kshs. 30,000.00 for soft tissue injuries that she had suffered.

9. For the respondent the firm of E. M. Juma filed submissions and put out the same issue for determination. They set out the respondent's injury accompanied by detailed analysis of the medical evidence, including citing an article by "*Minesha Katri MD @ 2017 WebMD LLC definition of G.E.R.D.*" They cited two (2) cases;

Geoffrey Mwaniki Mwinzi v Ibero (k) Limited & Another (2014) eKLR the court awarded general damages of Kshs. 2,000,000 where the plaintiff had a fracture of the collarbone and fractures to his left leg which injuries were less severe than what the respondent herein sustained.

Alex Wachira Njagua v Gathuthi Tea Factory & Another [2010] eKLR where the court awarded Kshs. 3 Million where the plaintiff suffered blunt injuries of the head with confusion, fracture of the left tibia, fracture of the right fibula, cut wound on the forehead, bruised elbow and bruised knee with injuries are almost similar to what the respondent herein sustained."

And urged me to uphold the trial court's award of Kshs. 2.5 million.

10. It is not in dispute that on 11th November, 2013 the respondent was involved in a Road Traffic Accident whereby he sustained injuries. He was first admitted at Provincial General Hospital Nakuru and according to the discharge summary, between 11th November, 2013 to 13th November, 2013. He came to the hospital with complaint of inability to use the right hand, was conscious, bandage on head, broken pieces of glass all over the body. X-ray of right hand indicated fracture of humerus, and the skull x-ray normal.

11. On 21st November, 2013 he was admitted at Thika Level Five (5) Hospital with intra-abdominal pain, traumatic liver injury, gall bladder removed discharged on **10th December, 2013**; **P3** was filled on **28th May, 2015** showed; *head lacerations on head, extended midline excision scar, right humerus, had fracture, grievous harm*. According to **Dr. Omuyoma's report**; examined on **18th June 2015**, complaint was pain in the right hand. His findings;

- Permanent scar on scalp 14 cm, scar on supra orbital region left eye 6m long, CT Scan, mild head injury.
- Abdominal surgical scar, healed fracture of humerus.
- Permanent disability, 40%, degree of injury grievous harm

Dr. Malik's report of 19th January 2018

- Complainants
- Occasional abdominal pains after meals
- Inability to grip and lift heavy objects with right hand.
- Fracture had healed fully and was in a very good position, not detected muscular neurological deficit in right arm, removal of gall bladder "allow patient to lead normal life".
- Possibility of post-operative adhesions in the abdomen which may give discomfort after heavy meals
- Suffered total incapacity of temporary nature, 8 weeks

- Partial incapacity of temporary nature, 4 weeks
- No detectable signs of permanent physical disability
- 5% liability benefits for possible sequela of his abdominal injury

12. In **Geoffrey Mwaniki Mwinzi v Ibero K. Limited** the plaintiff not only suffered extensive compound fractures, extensive damage to his soft tissues of the left leg and collarbone, the left lower limb had to be AMPUTATED above the knee. Before that fracture was fixed with a metallic plate. Major permanent disability 55 – 60%. Award in 2014 Kshs. 2.5 million, 20% contribution. Obviously these were far more serious than injuries sustained by the respondent herein.

In **Alex Wachira Njagua vs Gathuthi Tea Factory** apart from the fractures, the plaintiff became mentally ill following the Road Traffic Accident 100% incapability. Kshs. 3 million in 2010.

13. For the respondent in **John Mutisya Naile vs Nthambi Paul Mutisya**, there were no fractures, award of Kshs. 200,000/= In **Maina Onesmus v Charles Wanjohi**, this court reduced an award of Kshs. 600,000/= to 300,000/= for fracture of the mid shaft humerus and condyles and fragment fracture of the shoulder girdle. In **Fast Choice Company Limited** the court reduced an award of Kshs. 450,000/= to Kshs. 180,000/= for comminuted fracture of shaft of right humerus 1/3 plus other STI.

