



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MAKUENI
CIVIL APPEAL NO. 32 OF 2018
LAWRENCE MUSYOKA MULONZI.....1ST APPELLANT
DORIS MUTHEU KISILU.....2ND APPELLANT

-VERSUS-

DANIEL JOHN KATO NDAMBUKI.....RESPONDENT
(Being an Appeal from the Judgment of Hon. N. Ruguru (SRM) in the Senior Principle Magistrate's Court at Makueni, Civil Case No.43 of 2017, delivered on 17th April 2018)

JUDGMENT

1. The Respondent sued the Appellants in the lower court seeking general damages for personal injuries sustained from a road accident which occurred on 18/09/2016 along the Wote-Machakos Road. He was a pillion passenger on a motor cycle when the Appellants' motor vehicle hit them from behind. He also prayed for special damages, future medical costs, loss of earning capacity, costs of the suit and interest.

2. The Respondents filed a joint statement of defence denying the claim. The parties consented on liability in the ratio of 85:15 in favor of the Respondent after which the learned trial magistrate assessed the quantum. She awarded damages as follows;

General damages.....	Kshs .1,500,000/=
Future medical expenses.....	Kshs. 600,000/=
Special damages.....	Kshs. 950/=
Sub-total.....	Kshs. 2,100,950/=
Less 15% liability	315,142.5
Total sum.....	Kshs 1,785,807.50

3. Aggrieved by the award, the Appellants filed this appeal and listed 4 grounds as follows;

- a) *The learned Magistrate erred in law and fact and misdirected herself by failing to consider all the submissions made before her by the defendants and reached an erroneous conclusion thereby occasioning a miscarriage of justice.*
- b) *The learned Magistrate erred in law and fact by awarding general damages of Kshs.1,500,000/= that was manifestly high and by disregarding the defendants' submissions and cited authorities.*
- c) *The learned Magistrate erred in law and fact by awarding future medical expenses of Kshs.600,000/= when the same was not proved.*
- d) *The learned Magistrate in assessing quantum of damages took into account irrelevant factors and wrong decision principles and arrived at a wrong decision and excessive award on quantum of damages.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. The Appellants submit that damages awarded should represent a fair compensation but should not be excessive. They rely on **Civil Appeal No. 30 of 1997; Ossuman Mohammed & Anor –vs- Saluro Bundit Mohammed (UR)** where the Court of Appeal stated;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance or increased fees.”

6. It is their submission that Dr. Emmanuel Loiposha estimated the future medical expenses at Kshs.1,200,000/= without specifically breaking down what it was needed for and in which hospital. They contend that he did not itemize the costs if indeed they were needed. They also contend that the medical report does not disclose his qualifications and specialization in order to ascertain the correctness of his recommendations.

7. They argue that according to Dr. Modi, a specialist orthopedic surgeon, the Respondent does not require future medical expenses. They

further argue that his report is more accurate and as such, the award of general damages of Kshs.1,500,000/= is erroneous in light of the injuries sustained.

8. They also submit that the trial Magistrate erred by differing with the expert opinion of Dr. Modi with regard to the extent of head injuries sustained by the Respondent.

9. Further, they submit that it was erroneous for the trial Magistrate to state that their authorities were not comparable. They rely on the following authorities;

a) **Mombasa Maize Millers (KSM) Ltd & Anor –vs- Rengo Joshua Wafula (2017) eKLR** where the Plaintiff sustained facial injury with fracture, injury to right jaw and teeth, injury to chest and fracture right condylar (*mandible*). He was examined 4 months after the accident and the doctor observed that he had a 6cm scar on the right cheek, pain on chest, pain on right jaw and teeth, inability to open the mouth fully, tenderness on chest and tenderness on right leg. The general damages of Kshs.600,000/=was reduced to Kshs.400,000/=.

b) **Haron Kipchumba Cheron –vs- Eastern Produce (K) Ltd (2014) eKLR** where the Plaintiff sustained; fracture on the right radius distal third, double fractures of the right ulna, fracture of the right olecranon of the right ulna at the elbow joint and soft tissue injuries. Some plates which were initially fixed to deal with the fractures were later replaced with screws and pins after an open reduction. He was awarded Kshs.350,000/= as general damages.

c) **Francis Wachiuri Murage & Pwani United Builders –vs- PGK & Anor (2016) eKLR** where the plaintiff sustained; cut wound on the left forehead and eyebrow, pelvic fractures involving left superior and inferior public ramii, fracture of the right olecranon (*elbow*), blunt injuries over the abdomen with tenderness. He was awarded Kshs.400,000/= as general damages.

10. They submit that the injuries in the cited cases are more serious and that an amount of Kshs.300,000/= as general damages will be adequate compensation for the Respondent.

11. They finally submit that it was erroneous for the trial Magistrate to rationalize the award of Kshs.600,000/= for future medical expenses by stating that Dr. Modi's medical report was silent on the issue. They submit that the doctor was silent on the issue because his expert opinion was that future medical expenses were unnecessary.

12. The Respondent submits that his injuries were confirmed by Dr. Loiposha and that the cases relied on by the Appellants were not in any way comparable.

13. He contends that he pleaded the need for future medical expenses and it was not controverted. It is his submission that the Appellants' doctor was clear about the likelihood of headaches and seizures in future as well as the slight reduction of his elbow joint. He relies *inter alia* on **C & P Shoe Industries –vs- Albert Maina Kalii (2014) eKLR** where the Court stated that;

“It is clear from the evidence on record that the Respondent produced an appointment letter and a termination letter to prove that he was an employee of the Appellant. The Appellant did not furnish any evidence to controvert this fact rather it brought Dw1 who denied that the Respondent was injured on the material day. The Respondent's witness confirmed that the injury was a result of chemical burns which chemical is normally used in the Appellant's premises. It is noteworthy that the accident register is a document under custody of the Appellant that is capable of being altered to favor its case. I am satisfied that the

Respondent proved on a balance of probability that he was injured while at his place of work.”

14. It is his further submission that the Appellants have not demonstrated that the Trial court relied on wrong principles or that the damages were too high to warrant the interference of this Honorable court.

15. In his submissions before the Trial court, the Respondent cited the following cases;

a) **Ali Issa –vs- East Africa Cement Company (2016) eKLR** where the doctor testified that the CT scan revealed a subdural haematoma. The Appellant was admitted in hospital for 10 days and treatment included 'craniology, elevation and evacuation of the hematoma'. The Appellant healed but was left with a 'crescentic craniotomy scar on the right frontotemporal scalp'. The doctor further testified that despite the elevation of the depressed skull fractures, the Appellant was left with a 'frontal parietal bony depression'. He was awarded Kshs.600,000/=.

b) **Alfred Ngige Karanja –vs- Charles Ndung'u Mundia (2005) eKLR** where the Plaintiff was awarded Kshs.1.2million for; head injury-fracture of the base of the skull anterior and middle cranial fossa, loss of consciousness for 48 hours, post traumatic epilepsy.

16. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle & Anor –vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123**.

17. The only issue for determination is whether the quantum of damages should be disturbed.

18. Award of damages is largely a question of discretion and the principles which should guide an appellate Court in deciding whether to interfere with such an award are well settled. The appellate Court should be satisfied that in assessing the damages, the trial magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous

estimate.

19. In the instant case the injuries sustained were pleaded as follows;

- a) Subdural Hematoma
- b) Fracture left olecranon process.
- c) Injury to the chest.
- d) Injury to right knee.
- e) Bruises of forehead.
- f) Injury to the left shoulder.
- g) Swollen left elbow joint.

20. The parties further consented to produce the following documents without calling the makers;

- a) Summary medical report from Makueni Hospital
- b) Report from Machakos imaging centre.
- c) Medical report from Dr. Loiposha.
- d) Second medical report from Dr. Modi.

21. The summary medical report from Makueni Hospital (*Dr. Kasanga*) shows that the Respondent was examined at the facility on the day of the accident (18/09/2016) at 18.45 hours. The examination revealed that he had bruises on the left side of the forehead, right knee and left shoulder. He also had a fracture of the left olecranon process. The plaster of paris on his left upper limb was removed after one month.

22. The report also indicates that during follow up, the headache worsened and he developed vomiting culminating to loss of consciousness/coma (*Glasgow coma scale rated 4/15, meaning severe head injury*). A head CT-Scan revealed that he had bilateral subdural haematoma. He was operated on i.e Craniotomy (*Burr hole surgery*) and blood evacuated from his cranium successfully. He was admitted at the facility for five days.

23. Dr. Loiposha's Medical Report is dated 15/12/2016 and it captured the injuries sustained as follows;

- a) Subdural Hematoma
- b) Fracture left olecranon process
- c) B1 chest
- d) B1 right knee

Under 'current complaints', the doctor indicated 'reduced rota of left hand'.

24. His comments and conclusion were that the Respondent sustained severe injuries, underwent a successful Neurosurgery with anticipated future neurological deficits. Suffered both physical and psychological trauma, experienced loss of income for three months. He estimated the current and future medical expenses at Kshs.1.2 million and recommended physiotherapy, sopc and mopc attendance for two years.

25. The Respondent was re-examined by Dr. Modi on 01/11/2017 and his report captured the injuries sustained as follows;

- a) Subdural hematoma
- b) Fracture left olecranon process
- c) Bruises right knee and chest

Under 'present complaints', the doctor indicated that the Respondent had on and off headache and could not lift heavy weight with left hand.

26. In his comments, the doctor indicated a follows;

"...fracture olecranon was treated with application of cast for one month. Now the fracture has healed in satisfactory position. Left elbow movement is slightly reduced. There is no deformity over left elbow. Subdural hematoma was evacuated surgically. Recovery after this surgery is good. Now there is no neurological deficit. Due to subdural hematoma and surgery, he may feel some headache at times and he is prone to develop seizures in the future. Chest and knee examination did not show any abnormality."

