



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL APPEAL NO. 27 OF 2019

1. HASHI MOHAMUD

2. MOHAMI MOHAMED.....APPELLANTS

VERSUS

ELIJAH MWITA WANTORA.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. R. Odenyo

Senior Principal Magistrate delivered on 23/01/2019)

JUDGMENT

1. The appeal subject of this judgment is only against the quantum of damages.
2. Liability was agreed at 20%: 80% in favour of the Respondent herein, *Elijah Mwita Wantora*.
3. The Respondent instituted **Migori Chief Magistrate's Civil Case No. 2419 of 2015** (hereinafter referred to as '**the suit**') against the Appellants. The suit arose from a road traffic accident which occurred on 18/11/2014 at the junction to Maranatha Mission Centre along the Migori-Sirare road.
4. The Respondent pleaded that at the time of the accident he was riding his own motor cycle whereas the 2nd Appellant herein, *Mohami Mohamed*, was driving and/or controlling the offending motor vehicle registration number KBR 102P. The 1st Appellant was sued as the owner of the motor vehicle.
5. It was further pleaded that as a result of the accident the Respondent sustained serious injuries. He prayed for damages and costs.
6. The suit was defended. The claim was denied.
7. The Respondent testified and called two witnesses. They were a medical officer one *Dr. Aggrey Idagiza Akidiva (PW2)* and a police officer from Migori Police station one *No. 80167 PC Dickson Nyarambe (PW3)*.
8. At the close of the Respondent's case the parties agreed on liability aforesaid. Written submissions were filed by the parties. The court then assessed damages and it is the resultant assessment which prompted this appeal.
9. The Appellants raised the following three grounds of appeal in their Memorandum of Appeal dated on 05/02/2019 and filed on 06/02/2019: -
 1. That the learned trial Magistrate erred both in law and Principle, by applying erroneous principle in computation of damages payable thus arriving at erroneous and grossly excessive estimates of General damages payable.
 2. That learned trial magistrate erred in law and in fact when the same awarded the respondent general damages of Kshs. 800,000/= which award was manifestly excessive owing to the nature of the injuries allegedly sustained by the respondent.

3. That the learned trial magistrate erred in error when the same failed to properly evaluate evidence on record thus reaching erroneous decision.

10. Directions were taken and the appeal was disposed of by way of written submissions where both parties duly complied with the filing of the submissions.

11. The Appellants argued the appeal on one main ground. They contended that the award of Kshs. 800,000/= on general damages for pain, suffering and loss of amenities was excessive. They contended that a reasonable award was within the region of Kshs. 100,000/= and Kshs. 120,000/=. They relied on Timsales Ltd vs. Wilson Ubuywa (2008) eKLR, Ndungu Dennis vs. Ann Wangari Ndirangu & Another (2018) eKLR, PF (suing as next friend and father of SK (minor) VS. Victor O. Kamadi & Another (2018) eKLR and Nyambati Nyaswabu Erick vs. Toyota Kenya Ltd & 2 others (2019) eKLR in support of the appeal.

12. The appeal was opposed. The Respondent supported the impugned judgment. It was submitted that the award was very reasonable and that there was no need of interference by this Court.

13. The Respondent relied on several decisions on different injuries in urging this Court to find that the award was justified. They were James Mwaro Shadrack vs. Ali Zuleikha & 3 others (2017) eKLR on a deep cut wound on the head, George Kinyanjui t/a Climax Coaches & Another vs. Hussein Mahad Kayle (2016) eKLR on a blunt injury on the chest, Hantex Garment (EPZ) Ltd vs. Haron Mwasala Mwakawa on a blunt injury on the head, Hassan Farid & Another vs. Sataiya Ene Mepukori & 6 others (2018) eKLR on multiple deep cut wounds on the foot and Arrow Car Ltd vs. Elijah Shamilla Bimomo & others (2004) eKLR on soft tissue injuries.

14. As the appeal is on assessment of damages, I reiterate that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See Butler vs. Butler (1982) KLR 277.)

15. The Court of Appeal in the case of Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 discussed the principles to be observed when an appellate court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

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

16. This position was restated by the Court of Appeal in the case of Arrow Car Limited -vs- Bimomo & 2 others (2004) 2 KLR 101 and so recently in the case of Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd (2013) eKLR.

17. I have carefully read and understood the gist of the appeal, the pleadings, the proceedings, the impugned judgment, the submissions and the judicial authorities referred to by the parties.

