



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 39 OF 2020**

**FM (Minor suing through Mother and next friend**

**MWM).....APPELLANT**

**-VERSUS-**

**JNM**

**JDK.....RESPONDENTS**

***(Being an Appeal against the Judgment of the Hon. D. WASIKE,***

***Senior Resident Magistrate in CMCC NO. 29 of 2019 Malindi delivered***

***on 22.10.2019 by the leave of the court issued on 5.08.2020 in Misc. Appl. No. 17 of 2020)***

**Coram: Hon. Justice R. Nyakundi**

**Wambua Kilonzo advocate for the Appellant**

**Janet Katisya and Mwadumo Advocates for the Respondents**

**JUDGEMENT**

The appeal before me is against the award of damages by the trial court in the sum of Kshs. 62,550/= for general and special damages with liability at 100%.The judgment was delivered on 22.10.2019. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the 7.08.2020. The appeal is mainly on the Trial Court's finding on quantum. The grounds of appeal are that: -

- 1) The Learned Trial Magistrate erred in Law and in fact in finding that the plaintiff was entitled to general damages of Kshs. 60,000.00/- which was too much on the lower side in view of the injuries suffered by the minor that it presented a miscarriage of justice.***
- 2) The Learned Trial Magistrate erred in Law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.***
- 3) The Learned Trial Magistrate erred in Law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded general damages for pain and suffering which is very low.***
- 4) The Learned Trial Magistrate erred in Law and in fact when making her award by failing to consider the passage of time and incidence of inflation.***

***It is proposed to ask the court for the following orders that:-***

***a. This appeal be allowed with costs***

***b. The judgment of the Honorable D. Wasike delivered on 22.10.2019 be set aside and the court herein be pleased to***

*reassess the general damages payable to the plaintiff.*

At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see **Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123**. The parties filed Written Submissions but did not find it necessary to orally highlight.

### **Background**

The Plaintiff/appellant through her next friend and mother, filed suit against the Defendant/Respondent dated 25.02.2019 seeking for general and special damages for serious injuries sustained in a road accident on the 14.07.2019 along Malindi-Lamu road at Gongoni Cultural Area while on their way to Borabora from Mjana Heri. The plaintiff was lawfully traveling as a passenger aboard Motor Vehicle Registration Number KTWB 532K (tuk-tuk) belonging to the Defendants and driven by him or his authorized driver/agent/servant and/or employee when the said Motor Vehicle (tuk-tuk) overturned as a result whereof he sustained multiple abrasions on the head (scalp) and bruises on the right upper limb (chest area).

From the P3 form and the medical report by **Dr. Ajoni Adede**, the minor suffered minor soft tissue injuries, which were blunt object injury to the head, neck, limbs thorax and abdomen. From the evidence presented at trial the minor was treated as an outpatient and did not suffer any permanent disability. The trial court also noted that the cuts and bruises were no longer visible at the time of the trial.

Further the Plaintiff/ appellant had pleaded and proved special damages of Kshs. 2,550.00 being kshs 2,000.00 paid for the medical report and Kshs. 550.00 paid for the motor vehicle search.

Interlocutory judgment was entered on 14.06.2019 as the Defendants failed to enter appearance and or file a defence after having been duly served and the matter proceeded for Formal Proof on 7.08.2019 where the Plaintiff/Appellant called two Witnesses to testify in support of his claim. The issue of liability was determined at 100% by virtue of Interlocutory judgment.

### **The Evidence**

The Plaintiff, **Mapenzi Wario**, who is the mother and next friend of the minor, testified as PW1 and relied on her witness statement dated 28.02.2019 as her evidence in chief. She stated that she was the mother of **Phelister Mumba**, a 9 year old minor, and a class 2 pupil at St.Paul's. involved in the accident. She testified that on the material day she received a call from one **Dama Katana Mwaringa**, a neighbor, informing her that while she and the minor were lawfully traveling aboard was aboard Motor Vehicle Registration Number KTWB 532K (tuk-tuk) as passengers when upon reaching the Gongoni Area along the Lamu-Malindi road, the tuk-tuk which was being driven at a reckless high speed started moving in a zig zag manner and overturned causing them injury. She further testified that the minor had suffered blunt object injury to the head, neck, limbs, thorax and abdomen and was treated at Gongoni Health Centre as an outpatient. She also testified that she reported the accident to the Marereni Police Station and was issued with a P3 form dated 1.10.2018 and on 18.11.2018 she was issued with a police abstract. She stated that her daughter was later seen by **Dr. Ajoni Adede** on 10.11.2018 who prepared a medical report at a cost of Kshs. 2,000.00.

She stated that's he instructed counsel on 9.10.2018 who did a search of the motor vehicle at a cost of Kshs. 550.00 and confirmed that the 1<sup>st</sup> Defendant was the registered owner of the said Motor Vehicle. She blamed the driver for the accident and prayed for compensation on behalf of the minor. She produced the treatment notes as **PEX1** and marked the relevant police abstract as **PMFI-2** and the P3 form as **PMFI-3**, the Medical report as **PMFI-4(a)** and the receipt for Kshs. 2,000.00/- paid for the medical report as **PMFI-4(b)**. She also produced a demand letter dated 21.01.2019 as **PEX5**. She produce the copy of records as **PEX6** and confirmed that the child was healed.

**PW2, Dama Katana Mwaringa**, stated that there was an accident on 14.07.2018 and that she was with the minor coming from Mjana Heri and heading to Borabora along the Malindi-Kilifi Road. She stated that there were three children, **Phelister, James** and **Henry**. She stated that she wished to adopt her statement dated 25.02.2019. she stated that the tuk-tuk fell as it was eing driven very fast . she stated that everyone including herself were injured and blamed the driver of the Tuk-tuk.

At this juncture the plaintiff closed its case.

The Plaintiff then filed submissions dated 14.08.2019 wherein they submitted that they had proved their case on a balance of probabilities and urged the court to find the defendants 100% liable for the negligence of their authorized driver. They further prayed for Kshs. 200,000.00 as general damages for pain and suffering and relied on the case of **HCCA No.41, 42, 43, 44 & 45 of 2012-Kisumu Dickson Ndung'u Kirembe & Another-v-Theresa Atieno & 3 Others** where they argue that similar injuries were awarded Kshs. 150,000.00 as general damages for pain and suffering. They further argued that due to inflation trends the trial court should find Kshs. 200,000.00 as fair and reasonable.

With regard to special damages they submitted that the receipts of Kshs. 2,550.00 for medical report and motor vehicle search that were produced as exhibits were pleaded and proven.

### **The Trial Court's judgment**

The trial court made a determination that the Plaintiff had sufficiently proved that the accident had indeed occurred as pleaded in the Plaint. The trial court was further persuaded by the Plaintiff that the motor vehicle did indeed belong to the Defendant as evident from the Motor vehicle search presented at trial.

On the issue of General damages the trial court stated that from the evidence adduced before it, the minor had suffered only soft tissue injuries as seen from PW1's evidence, PEx1 which were the treatment notes from Gongoni Hospital, PEx2 which was the P3 form, PEx3 the police abstract and PEx4 the medical report from Dr. Ajoni Adede. However neither the Treatment notes nor the p3 form were specific about the nature of the injuries sustained and only referred to them as soft tissue injuries. The Medical report on the other hand indicated that there was blunt object injury to the head, neck, thorax, abdomen and limbs which concurred with the P3 form, which injuries had since healed with no permanent disability.

On the issue of quantum the trial court submitted that it had perused the authorities relied on by the plaintiff and that they included almost similar injuries as the plaintiff's however the proposal of Kshs.200,000.00/- was on the higher side given that the injuries were no longer visible and further that the injuries sustained in the authority submitted by the plaintiff were more serious in nature resulting in the cut being stitched, swelling to the neck and tenderness to the back unlike the instant case where the injuries were blunt object as such a sum of Kshs. 60,000.00 would suffice as general damages for Pain, Suffering and loss of amenities.

The Trial Court delivered judgment in favor of the Appellant against the Respondents at 100% liability, General damages of Kshs.60,000.00/=, special damages of Kshs.2, 550.00/= as well as costs and interests from the date of filing suit until judgment.

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

Counsel for the Appellant, **Mr. Wambua Kilonzo**, submitted that the appeal was against the award of damages and as such the court should be guided by the principles set out in the Court of Appeal in **Henry Hidayi Ilanga V Manyema Manyioka [1961] 1 EA 705 (CAD)** while applying with approval the rule laid down by the **Privy Council in Nance V. British Columbia Electric Railway Company Ltd (4) (1951) A.C 601 at p.613**.

Counsel submitted that it was a principle of law that comparable injuries should receive comparable awards as seen in the case of **Arrow Car Limited V Elijah Shamall Bimomo & 2 Others [2004] eKLR**. He further submitted that the relevant authority, **HCCA No.41, 42, 43, 44 & 45 of 2012-Kisumu Dickson Ndung'u Kirembe & Another-v-Theresa Atieno & 3 Others**, supplied to the trial court had similar injuries and had been awarded Kshs.150,000.00. Further Counsel submitted that since the matter had proceeded by way of formal proof therefore there were no submissions put by the respondents in opposition to the proposed award of Kshs. 200,000.00 as being fair and reasonable and neither did the trial court provide substantial reasons which favored her decision and that the trial court did not consider all the factors and the evidence adduced in awarding Kshs.60,000.00.

Counsel submitted that the award of Kshs. 200,000.00/- would have been fair and reasonable considering the aspect of inflation and taking into account the nature of the injuries, passage of time and economic realities as echoed in the case of **Nyambati Nyaswambu Erick v Toyota Kenya Ltd & 2 Others HCCA No.66 of 2018**.

Counsel submitted that the award was inordinately low and disproportionate to the injuries suffered in the circumstances so as to occasion a miscarriage of justice.

Consequently Counsel asked that the Court find that the trial court's award was inordinately low and to reassess the general damages payable for the appellant proven.

### **Issues For Determination**

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see **Court of Appeal for East Africa in Peters -vs- Sunday Post Limited [1958] EA 424**. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

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

Following a cursory look at the record of appeal before me it suffices to see that indeed on a balance of probabilities the was sufficient enough to prove, at least on a balance of probability, that indeed a road traffic accident involving the said motor vehicle registration occurred along Malindi-Lamu road as pleaded by the Appellant and consequently is enough to prove that the Appellant was a passenger in the accident motor vehicle and that the Respondents were its owners/authorized driver. The certificate of official search from the registrar of motor vehicles also conclusively proved of ownership of the particular motor vehicle. There was no evidence called to rebut this assumption consequently displaying to the trial court that the issue of ownership was not a central issue, for this I am persuaded by the Court of Appeal in the case of **Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Another**. I therefore find that the said accident did occur and that the motor vehicle was indeed the respondent's. Consequently, without any rebuttal, the learned magistrate was right to accept the appellant's evidence as the truth with respect to the question of who might have been responsible for the accident. As such I am in agreement with the Learned Magistrate's finding on 100% liability against the Respondent as there was no evidence adduced to the contrary.

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following issue for determination by this court in my view:

## 1. Quantum

### QUANTUM

The issue for determination here is whether the award of general damages of Kshs. 60,000.00/= in light of the injuries stated above is inordinately low to persuade this court to interfere with it. The Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that “*comparable injuries should attract comparable awards*”.

To begin, the injuries suffered by the appellant were listed in the treatment notes, the P3 form and the Medical report by **Dr. Ajoni Adede** as:

1. *Blunt Object injury to the head*
2. *Blunt Object injury to the neck*
3. *Blunt Object injury to the thorax*
4. *Blunt Object injury to the abdomen*
5. *Blunt Object injury to the limbs*

I have considered the Appellant’s submissions on the quantum of damages, the authorities cited by Counsel in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person’s injuries. What a court is to consider is that as far as possible comparable” to the other person’s injuries, and the after effects.

I must hasten to add that the fact that the Respondents did not file submissions during trial should not be a basis for the court’s assessment of quantum.

From the evidence adduced by the Appellant it is clear that the minor had suffered soft tissue injuries with no resulting disability and has healed completely from the injuries she sustained.

For the issue of quantum I shall rely on the Court of Appeal’s decision in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that –

*“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 All ER 297*. It was echoed with approval by this Court in *Butt v. Khan [1981] KLR 349* when it held as per Law, J.A 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 was either inordinately high or low.’ (Emphasis my own).*

From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine **whether the award was consistent with comparable awards made**. Upon studying the cited authorities relied upon by the Appellant, I note that the injuries therein were more severe in nature than in the current case. I am therefore not persuaded by the authorities cited by the appellant.

Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5** where the court 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 was either inordinately high or low”*

In the case of **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR** the court stated as follows: -

*“It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance ...”*

The other critical point of convergence for the court is to bear in mind that the award of general damages is an exercise of discretion by the trial court based on the evidence and impressions on demeanor of witnesses made by the Learned trial Magistrate which advantage an appeal court by its mode of delivery lacks. (See **Simon Tavera v Mercy Mutitu Njeru {2014} eKLR**).

I took the step of considering comparable awards previously made and relied on the following cases:

- a. **Fred Barasa Matayo v Channan Agricultural Contractors {2013} eKLR**: The court reviewed downwards an award of Kshs.250,000/= to Kshs.150,000/= to moderate soft tissue injuries that were expected to heal in eight months' time
- b. **Dickson Ndungu v Theresia Otieno & 4 Others {2014} eKLR** The court reviewed the award of Kshs.250,000/- to Kshs.127,500/= for soft tissue injuries which produced no complains.
- c. **Purity Wambui Muriithi v Highlands Mineral Water Company Ltd {2015} eKLR**: The award of Kshs.700,000/= was reduced to Kshs.150,000/= for injuries to the left elbow, pubic region, lower back and right ankle.

I further wish to point out that *in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to mulct the tortfeasor for the injury he has caused see the case of Lim v Camden HA {1980} AC 174. There is a distinct difference between the pain and suffering experienced by a victim of an accident with serious multiple skeletal injuries in contrast with that of low level soft tissue injuries.*

In view of the foregoing, I am persuaded that the award made by the learned trial magistrate fell on the lower side in comparison to comparable awards, hence there is need for interference. However, I am not persuaded that the sum suggested by the Appellant is reasonable and fair in light of the injuries suffered.

Upon considering the damages awarded in the authorities I have just cited, I find an award of Kshs.100,000/ to be reasonable and adequate to compensate for the injuries suffered in this case.

The test to be applied in an award of special damages is clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the Appellant had clearly proven the amount pleaded as special damages and as such I find no reason to vary the Learned Magistrate's decision on that.

Accordingly and for reasons stated, I would allow the appeal, and set aside the award of Kshs.60,000.00/= by substituting it with Kshs.100,000.00/=, taking into account the salvage of inflation as an additional factor. Each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF DECEMBER 2020.**

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**R. NYAKUNDI**

**JUDGE**

**NB: This Judgment is dispatched electronically to the respective emails of the advocates in the matter.**