REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO.139 OF 2013

NAHASHON NDUNGU MACHARIA.................1ST APPELLANT

MUSA WALEMBA MARI....................................2ND APPELLANT

VERSUS

FA (Minor Suing .

Thru' mother and next friend MNJ..........................RESPONDENT

JUDGMENT

1. At all material times the 1st Appellant was the owner of a motorbike Registration No. KAX 332F and the 2nd Appellant its rider.

The Respondent, then a minor was knocked down by the said motorbike causing him to sustain serious injuries. His next friend and mother sued the appellants for damages arising out of the said accident.

2. Judgment on liability was recorded at 80:20 in favour of the Respondent and the court proceeded to assess general damages at Kshs.700,000/= for pain, suffering and loss of amenities and Kshs.5,000/= in special damages.

The appellants being dissatisfied with the award of damages preferred this appeal, alleging that the same is inordinately low as to be a fair estimate of the damages.

3. The minor sustained injuries stated in the medical records produced to the trial court in the P3 form, Dr. Kiamba's medical report and treatment card from Egerton University Health Centre and Dr. S.M. Malik medical report.

Both doctors are in agreement that the main injuries were

· Fracture of the lower thirds of both bones with angulation (deformity) and displacement at both fracture sites.

· At the time of examination, the fracture had malunited, with reduced right lower limb reduced. There were also scars covering 5 Cm by 3 Cm over the medical malleolus of the ankle, and complaints of occasional pain.

The appellant, by this Appeal, urges the court to reassess the damages downwards.

4. **Issue for determination is whether the award of Kshs.700,000/= is inordinately high and excessive as to invite this court's interference.**

5. Assessment of damages is at the discretion of the trial court. It is trite that

> *"an appellate court will not disturb an award of damages unless it is so inordinately high or low as to present an entirely erroneous estimate* ***– Butt –vs- Khan (1981) e KLR 349, and***

> *"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 was either inordinately high or low."*

See also ***Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A.M. Lubia (1982-88) KAR 727.*** I have considered the

submissions tendered before the trial court and each parties cited authorities.

6. For the appellants, a sum of Kshs.80,000/= was proposed citing ***Kisovi J. Syengo –vs- Dhanjah Brothers Ltd and Another HCCC 260/2017 (Mombasa) where Kshs.60,000/=*** was awarded, and **Hamisi K. Ndegwa –vs- Narcol Aluminum Rolling Mills Ltd. HCC No. 975/1984 –** Mombasa with an award of Kshs.60,000/=. Only digests of the authorities were provided to the court.

7. The Respondent suggested a sum of Kshs.1,000,000/= citing the case **Kombo Juma Mzee –vs- Karisa Nzai Munyika & Another HCCC 488 of 1996 – Mombasa,** also a digest of the case was provided. The plaintiff herein was awarded Kshs.650,000/=.

These digests of the authorities are of no help to the court as they do not state the totality of injuries and effects thereof sustained by the plaintiffs.

8. What were the comparable awards during the trial court's judgment period, August 2013?

It is trite that no injuries can be similar, but only comparable **Muteti Wambua –vs- KPLC (2013) e KLR**. I have considered the following. In clement **Gitau –vs- GKK (2016) e KLR,** the court in 2016, upheld an award by the trial court of Kshs.600,000/= for comparable injuries. Wherein the respondent had sustained a fracture of the left tibia and minor bruises.

In **Mwangi Njeru –vs- Joseph Wachira Kanoga (2014) e KLR,** the plaintiff was awarded Kshs.400,000/= for fracture of the tibia and fibula. In **James Wanyoike & Another –vs- Rosebella Jebet Bor (2019) KLR**, this court awarded Kshs.600,000/= for comparable injuries.

9. In **Alphonse Wathaya Warutu & Another –v- Joseph Muema (2017) e KLR,** the high court upheld an award of Kshs.800,000/= for the following injuries.

- Deep cut on the forehead

- Compound fracture of midshaft of right humerus

- Compound fracture right tibia and 1/3 tibia fibula.

In **Beatrice Wairimu Wandurua –vs- Dorman Ltd (2009) e KLR,** an award of Kshs.550,000/= was granted by the Court of Appeal in 2009 for very comparable injuries.

10. Looking at the above cited authorities with comparable injuries, it is evidence that there is some very close uniformity in the awards.

> The **Court of Appeal in Bhagal –vs Burbidge and Another (1975) EA 285** held that some decree of uniformity must be sought in the award of general damages, and recent awards in comparable cases in local courts may be considered.

11. In so doing so, and in furtherance thereof the Court of Appeal in **Kagaragari –vs- Aya (1985) KLR 273, the Court of Appeal** rendered that

> *"In considering damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance covers and fees unaffordable for the public."*

12. Disturbing an award of damages is a matter of opinion of judgment and experience. Being of different view and opinion are factors to be considered, but such opinion ought not dismiss the trial court's discretion on the award for the only reason that it does not agree with own assessment.

13. Being of the above view and having considered the above comparable authorities, I decline to exercise my discretion in favour of reduction of the award of Kshs.600,000/= awarded by the trial court. The appellants have not demonstrated how the trial court proceeded on wrong principles of law or how it misapprehended the evidence, by way of Medical reports in any material aspects.

14. For the above reasons, I find no merit in the appeal. It is dismissed with costs.

Orders accordingly.

Delivered, signed and dated at Nakuru this 20th Day of February 2020.

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J.N. MULWA

JUDGE