



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CIVIL APPEAL NO.105 OF 2017**

**(Appeal Originating from Nyahururu CM's Civil.106 of 2015 Before Hon. O. Momanyi – SRM)**

**JOHN KAINDO NGUGI.....1ST APPELLANT**

**NYANDARUA COUNTY GOVERNMENT.....2ND APPELLANT**

**V E R S U S**

**JOHN KIMANI IRAYA.....RESPONDENT**

**J U D G M E N T**

This is an appeal against the Judgment of Hon. O. Momanyi, SRM, delivered on 8/3/2017 in C.M.'s Civ.106/2015. The respondent, John Kimani Iraya, vide a plaint dated 24/6/2015 sought the following reliefs against the appellant's, John Kaindo Ngugi and the County Government of Nyandarua(defendants):

1. *General damages for pain, suffering and loss of amenities;*
2. *Special damages of Kshs.4,710/=;*
3. *Costs of the suit plus interest at court rates;*
4. *Any other relief that this court may deem fit to grant.*

The respondent claimed to have suffered injuries following an accident involving the appellant's motor vehicle and the respondent for which he blamed the appellant's driver for negligence and for its occurrence. The respondent listed the following injuries:

- (a) *Soft tissue swelling of the right upper limb, around the wrist joint;*
- (b) *Glozes in the right leg associated with swelling;*
- (c) *Soft tissue injury to the scalp;*
- (d) *Scars on the tibia, tube tuberosity of right leg, mid-leg.*

The respondent produced in evidence, a police abstract, P3 form, receipts for payment for treatment, medical report dated 6/5/2016 and demand letter P.Ex.1-5. By consent, the medical report by Dr. Kalande dated 3/10/2016 was produced as the appellant's exhibit No.1.

The parties settled the issue of liability in the ratio of 75% to 25% in favour of the plaintiff (respondent). The only issue that the court addressed was quantum and the trial court made an award of Kshs.450,000/= as general damages in favour of the respondent subject to apportionment. The appellant (defendant) is aggrieved by the said award.

By a Memorandum of Appeal dated 29/3/2017, the appellant set out the following eight (8) grounds of appeal:

1. *That the magistrate erred in both fact and law when he awarded Kshs.450,000/= as general damages in favour of the plaintiff/respondent against the defendant/applicant;*
2. *That the trial magistrate erred in law and fact in awarding Kshs.450,000/= as general damages as the same is excessively high and also in failing to find that the nature of injuries sustained by the respondent did not warrant such an award;*

3. That the magistrate erred both in law and fact in failing to take into account the submissions of the appellant's counsel whilst making the award;
4. That the learned trial magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by the laws of natural justice;
5. That the magistrate erred both in law and fact in making an award on quantum which is too high and was not supported by relevant authorities and or commensurate with the injuries suffered by the plaintiff;
6. That the learned trial magistrate erred both in law and fact by failing to uphold the doctrine of precedent and appreciate and be guided by case law with similar facts;
7. That the learned trial magistrate erred in law and fact in applying the wrong principles and failing to appreciate and be guided by the prevailing range of comparable awards in cases of similar nature;
8. That the award on general damages was against the weight of the evidence before the court and was without any consideration to the submissions of both counsel whilst making the award.

The appellant challenged the whole award of damages on grounds that the trial court did not exercise its discretion judiciously and failed to observe the principles that guide the courts in awarding damages.

In Kenya Tea Development Agency v Augustine Gowi Makori C.A.136/2005, the High Court relied on the decision in Kipkebe Land v Moses Kauri Masaku HCA.127/2004 Kisii, where the court observed:

*“It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such facts as previous awards for similar injuries and such other relevant factors.”*

The respondent on the other hand argued that the award was reasonable and the court did not apply wrong principles in the award of damages.

In awarding damages, the court must also take into account the fact that an award of damages can never put the plaintiff back in the shoes he was in before the injury. This fact was reiterated in Rahima Tayab & others v Anna Mary Kinanu C.A.29/1982 (1983) KLR 114, where the court relied on the decision of H. West & Son Ltd v Shepherd (1964) where it was held that:

*“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 awarding damages, the court in the exercise of its discretion must bear in mind that the respondent's shattered frame can never be taken back to where it was but the court only makes a reasonable compensation.

In the case of Kemfro Africa Ltd t/a Meru Express & another v A.M. Lubia & another (No.2) CA.21/1984 (1985 eKLR), the court set down further principles to be observed by courts in the exercise of discretion in awarding damages. The court said:

*“The principles to be observed by an appellant court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial Judge were held by the former Court of Eastern Africa to be that it must be satisfied that either the Judge, in assessing damages, took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”*

See also Butt v Khan (1978) KLR 1 [CA.40/1977].

The question is whether the trial court failed to observe any of the above stated principles.

According to the appellant, the damages awarded were inordinately high. The medical report by Dr. Mburu dated 6/5/2015 indicated that the respondent suffered soft tissue swelling of the right upper limb especially found in most joint Glazes in the right leg associated with swelling and soft tissue injury – scalp. Dr. Kalande in his Medical Report dated 3/10/2016 indicated that the respondent suffered soft tissue to the right wrist, right leg tissues and temporal scalp injury; that the respondent was in good health and could go back to work. Dr. Kalande concluded that the injuries suffered were mild soft tissue injury.

According to the appellant, an award of Kshs.150,000/= was reasonable. Mr. Muli, counsel for the appellant relied on the decision in F. Kibon Changwony v Phoebe Nanjala Lubukha (2016) eKLR, where the plaintiff was awarded Kshs.152,200/= general damages for soft tissue injuries to the scalp, shoulders, arms and right eye which was swollen and tender, blunt trauma to the neck, chest, lumber spine swollen abdomen. In Yusuf M. Hamza & another v Farida Pendo Kapumu (2010) eKLR, the respondent suffered soft tissue injuries on the left hand and was awarded Kshs.180,000/=.

The respondent on the other hand relied on the decisions of H.C.950/1998 Habiba Abdi Mohamed v Peter Maleve where plaintiff suffered injuries to the left arm, head and face and an award of Kshs.400,000/= was made.

In Nyeri H.C.320/1998 Catherine Wanjiru Kingori & others v Lasbon Theuri, the 1st plaintiff sustained injuries to the left ankle, legs and chest and an award of Kshs.300,000/= was made in 2005.

I note from the Judgment of the court that the court did not consider any comparable decisions in awarding damages.

I have taken into account the medical reports and the injuries suffered by the respondent and the decisions that have been cited by the appellant on quantum are more comparable with the injuries suffered by the respondent.

They are also decisions that were made recently in 2018. I also take into account the incidence of inflation in Kenya. Generally, the respondent suffered very mild soft tissue injuries and it is my view that the award by the trial court was on the higher side.

I consider an award of Kshs.250,000/= to be adequate compensation for the plaintiff. In that regard, I set aside the award of Kshs.450,000/= and instead award the respondent Kshs.250,000/= as general damages and I enter Judgment in favour of the respondent for the said sum subject to the contribution agreed at 25% as against the respondent.

The special damages were not in issue.

The appellant will have ½ the costs of the appeal. The appeal succeeds to that extent.

**Dated, Signed and Delivered at NYAHURURU this 25th day of February, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

**Ms. Wanjiru Muriithi for the respondent**

**Muli Advocate for appellants – absent**

**Erick – Court Assistant**