14. In the trial court the respondent relied on **Duncan Kimathi Karagania vs Ngugi David & 3 others [2016] eKLR**. The applicants relied on **Shreeji Enterprises (k) Limited v John Kiyeene Wambua & Another [2015] eKLR**, where the plaintiff suffered two (2) fractures, right clavicle and right humerus with replacement. They proposed Kshs. 350,000/=.

15. As the court of first appeal I am guided by **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** where the court stated:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

*However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270**).”*

I have carefully set out the authorities cited by both parties. The authorities cited by the respondent were for injuries much more severe than he suffered. In fact in the **Nancy Oseko** case cited by the learned trial magistrate the plaintiff had sustained very serious injuries as compared to the appellant herein

1. Chest injury with accumulation of blood in the chest;
2. Head compression fracture of the thoracic spine no 12;
3. Loss of sensation from the level T-12 downwards.
4. Loss of motor function from same level downwards;
5. Loss of control of urine and stool.

16. The plaintiff was awarded general damages for pain and suffering of Ksh 2.5 million because the effects of those injuries were dire. *She underwent an operation of the spine where metals were fixed to stabilize the spine, an open chest operation to remove blood; under went physiotherapy, occupational therapy; ambulating her on a wheelchair. The plaintiff developed bed sores which were healed, has to use medication to evacuate stool. The Doctor opined that she had permanent loss of the following functions;*

1. Inability to walk. She has been confined to a wheel chair for life and a paraplegic and need confined to a wheelchair for life and was a lapel all her life.
2. Inability to control stool.
3. Inability to control urine, she was fitted with a catheter rundown, and urine bag, uses diapers or napkins.
4. Ability to engage in sexual life in future is medical. Though she can conceive, delivery would be by caesarian section.
5. Is affected psychologically- if she does not adjust she may never engage in any gainful employment.
6. Predisposed to recurrent chest and urinary tract infections and infections due to the nature of her injuries, she requires frequent check-ups.

7. She requires a special bed that can be turned by hydraulic or electronic system and a special mattress .

8. Regular follow up as an outpatient for life on a three Monthly basis.

17. These are not injuries that are anywhere comparable to the injuries sustained by the respondent herein and clearly the learned trial magistrate misled herself in arriving at the similar general damages.

18. Secondly, it is noteworthy that issue of the removal of the gall bladder was not pleaded as an injury consequent to the Road Traffic Accident despite the fact the same is said to have been removed in 2013. Nevertheless the respondent did sustain injury to the liver and gall bladder and that is pleaded.

19. Both medical reports painted the picture of a plaintiff who had healed well from his injuries and who had not sustained permanent disability. The disparity between the assessments of the two (2) doctors is disconcerting but suffice it to say that one was in 2015 when the injuries had not healed well while the other was in 2018 after the injuries had healed leaving scars. No amount of damages can put a plaintiff in the position before the injuries but compensation must be reasonable.

20. I am of the view that in the above circumstances the award of Kshs. 2.5 million was excessive.

21. I find it necessary to interfere with the trial magistrate's finding on general damages, bearing in mind the principles that guide assessment of damages as espoused in **West (HI) and Sons LTD VRS SHEPHERD (1964) AC 326** which was adopted in the case of **CECILIA MWANGI & Another vs RUTH MWANGI CA 251 /1996**, and in the **Nancy Oseko** case where the Judge adopted what *Lord Morris* said:

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

22. In view of the cited authorities and the injuries sustained by the respondent, and the final diagnosis, I find that a sum of Kshs. 500,000/= would be appropriate. I therefore set aside the award of Kshs. 2.5 million and substitute it with Ksh 500,000/= plus interest at court rates from the date of the award in the court below.

23. The appellant will have half the costs of this appeal.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Edna

Ms Githae for Ms Obura for respondent

Mr. Mwangi for Mr. Murimi for appellant