



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 66 OF 2018

BETWEEN

NYAMBATI NYASWABU ERICK.....APPELLANT

AND

TOYOTA KENYA LIMITED1ST RESPONDENT

TSHUSHO CAPITAL KENYA LIMITED ... 2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. M. Nyotah, RM dated 3rd August 2018 at the Magistrates Court at Kisii in Civil Case No. 356 of 2016)

JUDGMENT

1. This an appeal against the award of Kshs. 55,000/- as general damages assessed by the trial court. The appellant was a passenger in motor vehicle registration GKB 038F when the vehicle lost control and overturned at Enamba along the Keumbu – Igare road on 12th June 2015. The issue of liability was settled in a test suit in the ratio 75:25 against the respondents.
2. As this 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 *Butt v Khan [1982-88]1KAR 1* and *Mariga v Musila [1982-88] 1 KAR 507*).
3. Counsel for the appellant argued that the award was inordinately high bearing in mind the nature of injuries and the authorities cited and as such it represented an entirely erroneous estimate of damages. Counsel for the respondent urged the court to uphold the award of the trial court as the appellant had not established any basis for the appellate court to interfere with the award. He urged that the award of general damages was reasonable given the serious injuries sustained.
4. According to the plaint, the appellant sustained a deep cut on the scalp extending to the maxillary area, blunt injury to the left side of the chest, contusion on the back and contusion on both legs. In his testimony, the appellant produced the medical reports and stated that his injuries had healed. The medical report by Dr Ezekiel Oganda Zoga dated 11th May 2015 following his examination of the appellant on 3rd October 2014 confirmed the injuries enumerated in the plaint. At the material time, the appellant complained of chest pains but the doctor noted that he was in stable condition, had mild tender on the chest and a scar on the right temporal maxillary area. He concluded that, “Following the RTA Eric sustained some severe soft tissue injuries which are healing well. No permanent disability anticipated.”
5. In order to guide the trial magistrate parties relied on written submissions which they adopted in this appeal. The appellant suggested Kshs. 400,000/- as general damages. He relied on *Francis Ochieng and Another v Alice Kajimba MGR HCCA No. 23 of 2015 [2015] eKLR* where the plaintiff sustained multiple soft tissue injuries without fractures and was awarded Kshs. 350,000/- as general damages in 2015. In *Catherine Wanjiru Kingori and 3 Others v Gibson Theuri Gichubi NYR HCCC No. 320 of 1998 [2005] eKLR* where the plaintiffs were awarded sums between Kshs. 100,000/- and Kshs. 350,000/- as general damages for soft tissue injuries.
6. The respondent suggested that a sum of Kshs. 80,000/- would be appropriate. The respondent cited several cases. In *Mokaya v Julius Momanyi Nyokwoyo KSI HCCA No. 101 of 2010 [2013] eKLR* where the plaintiff sustained a cerebral concussion, deep cut wound on the back of his head and bruises on the right foreleg. He was awarded Kshs. 70,000/- in 2013. In *Kipkebe Limited v Thomas Amoro Ngarisa*

KSI HCCA No. 250 of 2011 [2015] eKLR where the plaintiff sustained deep cut wound on the right leg with continuing effects and pain on the right leg and was awarded Kshs. 70,000/- in 2015

7. After considering the evidence and parties' submissions, the trial magistrate came to the following conclusion:

Injuries to the chest and head are substantially consistent in the evidence produced although the description differs slightly. Contusion on both legs only appears in the medical report. No reference to leg injuries is made in the P3 form which was filled closer to the time of the accident than the medical report. The plaintiff said his right leg was injured. There is no consistency about the injury to the leg(s) if any. There was no reference to a neck and back injury in the P3 form and during oral testimony, the plaintiff did not explain what kind of injury to the neck and back he suffered. On a balance of probabilities, I find that the Plaintiff suffered a cut wound on the scalp and blunt injury to the chest.

8. I have also re-evaluated the evidence of the appellant, the injuries sustained as recorded in the P3 form and medical record and I do not fault the reasoning of the trial magistrate in the conclusion reached based on the evidence. The issue then is what was the appropriate award in light of the reported cases.

9. 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 (see *Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR*). I would also add what the Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [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.

10. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (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*).

11. Having considered the decisions cited, the trial magistrate found that the cases cited by the respondent are apposite in reaching the award of Kshs. 55,000/-. Both decisions were decided in 2013 and 2015 respectively and taking into account the passage of time and rate of inflation, I would find the award of Kshs. 55,000/- as inordinately low. I would therefore enhance the award to Kshs. 90,000/- as general damages.

12. I allow the appeal, set aside the award of general damages by the subordinate court and substitute it with an award of Kshs. 90,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

13. The respondent shall pay costs of the appeal which I assess at **Kshs. 30,000/-** exclusive of filing fees.

DATED and DELIVERED at KISII this 21st day of FEBRUARY 2019.

D.S. MAJANJA

JUDGE

Ms Kusa instructed by Khan and Associates Advocates for the appellant.

Mr Mose instructed by Mose, Mose and Milimo Advocates for the 1st and 2nd respondents.