



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 1 OF 2020

GEORGE WILLIAM AWUOR.....APPELLANT

VERSUS

BERYL AWUOR OCHIENG.....RESPONDENT

(Appeal from the judgment and decree passed in Bondo PM's Court Civil suit No. 70 of 2018 by Hon E. N. Wasike, SRM on 5th December, 2019)

JUDGMENT

Introduction

1. This is an appeal from the judgment and decree of Bondo Senior Resident Magistrate E.N. Wasike in Bondo PMCC 70 of 2018 in which the respondent herein **BERYL AWUOR OCHIENG** instituted a suit for general damages against the appellant herein **GEORGE WILLIAM AWUOR** for injuries she sustained in a road traffic accident. The issue of liability was settled by consent of the parties herein at the ratio of 70:30, the court proceeded to assess and award the respondent Kshs. 2,000,000/= less 30% leaving a balance of Kshs. 1,400,000/= as general damages plus costs of the suit.

2. The appellant was dissatisfied with the trial court's judgement and filed a memorandum of appeal dated 10th January 2020 on four grounds as follows;

a) That the quantum of general damages for pain and suffering and loss of amenities was inordinately high, erroneous, oppressive and punitive and amounted to a miscarriage of justice.

b) That the learned trial magistrate ignored the appellant's submissions, paid lip service and failed to consider all the precedents on general damages cited thus coming to a wrong decision on quantum.

c) That the learned trial magistrate erred in fact and in law in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards, and ignoring completely the appellant's submissions.

d) That the learned trial magistrate erred in law and in fact in making an award of Kshs. 2,000,000 without giving any reason for such an award thus making an award that was arbitrary, capricious and inordinately high, erroneous and which amounted to a miscarriage of justice.

3. The appeal was disposed of by way of written submissions.

Appellant's Submissions

4. It was submitted by the appellant that in making an award of Kshs. 2,000,000 the trial court ignored the cardinal principle in assessment of damages that comparable injuries should as far as possible be compensated by comparable awards as was held in the cases of **Simon Taveta v Mercy Mutitu Njeri (2014) eKLR** and that of **Morris Mugambi & Another v Isaiah Gituru Nairobi CA No. 138/2002** and thus arrived at an award that was inordinately high and which was unjust and unfair.

5. It was submitted that the trial court erred by failing to consider the authorities cited by the appellant which was a misdirection warranting intervention on the award of damages by an appellate court as was held in the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd (2013) eKLR**.

6. The appellant further submitted that the award given by the trial court was not grounded on any known principle and that the trial court was wrongly influenced by extraneous factors specifically that the respondent's husband and child died in the accident.

Respondent's Submissions

7. It was submitted that the magistrate's finding with regard to the issue of quantum of damages was based on the fact that the injuries sustained were very serious and further on the fact that the respondent suffered a lot of pain and had to be admitted and further that the respondent still needed money for further treatment.

Analysis & Determination

8. As the first appellate Court, this court's role is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Anor. v Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

9. I have carefully perused the proceedings, the evidence adduced before the trial court judgement, the record of appeal as a whole including the parties' submissions. The issue of liability having been settled, the issue for determination is ***whether the learned magistrate awarded excessive damages in view of the injuries sustained.***

10. The medical report by Dr. Odondi that was admitted by consent of both the appellant and the respondent revealed that the respondent suffered fractures of the right femur and left tibia fibula. The doctor noted that the tibia fibula fractures were compound while the femur fracture was simple. It was also noted that the respondent's right thigh had surgical scars and some bruising which had since healed but that the nail was still in situ and she would have to undergo surgery to remove the nail.

11. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Francis Ndungu Wambui & 2 others v VK (a minor suing through next friend and mother MCWK) [2019] eKLR**, **Butt vs Khan [1982-88] 1 KAR 1** and **Mariga vs Musila [1982-88] 1 KAR 57**).

12. 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 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**).

13. I would also add what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar [1998] eKLR** that:

"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."

