



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 75 OF 2012

RICHARD NGETICH.....1ST APPELLANT

NJOROGE IRANYA.....2ND APPELLANT

VERSUS

FRANCIS VOSENA KIDIGA.....RESPONDENT

JUDGMENT

1. The appeal before me is on the matter of quantum of damages awarded by the trial magistrate to the Respondent in the sum of Kshs.800,000/= in general damages arising from injuries he sustained following a road traffic accident on the 27/10/2008 along Geoffrey Kamau Way, Nakuru. The appellants being the owner and driver of the accident vehicle, Reg. NO. KAY 236S respectfully, were dissatisfied with the award as being inordinately excessive, hence this appeal urging for scaling downwards, on grounds stated in the Memorandum of Appeal filed on the 5/4/2012 on grounds that:

- 1. The award is excessively high.**
- 2. The trial magistrate applied wrong principles in arriving at the award.**
- 3. The trial magistrate failed to consider conventional awards made in respect of cases of similar injuries.**

2. The matter of liability was settled by consent of the parties at 50:50 basis.

3. The duty of the first appellate court has been stated in numerous superior court decisions among them **Butt Vs. Khan (1977) I KAR I**, that

“An appellate court will not disturb an award unless it is inordinately high or low so as to represent an erroneous estimate----”

4. In **Kemfro Africa Ltd t/a Meru Express Services & another Vs. A.M, Lubia & another (1982-88) L KAR 727, page 703**; the court held that

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance”

5. Further, In **Kiruga Vs. Kiruga & another (1988) KLR 348**, the Court of Appeal observed that

“An appeal court cannot properly substitute its own factual findings for that of a trial court unless there is evidence to support the findings or unless the judge can be said to be plainly wrong-----”

6. Bearing in mind the above principles, I now move to reconsider and re evaluate the evidence on injuries sustained by the Respondent and make own findings and conclusions. – **Paul Kipsang Koech & another Vs. Titus Osule Osore (2013) e KLR.**

The Respondent’s injuries.

7. Two medical reports were produced.

a. Report by Dr. Wellington Kiamba dated 4/3/2009 shows;

- Head injury with extradural haematoma and compound fracture of the left occipital bone.
- Bruises on the right side and pneumocranium of forehead.
- Admitted at Nakuru Provincial Hospital from 22/10/2008 to 10/11/2008.
- Prominent scar (4cm x 3cm) on right forehead on right supraorbital region.
- At time of examination,
- Suffers occasional headache
- Has permanent scars on forehead
- Degree of injury as grievous harm
- Awarded temporary disability of 3 months

b. Report by Dr. Malik dated 14/6/2010

- Head injury with an abrasion on right side of forehead
- Admitted for management
- CT scan of brain showed Extra-dural blood clot
- Operated on skull, blood clot removed
- Complaints at date of examination
- Occasional pain back of head
- Occasional watery discharge from right ear
- Superficial scars on forehead, and parieto-occipital area of skull
- Blur holes with operation
- X-rays – no fractures
- CT scan of head – show extra-dural haematoma in the parieto – occipital area of brain
- Fracture of partial bone

Conclusion

- Total incapacity of a temporary nature for 4 weeks;
- No permanent physical disability
- Injuries classified as grievous harm

8. Appellants Submissions.

It is submitted that the trial court awarded damages on what it termed as “**Permanent disability**” which was not based on any of the two doctor’s findings, as both found temporary disability, contrary to what both concurred to have been disability of a temporary nature.

Upon the above, it is submitted that the trial magistrate’s findings were completely erroneous and unsupported by the evidence of the medical experts, and therefore, relying on the unfounded aggravated clinical condition, an excessive award of damages was granted to the respondent.

9. Respondent’s Submissions.

It is submitted that the trial magistrate considered all the relevant factors and explained the reasons behind the award, including the cited authorities which were “extracts” which it is urged the court should reject as they serve no purpose nor do they assist the court in assessment of damages.

It is urged for upholding the decision on the award of general damages.

Analysis and determination.

10. I have considered the nature of injuries sustained by the Respondent, counsel submissions and the trial court’s judgement. Assessment of damages is at the discretion of the trial court which has the advantage of hearing and seeing the injured party as it testifies.

