



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HIGH COURT CIVIL APPEAL NO. 156 OF 2018**

**RAMADHAN JUMA MWAROME.....APPELLANT**

**VERSUS**

**OM (Minor Suing through his next friend AOM ).....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of the Senior Resident Magistrate**

**Hon. P. Wambugu in CMCC No. 271 of 2017 delivered on 1<sup>st</sup> August, 2018)**

**JUDGMENT**

1. The Appellant herein was sued in Mombasa CMCC No. 271 of 2017 by the Respondent who claimed for both general and special damages in respect of a road traffic accident arising out of negligence attributable to the driver of motor vehicle KBZ 719X, Toyota Hiace Van a vehicle whose registered owner is the Appellant.

2. At trial, it was agreed by consent that liability for the accident be entered in the ratio of 75% for the Defendant/ Appellant and 25% against the Plaintiff/Respondent. In consideration of the evidence at hand and submissions by the respective advocates', the learned trial magistrate awarded the appellant damages as follows:

General damages	Kshs. 900,000/=
Less 20%	Kshs. 225,000/=
Special damages	Kshs. 3,550/=
TOTAL	Kshs. 675,000/=

3. The Plaintiff/Respondent was also awarded the costs of the suit.

4. The Defendant/ Appellant being dissatisfied with the assessment of the trial magistrate, filed a Memorandum of Appeal dated 17<sup>th</sup> December, 2018 citing the grounds of appeal as: -

**a. That the assessment and award of general damages for pain suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate**

**b. That the learned trial magistrate in assessing damages for pain suffering and loss of amenities failed to apply the correct principals by leaving out of account, the age of the plaintiff, the length of suffering of the plaintiff and the fact that the plaintiff had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.**

**c. That the leaned trial magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct principles and judicial precedent and the submissions by parties that she made an award for pain suffering and loss of amenities that was inordinately high.**

**d. The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of *stare decisis* and take into account public interest. He thus made an award for**

**pain suffering and loss of amenities that was arbitrary, inordinately high and erroneous.**

5. The Appellate court was asked to reassess the award for general damages for pain, suffering and loss of amenities downwards.

The Counsel for both parties filed written submissions in canvassing the appeal which I will consider in dispensing the same.

### **The Appellant's Submissions**

6. Counsel for the appellant submitted that the trial magistrate erred and misdirected himself in awarding exorbitant damages without due regard to prevailing comparable authorities on such awards. The appellant's counsel further argued that the trial magistrate failed in her duty by relying on authorities where the injuries suffered were not comparable to those suffered by the Respondent in the instant case. He submitted that the trial court on page 68 line 4, indicated that it considered the Plaintiff's Authorities and submissions, meaning it was guided by the following cases:-

a) ***Stephen Mutisya Mumbi Vs Peter Mutuku Katuli HCCA No. 98 of 2004***, where injuries sustained are enumerated on **Page 4** of the Record of Appeal and an award of Kshs 800,000/- was made and on Appeal reduced to Kshs. 600,000/- and

b) ***Akamba Public Road Service Ltd Vs Abdulkadir Adan Galgalo***, HCCA No. 21 of 2015 whereby the injuries are listed at **page 50 line 25 to 30** of the Record of Appeal and an award of Kshs. 800, 000/- was made which was on Appeal reduced to Kshs. 500,000/-

7. He further submitted that in the authorities relied by court on, were case laws decided 3 to 4 years earlier and awards made ranged from Kshs. 350,000/- to Kshs. 450,000/- and as such the award of Kshs. 900, 000/- was inordinate.

### **Respondent's Submissions**

8. The Respondents failed to file any submissions on their part.

### **Analysis and Determinations**

8. As the appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make own conclusions. The duty of the court in a first appeal such as this one was stated in the case of ***Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123*** in the following terms:

*I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (***Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270***).*

10. The appropriate standard of review established in the case above can be stated in three complementary principles:

a) *First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*

b) *In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*

c) *It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.*

11. With the above principles in mind, I will now proceed to deal with the appeal herein. The Plaintiff/Respondent suffered **fracture of the right tibia and right fibula leg bones**. The Learned Trial Magistrate considered the submissions by both the Appellants and the Respondents and reached the conclusion that the amount of general damages that should be awarded is Kshs. 900,000/=. **The Appellant had prayed for Kshs. 250,000/= while the Respondents prayed for Kshs. 1,000,000.**

12. It is important to begin with stating the principles that govern an appellate Court in considering a request to review an award of general damages. In the case of ***Butt v Khan (1977) KAR 1*** it was held that:-

*“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 as either inordinately high or low.”*

13. In this case, if one takes into consideration the actual injury suffered by the Respondent – to wit- fracture of the right tibia and right fibula leg bones- in line with similar cases it becomes readily obvious that an award of Kshs. 900,000/= is inordinately excessive. In my view

an award of Kshs. 500,000/= would be adequate to compensate for the injuries suffered in this case and in the circumstances.

14. The upshot therefore, is that the appeal is hereby allowed and to proceed to set aside the assessment of damages by the Lower Court. In its place, the Court substitutes an assessment of quantum for general damages at Kshs. 500,000/=. The amount awarded in special damages was not challenged and it is therefore not affected.

15. I will not award costs on this appeal. Each party will bear its own costs.

16. Orders accordingly.

**Dated, Signed and Delivered in Nairobi this 28<sup>th</sup> Day of May,2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes