



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. 6 OF 2017

GRACE MWIHAKI NGUGI.....APPELLANT

VERSUS

NNM (minor suing through next friend)

ANO.....RESPONDENT

(Being an Appeal from the Judgment of Hon. C.R.T. ATEYA PMCC NO.323 of 2015 delivered on 5th December 2016)

JUDGMENT

1. **The minor Respondent, NNM through her next friend**, sued the Appellant, GMN, in the lower court claiming damages for the injuries she allegedly sustained in a road traffic accident on 20th September, 2015 involving the appellant's motor vehicle KCA 355V.

2. The appellant filed a statement of defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs. The parties subsequently agreed on liability at 80:20% in favour of respondent against the appellant.

3. The Appellant was found 80% liable and the Respondent was awarded Ksh.450, 000/- and Kshs.38, 695/- being general and special damages respectively. The aforesaid amount would be reduced by 20% contribution.

4. The Appellant being dissatisfied with the trial court's decision preferred this appeal and filed the Memorandum of Appeal dated 12th January 2017 which set out 3 grounds that:-

.1. The learned trial magistrate erred and misdirected himself in fact and law by awarding general damages to the Respondent that were manifestly excessive in the circumstances and thus failed to appreciate the principles applicable in the award of damages.

2. The learned Magistrate erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries.

3. The learned magistrate erred in failing to consider and critically analyse the submissions made on behalf of the defendants/appellants and thus arrived at an unjustifiably high award for the injuries sustained.

5. When the appeal came up for hearing on 3rd October 2018 the parties agreed to have the appeal disposed of by way of written submissions. The Appellant submitted that the Plaintiff's injuries were superficial injuries which have fully healed without any post-injury deficit. It was the appellant's case that the court failed to adhere with the doctrine of precedent, to make comparable awards for analogous injuries and the final award was therefore inordinately high and excessive. That the discrepancies in the Respondent's medical evidence is to such a large extent that it cannot be held to have proven the Respondent's case on a balance of probabilities. Under the circumstance they submitted that an award of Kshs. 150,000/- would be sufficient.

6. The respondent submitted that the trial court's award of Kshs. 450,000/- in general damages was very reasonable considering previous awards for similar injuries.

7. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings.

8. I have perused the entire record of appeal and considered the submissions by counsels for both parties and note that the appeal is on

damages. I am alive to the well-known principle that for an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**).

9. It is clear that the nature and extent of the respondent's injuries is contested. Medical reports from Dr. Ogando and Dr. Malik were both produced as evidence before the trial court. An extract of the judgment of the trial court addressing the two reports was as follows:

“The plaintiff sustained severe head injury and remained comatose for a week, deep cut wound on the posterior knee, blunt trauma to the back, deep extreme lacerations on the chest, multiple lacerations on both legs, extreme functional burns on the left thigh. She was admitted for three weeks in hospital. The examination done by Dr. Ogando about 1 month after the date of injury stated that these were multiple soft tissue injuries that would heal except for the head injury that was likely to leave her with post epilepsy, and permanent disability due to deformity on healing of the knee. The examination done by Dr. Malik on 22/4/2016 confirmed the injuries but noted that she had not developed any permanent disability.”

10. Save for the trial magistrate holding that the respondent sustained severe head injury, I am inclined to agree with his observation that examination by Dr. Malik confirmed the injuries but noted that she had not developed any permanent disability. Dr. Malik at the conclusion of his report notes as follows:

‘She suffered TOTAL incapacity of a temporary nature for a period of THREE WEEKS followed by a PARTIAL incapacity of a TEMPORARY nature for a further period of ONE WEEK. She suffered NO permanent physical or mental disability.’

The conclusion by Dr. Ogando Zoga in part read as follows:

‘Following the RTA Nolen sustained severe head injury which has not recovered fully as she still has episodes of confusion and amnesia which are permanent disabilities given the duration of comatose.’

The Discharge Summary from The Kisii Teaching & Referral Hospital indicates the condition of the Respondent as follows:

‘PROVISIONAL DIAGNOSIS (ON ADMISSION): moderate head injury’

11. It is worth noting that her provisional diagnosis on admission was that she had suffered moderate head injury. It was Dr. Malik's opinion that the respondent had been unconscious for some time, this is confirmed by the report of Dr. Ogando Zoga that the respondent had been in comatose for three weeks. I am therefore constrained to find that the respondent suffered head injuries and the submission by the appellant that she only suffered soft tissue injuries cannot stand.

12. In awarding damages, the court takes into account the nature and extent of injuries in relation to awards in similar cases to ensure consistency of awards bearing in mind that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. 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.”

13. The appellant contended that the nature of the injuries was soft tissue injuries and relied on the case of **Kiwanjani Hadware Ltd & Another vs. Nicholas Mule Mutinda (2008) eKLR** where the court declined to interfere with an award of Kshs. 150,000/- where the Plaintiff suffered a blunt injury to the head without loss of consciousness; blunt injury to the neck, a cut to the throat; blunt injury to the left shoulder and back; blunt injury to the chest; blunt injury to the right forearm; deep penetrating wound on the left leg with cuts and bruises on the same leg. The Respondent relied on the case of **Joel Matonya v Swan Carriers Ltd (2015) eKLR** where the plaintiff suffered severe head injury causing brain damage, laceration over the right eye brow, loss of consciousness for several weeks, poor memory, difficulty with speech, poor balance, changed personality and the court awarded Kshs. 1,500,000/-. The trial court in awarding damages disregarded the cases relied on by the appellant and respondent and preferred the case of **Hayer Bishan Singh & Sons Construction v Paul Oduor Ogola (2009) eKLR** where the Plaintiff had injuries to his head, chest, face, elbow, right forearm and waist and an award of Kshs. 190,000/- was made. The trial magistrate thus took into account the passage of time and current inflation in reaching the award of Kshs. 450,000/-.

14. The authority by the appellant is of injuries which are less serious compared to those that were sustained by the respondent in this case, while the authority relied upon by the Respondent are of injuries that are more severe. In **Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR** the Plaintiff sustained the following injuries; severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger, soft tissue injuries on the chest wall and was admitted for 5 months and in an unconscious state for that period. The trial court made an award of Kshs 600,000/- which was reduced to Kshs 350,000/- on appeal.

15. I therefore allow the appeal, set aside the award of general damages by the subordinate court and substitute with an award of Kshs. 350,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court. The appellant shall have costs of the appeal.

Dated, signed and delivered at Kisii this 28th day of February 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Wesonga h/b Mr. Kusa for the Appellant

Mr. Nyangacha h/b Mr. Geno for the Respondent

Rael Court clerk