11. The main contention between the parties in this appeal is **whether the Respondent suffered permanent or temporary incapacitation due to the injuries.**

I have considered the medical evidence. The two doctors agree to a large extent over the injuries and the residual effects save that, while

Doctor W. Kiamba, who examined the respondent on the 4/3/2009 awarded **temporary disability of three (3) months to the respondent, Dr. Malik on the 14/6/2010, about 1 year 3 month thereafter, assessed Total incapacitation of a Temporary nature for a total of four (4) weeks, with no permanent physical disability.**

12. In the trial magistrate's judgment dated 2/3/2012, it is evident that the two medical reports were considered, as well as the evidence adduced before the court, and the cited authorities. The magistrate stated that Dr. Malik found no permanent disability stating **"clearly this doctor was just trying to down play the serious injury sustained by the plaintiff whom the court saw. Indeed the plaintiff sustained permanent disability of a serious value"**.

13. It is this finding that the appellant rightfully submits was unsupported by any evidence.

Dr. Malik agreed with Dr. Kiamba's report of the degree of incapacitation as temporary disability. There is no statement in either reports of permanent incapacitation.

It is therefore erroneous, for the trial magistrate to have departed from expert opinion of the two doctors, by substituting own opinion, without any basis at all.

14. I agree with the appellants that the said finding was unjustified, unfounded and an aggravation of the clinical condition of the respondent.

As held in the case **Becky Jemutai Chesire Vs. Vernon Oyaro Mochache & another (2016) e KLR**, it is uncommon that medical doctors and experts in the field of medicine disagree with each other. Being non-expert in the medical field, the trial magistrate erred grossly and had no reason to depart from the expert's opinion, unless there is glaring evidence of departure from the investigations, which non was evident.

15. Having re-evaluated the medical reports and evidence, I find no reason to hold otherwise than as found observed and stated by the two medical doctors; **that the Respondent suffered disability of a temporary nature.**

Excessive award of damages?

16. The injuries sustained by the respondent were indeed serious; and no dispute on this has been raised. The medical reports are self-evident.

I agree that the authorities cited by both parties were very old, being 1993 and 1992 extracts for the appellants.

I have perused the extracts. They cannot be relied upon for a true picture and analysis of the nature of injuries. They are of no evidential value.

Despite the trial magistrate erroneously finding that the Respondent suffered **permanent disability of serious nature, was the sum of Kshs.800,000/= excessive in the circumstances?**

17. The appellants submit that a sum of Kshs.450,000/= would be sufficient. I have considered comparable decisions.

In the case **Peter Gicharu Ngige Vs. Charles Daudi Onderi (2012) e KLR**, the respondent sustained serious injuries; loss of consciousness for 6 days, fracture of right temporal bone, fracture of left jawbone, dislocation of right shoulder. The trial court awarded him a sum of Shs. 800,000/= general damages. On appeal, the High Court upheld the decision in February 2012.

18. The Court of Appeal in **Maintenance Ltd & another Vs. WA (a minor suing through father & next friend SKM (2015) e KLR** upheld an award of Kshs.800,000/= in 2015 where the child had sustained a depressed fracture of the skull of the left temporal area and brain concussion.

19. It is instructive to state that no two injuries can be similar. They can only be comparable, as was stated by the Court of Appeal in **Stanley Maore Vs. Geoffrey Mwenda (2004) e KLR**, where it expressed thus.

"It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should as far as possible, be compensated by comparable awards, keeping in mind the correct level of awards in similar cases"

20. The awards in the two cases, **Peter Gicharu Ngige and Maintenance Ltd (Supra)** are more serious than those of the respondent, but are comparable.

The appellants urged the court to reduce the trial courts award, but has offered no authorities for the court to consider, to support the proposal of Kshs.450,000/=.

21. In the case **Telcom Orange Kenya Ltd Vs. ISO (minor through his next friend & mother JN)(2018) e KLR**, the child had sustained head injury occasioning a depressed fracture of the skull, scars of the tempo-parietal area and bruises on the leg. The trial court awarded general damages of Kshs.950,000/= in 2017. On appeal, the High Court reduced the award to Kshs.500,000/=.

22. Comparing the above decisions to the injuries sustained by the respondent and the award by the trial court, I find that though the injuries were serious, and the occasional complaints of headache and pain at the back of the head and the residual scars, the respondent sustained no permanent incapacitation.

23. Having considered the decisions I find that the trial magistrate erred in not considering the nature and extent of the respondent's injuries to arrive at the award of Kshs.800,000/= which I find to be excessive in the circumstances, and therefore an erroneous estimate.

Consequently, I allow the appeal, set aside the award of general damages and substitute it with an award of Kshs.680,000/= in general damages.

This award shall be subjected to the agreed contribution of 50%.

The said sum shall accrue interest from the date of the trial magistrate's judgment, the 10th February 2012.

24. Each party shall bear own costs of this appeal.

Dated, Signed and Delivered electronically at Nairobi this 24th September, 2020.

J.N. MULWA

HIGH COURT JUDGE