14. 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 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

15. The appellant cited the case of **Patrick Kinyanjui Njama v Evans Juma Mukweyi [2017] eKLR** where the respondent suffered segmental fracture of the right femur mid shaft; segmental fracture of the right tibia shaft (open); fracture of the right fibula; and, fracture of the left 3rd metatarsal bone with recovery was expected in one and a half years and further surgery estimated at Kshs 50,000 to remove the metal plates leading the doctor to assess disability at 30%, injuries which in my mind were far serious than those suffered by the respondent herein, the court upheld the award of Kshs. 1,500,000 for general damages.

16. The respondent also relied on the case of **Guardial Singh Ghataurhae v Parminder Singh Manku & 3 others [2018] eKLR** where the plaintiff suffered far serious injuries of *comminuted intra articular fracture of the right tibial plateau and metaphysic, Fracture right patella, Comminuted fracture of right distal radius, Osteoarthritis of right knee, Fracture of four ribs on right side and Severe lacerations, bruising and scarring*, the court awarded general damages of Kshs. 2,500,000.

17. On his part the appellant submitted that an award of Kshs. 700,000 would be sufficient for general damages. He relied on the following cases;

a) **Joseph Mwangi Thuita v Joyce Mwole (2018) eKLR** where the plaintiff suffered injuries of *fractured right femur, compound fracture (r) tibia and fibula, shortening right leg and episodic pain (r) thigh with inability to walk without support* and the court awarded Kshs. 700,000 as general damages.

b) **Pauline Gesare Onami v Samuel Changamure & Another (2017) eKLR** where the plaintiff suffered *fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, Laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft* and the court upheld the trial court's award of Kshs. 600,000.

c) **Sammy Mugo Kinyanjui & Another v Kairo Thuo (2017) eKLR** where the respondent had slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; *fracture of the right tibia; fracture of the left tibia and fibula*. His conclusion was

that the injuries were *very severe* but had healed the court lowered the award of general damages from Kshs. 1,000,000 to 600,000.

d) **Tirus Mburu Chege & Another v JKN & Another (2018) eKLR** where the respondent suffered fractures on the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness the court lowered the award for general damages from Kshs. 800,000 to Kshs. 500,000.

e) **Alex Wanjala v Pwani Oil Products Limited & Another (2019) eKLR** where the appellant sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur with the court awarding Kshs. 600,000 for general damages.

f) **Reuben Mongare Keba v LPN (2016) eKLR** where the respondent suffered fracture of the tibia-fibula bones of right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur and degloving injury of the right leg and was awarded general damages of Kshs. 800,000.

g) **EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR** where this court upheld an award of Kshs. 800,000 where the plaintiff had suffered femur fractures and fractures of the tibia fibula.

18. It is my view that the injuries cited in the authorities relied on by the appellant are more comparable to the injuries suffered by the respondent. Having had due regard to the aforesaid cases and the inflationary trends as well as the fact that the doctor who examined the respondent noted that the respondent would require surgery to have the nail removed, I am of the view that a sum of award of Kshs 2,000,000/= general damages was rather excessive.

19. Accordingly, I am persuaded that this is a suitable case for exercise of discretion to interfere with the trial court's finding on general damages for the reason that the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same. In my humble view, and considering the age of the Respondent who was 21 years old it is my considered view that an award of Kshs. **1,200,000/= less 30% liability** leaving a balance of **Kshs. 840,000** would be sufficient compensation as general damages to the respondent.

20. Accordingly, the appeal herein against quantum of damages succeeds to the extent that the award of general damages in the sum of Kshs 2,000,000 is hereby set aside and substituted with an award of Kshs 1,200,000 less 30% contribution as agreed in the lower court. The respondent shall have costs of the suit in the lower court and interest on the reassessed damages from date of judgment in the lower court. Each party to bear their own costs of this appeal.

21. Orders accordingly.

Dated, Signed and Delivered at Siaya this 15th Day of December 2020

R.E. ABURILI

JUDGE