



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 5 OF 2020**

**EQUITY BANK KENYA LTD.....1<sup>ST</sup> APPELLANT**

**MARGARET NYAMB.URA NGANGA.....2<sup>ND</sup> APPELLANT**

**NICK ODHIAMBO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**DAVID GITHUU KURIA .....RESPONDENT**

***(Appeal from the judgment and decree of Hon J.P. Nandi in Bondo PM's Court Civil Suit No. 36 of 2017 delivered on 27/2/2020)***

**JUDGEMENT**

**Introduction**

1. This appeal is against the judgement, decree and order passed in the Principal Magistrates Court at Bondo by the Hon. J.P. Nandi on the 27<sup>th</sup> day of February 2020 in Civil Suit No. 36 of 2017.
2. The respondent herein DAVID GITHUU KURIA sued the appellants jointly and severally seeking general damages, special damages of Kshs. 241,707 as well as costs of the suit. It was the respondent's case that on the 8/4/2015 he was travelling in motor vehicle registration GK A702G, a Nissan Urvan along Siaya-Ndori road at Nyabenge area when the 3<sup>rd</sup> defendant and/or his driver drove motor vehicle registration number KBW 484X, a Toyota Isis negligently causing an accident whereof the respondent suffered injuries. The appellants filed a defence dated 10/4/2017 denying all the allegations levelled against them by the respondent. The parties had entered a consent on liability in the ratio of 70:30 in favour of the respondent thus the trial court proceeded to determine the quantum of damages which it arrived at Kshs. 400,000.
3. Being dissatisfied with the trial court's decision, the appellants filed their memorandum of appeal dated 12<sup>th</sup> March 2020 setting out the following 3 grounds of appeal:
  - a) *That the Honourable Principal Magistrate erred in law when he awarded Kshs. 400,000 for soft tissue injuries thereby arriving at a figure which was inordinately high that no court properly analysing the evidence on the injuries sustained by the respondent would arrived at.*
  - b) *That the Honourable magistrate erred in law when he awarded special damages of an amount that was not specifically pleaded, particularized, supported by receipts and strictly proved thereby erroneously arriving at Kshs. 241,707.*
  - c) *That the judgement is against the weight of evidence placed before court.*
4. The appeal was canvassed by way of written submissions.

**Appellant's Submissions**

5. It was submitted by the appellants' Counsel that the medical report produced before the trial court and prepared by Dr. G.K. Mwaura listed the respondent's injuries as *blunt injury (tender) anterior chest wall, cut wounds left knee and swollen, tender left knee*, all which were soft tissue injuries that did not warrant the general damages granted.
6. It was submitted on behalf of the appellants that in arriving at the award for general damages, the trial court relied on the case of **Bungoma HCCA No 6 of 2012; Global Trucks Ltd v Titus Osule Osoro** in which the appellant had suffered *fracture of the right upper*

incisor, loosening of two teeth & post-accident pain on the left elbow and abdomen all which the appellants submitted were not relevant to the instant case thus leading the court to arrive at an award that was manifestly high that no court could have addressed its mind similarly.

7. The appellants submitted that they proposed an award of Kshs. 100,000 guided by the case of **Rosemary Wanjara Baiba v Benson Irungu Nairobi HCC No. 577 of 1991** where the plaintiff suffered soft tissue injuries to the back, chest and throat and the court awarded Kshs. 90,000 as general damages.

### **Respondent's Submissions**

8. The respondent's Counsel submitted that the Appellants had not given any reason why the awarded General Damages should be disturbed by this Honourable court and that the annexed authority by the Appellants, **Rosemary Wanjara Baiba (supra)** was made more than 21 years ago. The appellant submitted that in awarding damages, the trial court has to take care of the inflation rate being experienced at the time.

9. The Respondent's Counsel relied on the case of **Catherine Wanjiru Kingori & 3 Others v Gibson Theuri Gichubi [2005] eKLR** where the court awarded the 1<sup>st</sup> Plaintiff Kshs 300,000 for injury on the left ankle, injuries on the legs and injuries on the chest. It was the respondent's submission that the appellants similarly relied on the authority above in their lower court submissions.

10. The Respondents submitted that no mistake or error was committed by the subordinate trial court in awarding the general damages. He urged this court to uphold the award and to dismiss the Appellants' appeal with costs for lack of merit.

### **Analysis & Determination**

11. The role of this court on first appeal is to re-evaluate all the evidence adduced in the lower court and to reach its own conclusions in respect thereof. This position was espoused in *Sielle vs Associated Motor Boat Company* and restated in **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**.

12. Having considered the Respondent's grounds of appeal, the rival submissions herein and the injuries as pleaded, the evidence tendered in the lower court as supported by the medical report prepared by Dr Mwaura, I observe that the parties settled the issue of liability in favour of the respondent in the ratio of 70:30. Accordingly, in my humble view, the main issues for determination in this appeal are:

- a) *Whether the general damages awarded to the Respondent were manifestly and excessively too high;*
- b) *Whether the respondent strictly proved the special damages of Kshs 241,707 pleaded to warrant the award by the trial court.*

#### **a) On whether the general damages awarded to the respondent were manifestly and excessively high,**

13. Before the trial court, the parties herein and by consent adopted the medical report of Dr. G.K. Mwaura who examined the respondent and concluded that the respondent experienced pain on the left knee on exertion, that there was a scar left knee and that he sustained soft tissue injuries, moderate in degree.

14. Counsel for the respondent in the trial court suggested an award of One Million Kenya Shillings (Kshs. 1,000,000) and relied on the case of **Catherine Wanjiru Kingori (supra)** where the plaintiff therein suffered injuries on the left ankle, injuries on the legs and chest, dislocation of the left wrist, fracture of the radius and ulna and soft tissue injuries to the face. The Court awarded general damages of Kshs. 300,000 in 2005.

15. On their part, the appellants relied on case of **Rosemary Wanjara Baiba (supra)**, a 1991 case where the court awarded Kshs. 95,000 for soft tissue injuries to the back, chest and throat.

16. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing general damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**).

17. In **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** the Court of Appeal stated:

*“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”*

18. In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (see **Kigaraari v Aya [1982-88] 1 KAR 768, Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

19. I have considered the authorities cited by both parties in support of their respective positions. In my humble view, the authority cited by the respondent in the trial court had more serious injuries than those sustained by the Respondent herein. The said injuries suffered by the

plaintiffs in the cited cases are more serious and not comparable to those suffered by the respondent in the instant case.

20. I further observe that the case cited by the appellants in the trial court was more comparable to the injuries suffered by the respondent. However, as was correctly submitted by the respondent's counsel, that was a 1991 case and the court herein must take note of the effect of inflation.

21. In **Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] eKLR** a more recent decision, the High Court reviewed downwards an award of Kshs. 250,000/ to Kshs. 150,000/= for "moderate soft tissue injuries that were expected to heal in eight months' time. In **George Kinyanjui T/A Climax Coaches & Anor. v Hussein Mahad Kuyale [2016] Eklr**, the High Court reviewed downwards an award of Kshs. 650,000/= to Kshs. 109,890/= for soft tissue injuries.

22. In **Dickson Ndungu Kirembe v Theresia Atieno & 4 Others [2014] eKLR** the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,500= for soft tissue injuries which healed with no complications. In **Francis Ndungu Wambui & 2 others v Benson Maina Gatia [2019] eKLR** quite recently, the High Court reviewed downwards an award of general damages of Kshs. 400,000 to Kshs. 300,000 for injuries of head injury with loss of consciousness and soft tissue injuries. Finally, in **Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR** the Court of Appeal revised downwards an award by the High Court of Kshs. 700,000/= to Kshs. 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.

23. The respondent herein suffered soft tissue injuries which were moderate in degree according to the report by Dr. G.K. Mwaura, which medical report was adopted by both parties. Accordingly, it is my considered view that the award of Kshs 400,000 general damages for pain and suffering was manifestly excessive and warrants interference by this court. In my humble view, an award of Kshs 250,000 is adequate compensation for the Respondent taking into account inflation and time lapse since the cited authorities which are relevant were made.

**b) On whether the respondent strictly proved the special damages pleaded to warrant the award by the trial court,**

24. I have perused the record of appeal together with the original file. I have noted that the respondent pleaded special damages in the sum of kshs 241,707 and he annexed receipts of special damages totalling to Kshs. 241,707 as pleaded. The said receipts were admitted by the appellants in their submission where they raised no issue with any of the receipts for special damages pleaded and strictly proved before the trial court. I find the ground of appeal an afterthought and devoid of merit. I dismiss it.

25. For all the above reasons, the appeal herein partially succeeds to the extent that the award of general damages in the sum of Kshs 400,000 is hereby set aside and substituted with an award of KSHS 250,000 less agreed contribution of 30%. Interest will earn from date of judgment in the lower court. I uphold the award for special damages. Interest will accrue from date of filing suit in the lower court. It should be noted that no contribution is attributable to special damages as pleaded and proved.

26. Each party to bear their own costs of the appeal.

Orders accordingly.

**Dated, signed and Delivered at Siaya this 16<sup>th</sup> Day of December, 2020**

**R.E. ABURILI**

**JUDGE**