18. Accordingly, I will now determine the nature of injuries sustained by the Respondent, but first the period the Respondent was admitted to hospital. The starting point are the initial treatment notes. The accident occurred on 18/11/2014. The Respondent was rushed by a good samaritan to Ojele Memorial Hospital in Migori. He was by then unconscious. The Respondent testified that he regained consciousness two days later and that he was in hospital for one month.

19. The Respondent did not produce any treatment notes. He relied on a P3 Form which was filled on 09/02/2015 which was around 3 months post the accident. The P3 Form was produced by PW2. The P3 Form did not indicate the period of treatment. Instead, it stated that the age of the injuries contained therein as at the time of filling in the form was *hours*.

20. PW2 testified that the Respondent was admitted at Ojele Memorial Hospital for 2 weeks. PW2 was shown a Discharge Summary from the hospital which indicated that the Respondent was admitted for only 4 days. He stated that according to the documents availed to him by the Respondent they indicated that he had been admitted for 2 weeks. The said documents were not produced as exhibits.

21. The Discharge Summary was also not produced in evidence. The only documents which were produced as exhibits and which had the period the Respondent was admitted in hospital were two In-Patient Bills. The first one was dated 22/11/2014 and was for Kshs. 10,410/=. The settlement of the bill was evidenced by a receipt for the same amount. Both the bill and the receipt were issued on the same day; 22/11/2014. According to the contents of the first bill the Respondent was admitted on 18/11/2014 and discharged on 22/11/2014. That was a period of 4 days.

22. There was another In-Patient bill and a receipt thereto. It was dated 05/12/2014 and it was for Kshs. 24,470/=. It indicated that the Respondent was admitted from 23/11/2014 and discharged on 05/12/2014. That was a period of 12 days.

23. The Respondent pleaded in paragraph 8 of the Complaint that he incurred expenses on treatment to the tune of Kshs. 34,880/=. That was the total amount for the two bills. The trial court awarded the sum. The Appellants did not appeal against that award.

24. It therefore occurs that PW2 was right when he stated that the Respondent was admitted for 14 days. Infact he was admitted for 16 days.

25. In consideration of the evidence of the Respondent and PW2 against the contents of the bills and the receipts thereof I find and hold that

the Respondent was admitted for a period of 16 days, that is from 18/11/2014 to 05/12/2014.

26. I will now revert to the issue of the injuries sustained by the Respondent. According to paragraph 7 of the Complaint the Respondent sustained five injuries. They were a deep cut wound on the head, a blunt injury on the chest, a blunt injury on the left hand, multiple deep cut wounds on the right foot and soft tissue injuries.

27. PW2 prepared and produced in court a medical report for the Respondent. The report was dated 17/01/2018. PW2 stated that he relied on the P3 Form, the treatment notes and physical examination of the Respondent in the preparation of the report. The report had the five injuries contained in the Complaint together with a sixth injury: *swelling of the left mandible*. The further injury originated from the P3 Form. Further the report indicated that the Respondent was not able to hear using the left ear and that there was numbness of the left face. PW2 opined that the Respondent sustained serious soft tissue injuries.

28. The Respondent also testified on the injuries he sustained. He stated that he was injured on the head, chest and right leg. He complained of pains on the chest and the malfunctioning of the left side of his body.

29. I have considered the evidence and the documents in support of the nature of injuries sustained by the Respondent. My observation is that the Respondent sustained severe soft tissue injuries. The injuries were on the head, chest and the left foot. As a result, the Respondent developed a permanent neurology deficit on the left ear and the facial muscles.

30. Before I decide on whether the award by the trial court ought to be interfered with there is an issue which I must first deal with. It is on the manner in which a Court ought to approach the issue of assessment of damages where a claimant sustained multiple injuries.

31. The Respondent vouched for separate awards for each distinct injury. The Appellants on the other hand were for a single global award for all the injuries.

32. Kamau, J in **Peninah Mboje Mwabili v. Kenya Power and Lighting Co. Ltd Voi HCCC No. 2 of 2015 (2016) eKLR** and Majanja, J in **Kisii HCCA No. 126 of 2018 Benuel Bosire vs. Lydia Kemunto Mokora (2019) eKLR** adopted the approach on a global award. This is how Majanja, J dealt with the issue: -

14. Before I conclude my finding on general damages, I need to consider the complaint by the appellant that the trial magistrate erred in awarding a separate award for loss of amenities. In Mwaura Muiuri v Suera Flowers and Another (supra), the learned Judge expressed the view that:

[12] Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of the accident are diminished. Essentially the quality of life of the Plaintiff is reduced due to the inability to do the things he would otherwise have done had it not been for the injuries.

