



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 52 OF 2019**

**RINGERA MURITHI.....APPELLANT**

**VERSUS**

**SAMUEL MWAURA GITHINJI.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Adalo (SRM) Mariakani delivered on 16.7.2019 PMCC NO. 236 OF 2018)*

**CORAM: Hon. Justice R. Nyakundi**

**Njoroge Mwangi Advocates for the Plaintiff**

**Kiarie Kariuki Advocates for the Defendant**

**JUDGMENT**

This appeal to the 1<sup>st</sup> appeal court is against the Judgment in **PMCC NO. 236 OF 2018** in which the Learned Senior Resident Magistrate awarded general damages of Kshs.400,000/= plus costs and interest.

The material history of this case can be concisely stated. The respondent filed a claim for general and special damages against the appellant on 24.7.2018 arising out of personal injuries sustained in a road traffic accident which occurred on 16.5.2018 along Nairobi – Mombasa Road. The circumstances leading to the collision were that the respondent was lawfully crossing the said road when motor vehicle registration No. KCQ 599G suddenly emerged, lost control and knocked the respondent: As a result he suffered injuries of fracture to the 3<sup>rd</sup> and 4<sup>th</sup> metatarsal of the left foot. Pain and suffering of the left foot, slightly swollen foot and right upper arm.

The respondent pleaded particulars of negligence against the appellant as itemized in paragraph 4 of the plaint dated 5.7.2018. The appellant in his statement of defence dated 1.8.2018 denied the occurrence of an accident and in the alternative if it did occur, it was caused or substantially contributed to by the respondent as pleaded in paragraph 5 of the defence.

On this basis, consent on liability was entered on the 11.6.2019 apportioning it at a ratio of 75%:25% in favour of the respondent. The task left for the trial court was to assess general damages for pain and suffering.

Having so assessed them at Kshs.400,000/=, the appellant was aggrieved and in the filed Memorandum of Appeal of 24.7.2019 he prayed that the award be set aside for being inordinately high compared with other injuries of similar awards.

The background materials before the trial court was by way of written submissions. For the respondent's side. Learned counsel submitted on quantum and proposed an award of Kshs.750,000/= placing reliance on the case of **Njora Samwel v Richard Nyangau Odechi {2018} eKLR**, in this case the plaintiff was awarded Kshs.500,000/= for a closed fracture right 5<sup>th</sup> metatarsal bone. The respondent's evidence was qualified and supported with the medical report of Dr. Ndegwa dated 28.6.2018, treatment notes and P3 Form.

The appellant counsel on his part submitted and proposed an award of Kshs.200,000/= as adequate compensation for the plaintiff (respondent) above. To the submissions Learned counsel cited the authorities of **Francis J. Angasha v Mohammed Abdalla Mombasa HCC NO. 499 OF 1989, Parodi Giorgio v John Kuria Macharia {2014} eKLR**.

The trial court therefore had its dispute the submissions and the cited authorities in which her exercise of discretion placed the claim for the respondent within range of Kshs.400,000/=.

**Appeal**

On appeal, the Learned Counsel has urged this court to peruse and appraise the medical report by **Dr. Ndegwa** which opined that the respondent never suffered any permanent disability. Learned counsel argued and contended that the similar awards cases presented to the court still remain to be the correct legal proposition of the case. He therefore maintained even on appeal for an award of Kshs.200,000/= would be fair and proportionate compensation for the injuries. The respondent in opposing the appeal submitted that the award before the trial court was supported with sound and credible evidence. According to Learned Counsel no error or misdirection has been shown to hold against the respondent, Judgment as pronounced by the Learned trial Magistrate.

### **Determination**

Whether this court should exercise its appellate jurisdiction to interfere with the award of damages by the trial court and entitle it to substitute it with its own assessment is always an onerous task.

Why do I say so general damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. **Mc. Cormick Handbook on the Law of Damages 318 {1935}** say:

***“Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the Judge can, in his instructions, give the jury, no standard to go by.”***

In the case of **Braddrak v Sea Board Air Line R. Co. Fla {1955}** the court held:

***“the rule for measuring damages for pain and suffering, past, present and future, is that there is no standard by which to measure it except the enlightened conscience of impartial juries (or judges).” (emphasis mine)***

Our courts have consistently acknowledged the validity of this assertion that assessment of damages is a discretion any function of the trial court. That any such assessment rests in the sound Judgment of the trial Magistrate (Judge) dependent on the facts and circumstances of each case.

In my view when the precise amount of a particular limb of damage has been measured and awarded it means each case necessarily sets its own standard. Even as this court is mandated to evaluate the trial court discretion of assessment of damages it should bear in mind that there are so many incalculables. Furthermore, in any case, the concept of pain and suffering conjures up a deeply subjective response to physical or/and emotional trauma. In that sense, we can only answer such a question logically in hand by adverting to the judiciary’s power of discretion and conscience. On the basis of computing damages purposeful taking into account the national values and principles of governance under Article 10 of the Constitution would be useful to legal tools to apply in the decision making process.

Indeed as the phrase given that the conceptual problem of assessment and comparison are subjective its contemplated that past awards used as a measure for pain and suffering do not by definition provide compensation for fair quantifiable loses.

In the instant case I am also aware therefore that I do not aim to give complete satisfaction to the parties but I will endeavor to do the best I can. Under our Law the first appeal court in the case of **Idi Ayub Omar Shabani and another v City Council of Nairobi CA No. 52 of 1984 {1985} IKAR 681:**

***“The guiding principles are that the court would not interfere with an award of damages unless it has been shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate. That a wrong principle may be inferred.”***

The Court of Appeal in **Mohamed Jabane v High Stone Tongoi Olinja CA No. 2 of 1986 KLR 661** as regards assessment of damages rightly stated:

***“that the correct appraisal should factor the following:***

- (1). Each case depends on its own facts.***
- (2). Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes.***
- (3). Compensable injuries should attract comparable awards.***
- (4). Inflation should be taken into account and***
- (5). Unless the award is based on the application of wrong principle or misunderstanding of relevant evidence it so inordinately high or low as to be an entirely erroneous estimate for an appropriate award, leave it alone.”***

After careful analysis and scrutiny of the records submissions by both counsels and the grounds in the Memorandum of Appeal, there is no concrete evidence on which to interfere with the assessment of general damages by the Learned trial Magistrate.

With that I have reached the end of the appeal and to the finishing line, I say that the inescapable conclusion I reach, is that there is no evidence of any misdirection or application of wrong principles or factoring in an irrelevant material to impact negatively the decision on damages.

For reasons, I have attempted to explain myself the appeal is lost, the same is hereby dismissed with costs to the respondent.

The decretal sum if deposited in court or joint earning interest account of both witnesses to this appeal be released forthwith to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF MARCH 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Ms. Shujaa for Mwangi for the Plaintiff
2. Ms. Nyongesa for Kiarie for the Defendant