27. From the medical reports by the three doctors, it is clear that the Respondent sustained the following injuries;

- a) Subdural Hematoma
- b) Fracture left olecranon process.
- c) Injury to the chest.
- d) Injury to right knee.

28. Dr. Loiposha and Dr. Modi observed the same injuries hence there is no dispute on the injuries sustained. The three doctors were also in agreement that the subdural hematoma was successfully treated through the head surgery. In awarding Kshs.1,500,000/= as general damages, the learned trial magistrate expressed herself as follows;

“I have also considered the applicable law, current inflation trends and I find that authorities cited by the defendants have no head injuries yet it is the major injury sustained by the plaintiff herein. Having said that, I am of the view, the authorities referred to by the plaintiff are persuasive and injuries therein almost similar more so, the case in Alfred ibid. Since similar injuries must attract similar awards, I am of the view that, the award proposed by the defendant is too low and the one by the plaintiff too high!”

29. Having looked at and considered all the cases cited *vis a vis* the injuries sustained, I am of the view that the case of **Ali Issa (supra)** was the most comparable. Further, I have considered the case of **Alfred Ngige (supra)** which the learned trial Magistrate relied on and it is evident that the injuries therein were more severe than those in the current case. The Plaintiff therein suffered a brain injury which resulted to epileptic fits. The doctor opined that the epileptic fits would compromise her intellectual ability and assessed her partial permanent disability at 50%. The sentiments of the Hon. Judge were as follows;

“I have evaluated the evidence adduced. I do agree with the findings by Dr. D’cunha and Dr. Feksi that the plaintiff developed post-traumatic epilepsy as a result of the injuries that she sustained during the accident that occurred on the 25th of April 1993. I further find that the plaintiff’s quality of life has been affected by the injuries that she sustained especially the post-traumatic epilepsy that she had now developed. Although she appears to be a normal girl attending a boarding school while studying in Secondary School, evidence has been adduced that she would require constant medication for the rest of her life. The medication taken is also expensive and is a burden to her parents. Due to the nature of epilepsy, the plaintiff may not undertake certain tasks, like for instance cooking food as she would likely be injured if she was to develop convulsions. This fact will affect her prospects of marriage and also any prospects that she may have to be employed in a career that would require her to work without supervision. The quality of life of the plaintiff has been affected.”

30. I also looked at the case **Julius Chelule & Anor –vs- Nathan Kinyanjui [2013] eKLR** where general damages of Kshs.600,000/= were upheld by the High court for; fracture to the skull, head injuries and injury to the left knee with small cut wound and tenderness.

31. Accordingly, it is my considered view that reliance on the case of **Alfred Ngige (supra)** influenced the learned trial Magistrate to award an amount which was inordinately high in the circumstances. I am convinced that general damages of Kshs.750,000/= is adequate compensation.

32. Dr. Loiposha and Dr. Modi differed on whether the Respondent would require future medical expenses. As correctly observed by the Appellants, Dr. Loiposha did not indicate what the future medical expenses would cater for. On the other hand, Dr. Modi opined that the Respondent was likely to develop seizures in future. In awarding Kshs.600,000/=, the learned trial Magistrate expressed herself as follows;

“I glance at the said medical report and particular, Dr. Modi’s, he was silent on the issue of future medical expenses but he concluded that the plaintiff’s elbow was slightly reduced and due to the subdural haematoma, he may suffer headaches and seizures in future. Clearly, the said seizures and headaches will definitely need medical attention when they finally set in. However, Dr. Loiposha’s estimate was based on current and future medical expenses. Since no current medical expenses have been proven by way of receipts, I am of the view, an award of Ksh.600,000/= will be adequate to cater for the plaintiff’s future medical expenses.”

33. Noting that Dr. Modi examined the Respondent more than one year after the accident and examination by Dr. Loiposha, I find it contradictory that he opined about future seizures but did not attach any costs to their management and neither did he say that they would not need any costs. Accordingly, I find no basis of disturbing the award on costs.

34. The special damages were not contested.

35. The award should therefore work out as follows;

General damages.....Kshs 750,000/=

Future medical expenses.....Kshs 600,000/=

Special damages.....Kshs 950/=

Sub-total.....Kshs 1,350,950/=

Less 15% liability.....202,642.5/=

Total sum.....Kshs 1,148,308.5/=

36. I therefore set aside the judgment by the trial court and substitute it with a judgment of Kshs One million, one hundred and forty-eight thousand, three hundred and eight shillings and fifty cents. (**Kshs.1,148,308/50**) plus costs and interests.

37. The Appellants will get half of the costs of the appeal.

Orders accordingly.

Delivered, signed & dated this 24th day of June 2020, in open court at Makueni.

**H. I. Ong'udi
Judge**