He relied on a passage in Halsbury's Laws of England (4th Ed, Vol. 12 (1) at Page 348-884. Loss of amenities-

In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it.

15. The decision by Emukule J., in making of a separate award for loss of amenities runs against the grain of precedent and practice in this country where a single award of general damages is made to compensate the injured party for pain, suffering and loss of amenities. I would adopt the sentiments given by Kamau J., in Peninah Mboje Mwabili v Kenya Power and Lighting Co., Ltd VOI HCCC No. 2 of 2015 [2016]ekLR she explained that:

[25] General damages connotes a generic term for the different heads of claims, which are monetary award but where no particular value can be attached. At the very least, it can only be assessed to compensate an injured party but not to bring him to the exact position he was in before such injury. The inability to perform any duties must therefore be taken into account at the time of awarding general damages.

[26] A claim for loss of amenities is thus encompassed and/or is included in a claim general damages and need not be awarded separately. Allowing an extra amount in the sum of kshs. 2,000,000/= to form a distinct and separate award for loss of amenities as had been submitted by the Plaintiff would grossly exaggerate the claim herein.

33. In **Kiambu High Court Civil Case No. 12 of 2016 Christine Mwigina Akonya vs. Samuel Kairu Chege (2017) eKLR** the Court also dealt with issue. Ngugi, J affirmed the approach that a trial court ought to award a global figure in multi-injury claims. The Judge referred to **Paulo Covintoto vs. Vito Antonio Di Filippo** (unreported) where it was stated thus: -

It is of course correct to consider the injuries as such seriatim and to assess the severity of each separately, but the assessment of general; damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured. As a practical result of this, it may be said in general that the most reliable guide to a standard of general damages in cases of multiple injuries will be other cases of multiple injuries of similar severity, although no doubt it will be difficult to find cases where the multiple injuries are closely comparable in their nature.

34. I agree with the approach taken by my colleague Judges. To me, making separate awards connotes that the injured sustained separate pain, suffering and loss of amenities on each injury. That cannot be the case. An injured who sustains multiple injuries as a result of a single accident goes through the same pain in the course of nursing the injuries. The Court should instead consider the total effect of all the injuries on the quality of life of the injured.

35. In this case therefore the approach proposed by the Respondent is misguided.

36. Having settled on the injuries and how the assessment of damages ought to be approached I will now consider whether the award of Kshs. 800,000/= was manifestly excessive.

37. The Court of Appeal in **Simon Taveta vs. Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 (2014) eKLR** observed that: -

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

38. In **Jabane v. Olenja (1986) KLR 661** the Court of Appeal dealt with the parameters in awarding damages. It stated as follows: -

The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by this court to an award of damages by a trial judge.

1. Each case depends on its own facts;

2. Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);

3. Comparable injuries should attract comparable awards.

4. Inflation should be taken into account; and

5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

39. I have considered the decisions proposed by the parties on the awards. I find that the injuries in the decisions by the Appellants were lightly not comparable to those sustained by the Respondent. Unlike in those decisions, the Respondent in this case was unconscious for 24 hours. He was admitted for 16 days. He further developed post recovery resultant chest pains and a permanent neurological deficit which impaired the Respondent's hearing ability on the left ear.

40. The decision in **James Mwaro Shadrack vs. Ali Zuleikha** (supra) seems to be comparable to this case. In that case the claimant sustained a deep cut wound on the scalp and a contusion on the head. He also developed memory impairment, had poor concentration and was to be on drugs for the rest of his life. The trial court awarded Kshs. 100,000/= and on appeal the award was enhanced to Kshs. 350,000/= in 2017.

41. Guided by the foregone analysis I am of the considered view that this is an ideal case where I must interfere with the exercise of discretion by the trial court for the reason that the award was excessive in the circumstances of the case. The award of Kshs. 800,000/= was far much on the higher side. However, I must take into account the passage of time in the assessment.

42. Having dealt with the grounds of appeal herein I hereby make the following final orders: -

(a) The appeal is hereby allowed and the award of Kshs. 800,000/= on General Damages is hereby set-aside and substituted with an award of Kshs. 400,000/=. The sum shall attract interest from the date of judgment in the trial court.

(b) The Respondent shall bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 11th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. otienoadvocates@gmail.com for the firm of Messrs. O. M. Otieno & Company Advocates for the Appellant.

2. kerario@gmail.com for the firm of Messrs. Kerario Marwa & Company Advocates for the Respondent.

3. Parties are at liberty to obtain hard copies of the judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE