



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 115 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NOS. 116 AND 117 OF 2018

BETWEEN

CIVICON LIMITED.....APPELLANT

AND

RICHARD NJOMO OMWANCHA.....1ST RESPONDENT

GLADYS NYAKERARIO OMWANCHA.....2ND RESPONDENT

REBECCA NYABOKE MACHOGU.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Wamucii. Nyotah, RM

dated 26th October 2018 at the Magistrates Court at Kisii

in

Civil Case No. 225 of 2018, 226 of 2018 & 227 of 2018)

JUDGMENT

Introduction

1. The appellant was the registered owner of motor vehicle registration number KCC 537E. On 16th February 2018, while driving along the Kisii – Kilgoris road, the appellant’s driver negligently drove the motor vehicle causing it to hit a motor cycle carrying the respondents. The respondents were injured and filed suit for damages. The issue of liability was settled by consent in the ratio 75:25 against the appellant.

2. The matters then proceeded for assessment of damages and the trial court awarded the following damages subject to the consent on liability:

Richard Njomo Omwancha	General Damages	Kshs. 1,000,000.00	
	Special Damages	Kshs.	7,140.00
Gladys Nyakerario Omwancha	General Damages	Kshs. 1,000,000.00	
	Special Damages	Kshs.	10,860.00

Rebecca Nyaboke Machogu General Damages Kshs. 1,300,000.00

Special Damages Kshs. 10,810.00

3. The appellant now appeals against the award of damages in the respective judgments. 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 **Butt v Khan [1982-88]1KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**).

4. 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 respondents urged the court to uphold the award of the trial court as the appellant had not established any basis for this court to interfere with the award. She submitted that the award of general damages was reasonable given the serious nature of the injuries sustained by the respondents.

General Principles

5. 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**). 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.

6. 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**).

7. The parties' counsel also reiterated the written submissions that they had filed before the trial court. I shall therefore consider each claim in light of the principles I have cited and their submissions.

Richard Njomo Omwacha

8. According to the plaint, the 1st respondent sustained the following injuries: swollen lacerated iliac region, bruises on the left knee joint, swollen and tender left knee, bruised and tender left ankle joint, bruises on the left foot and pelvic fractures. Dr Morebu Peter Momanyi examined the appellant on 2nd March 2018. The doctor confirmed the injuries. He recorded that 1st respondent complained of pain on the fracture site and blunt trauma on the left knee. He concluded that the plaintiff sustained multiple severe soft tissue injuries which were in the process of healing. He also noted that the recovery would take a long time and he would require analgesics to treat his pain.

9. Dr J.A.S. Kumenda examined the 1st respondent on 30th February 2018 also confirmed that the 1st respondent had sustained injuries and that the X-ray showed pelvic fracture. He noted that he was treated as an outpatient. At the time the 1st respondent was walking with a slight limp and used a cane for support, had no scars and the left ankle and hip moved well without limitation. He concluded that the 1st respondent had suffered soft tissue injuries and pelvic bone fractures that had healed will without limitation. He assessed permanent disability as NIL%.

10. Before the trial court, the 1st respondent proposed Kshs. 1,000,000/- as general damages. He relied on the case of **George Njenga and Another v Daniel Wachira Mwangi NYK HCCA No. 1 of 2015 [2017] eKLR** in which the court affirmed Kshs. 800,000/- as general damages awarded to the plaintiff who sustained a pelvic fracture, unstable left knee and ankle joint, soft tissue injuries to the trunk and posterior chest and laceration on the anterior aspect of the left leg.

11. The appellants proposed Kshs. 300,000/- based on several decisions. In **Morris Miriti v Nahashon Muriuki and Another MRU HCCA No. 43 of 2014 [2018] eKLR** the plaintiff sustained a tender chest on the anterior and posterior, multiple bruises on the posterior chest, post traumatic fracture of the 3rd and 4th ribs with bilateral haemophreino thorax, left lung contusion and fracture of the right scapula. The court affirmed an award of Kshs. 300,000/-. In **Gogni Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR** the court awarded Kshs. 350,000/= as general damages where the respondent fell and sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks while in **Mwavita Jonathan v Silvia Onunga HCCA No. 17 of 2017 [2017] eKLR** where the claimant sustained a left hip comminuted intertrochanteric fracture, blunt chest injury, dislocated right knee joint, sprains at the cervical spine of the neck and the lumbar-sacral spine of the back and deep wound on the left lower leg which cause lot of blood. He was awarded Kshs. 400,000/- in 2017.

12. I have considered the injuries sustained by the 1st respondent in light of the authorities cited by the parties. The medical reports produced in evidence confirm that the 1st respondent sustained pelvic fractures. Although, the he had healed, he was still walking with a slight limp and a cane and both doctors did not assess any disability. In the decision cited by the 1st respondent, the plaintiff had similar injuries to that of the 1st respondent, in the cases cited by the appellant's the claimants had more serious injuries yet the awards were on the lower side. The duty of this court is to maintain a similar level of award for similar injuries while ensuring the claimant is fairly compensation.

13. The trial magistrate did not explain why she preferred the decision cited by the 1st respondent yet the decisions cited were decided within the same time frame. In the circumstances I find the award of Kshs. 1,000,000.00 on the higher side and indeed excessive. I substitute it with an award of **Kshs. 450,000.00** as general damages.

Gladys Nyakerario Omwancha

14. The 2nd respondent, in the plaint, stated that she sustained the following injuries: deep cut wound on the left ear lobe, tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint. The 2nd respondent was examined Dr Morebu Peter Momanyi on 2nd March 2018. He confirmed the injuries sustained and noted that the 2nd respondent was having occasional pains in the affected areas. He also observed that she was unable to walk without support and was using crutches. Dr Morebu concluded that she sustained multiple severe soft tissue injuries, fractures and dislocations which were in the process of healing. He assessed permanent disability at 30%. He expected recovery to take a long time.

15. Dr J.A.S. Kumenda examined the 2nd respondent on 30th May 2018. He recorded that the fractures and dislocation had been treated by POP and reduction and that she was admitted in hospital for one day. He noted that the 2nd respondent walked with the aid of a cane and had left hip joint tenderness at the extremes of abduction and flexion. He did not assess the level of disability.

16. In support of the proposition that the 2nd respondent was entitled to Kshs. 2,000,000/- based on the case of **Zachary Kariithi v Jashon Otieno Ochola KSM HCCA No. 153 of 2012 [2016] eKLR** where the plaintiff sustained chest pains, injuries to the waist, compound fracture of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3rd, 4th and 5th ribs of the right side, injuries to the forehead, hip joint and big left toe. He was awarded Kshs. 1,500,000/- as general damages in 2016.

17. The appellant proposed Kshs. 300,000/- as general damages. He relied on **Johnson Mose Nyaundi (minor suing through next friend and father Wilfred Wadibe Nyaundi) v Petroleum Industries Limited KSM HCCA No. 183 of 2010 [2014] eKLR** where the plaintiff sustained bruises on the face, chest, contusions, cerebral concussion, bruises on the elbows and fracture of the right tibia and fibula was awarded Kshs. 180,000/- in 2014. In **S A O (minor suing through next friend MOO) v The Registered Trustees of the Anglican Church of Kenya Maseno North Parish KSM HCCA No. 95 of 2014 [2017] eKLR** the plaintiff sustained a head injury with brain concussion and damage of the right lower mandible jaw and left cheek, blunt chest injury, multiple frictions lacerations/bruised on the right elbow joint, fracture of the right/tibia at the midshaft region, compound fracture of the left tibia/fibula at the distal metaphysic, multiple cut wounds on the left ankle joint involving thigh down to knee region, fracture left ankle joint involving malleolus bones and discoloration right ankle joint. The court enhanced an award of Kshs. 200,000/- to Kshs. 600,000/- in 2017.

18. In this case, the 2nd respondent sustained a single fracture of the tibia and fibula and dislocation of the hip joint. The fracture was treated by POP and it was not comparable to the injuries sustained by the claimant in **Zachary Kariithi's Case (Supra)** who sustained multiple compound fractures. Even in the case of **S A O (minor suing through next friend MOO) v The Registered Trustees of the Anglican Church of Kenya Maseno North Parish (Supra)**, the claimant sustained multiple injuries. Although Dr Morebu assessed permanent disability at 30%, Dr Kumenda who examined her a few months later did not make such an assessment.

19. Taking into account decisions and the nature and extent of the injuries, I find the award of Kshs. 1,000,000.00 unjustified and excessive. I set it aside and reduce it to **Kshs. 450,000/-**.

Rebeccah Nyaboke Machogu

20. The 3rd respondent pleaded that she had sustained the following injuries: fracture of four upper teeth, cut wound on the upper and lower lips, swollen and tender upper lip, bruises on the chin, dislocation on the left shoulder, bruises on right knee, fracture of the right tibia and fibula. Dr Morebu Peter Momanyi examined the 3rd respondent on 28th February 2018 and observed that she had pain on the fracture sites and on the right leg and was unable to eat hard food and walk without support. He also noted that she was using crutches. Dr Morebu concluded that the 2nd respondent sustained severe multiple injuries which had healed with some complication. He assessed permanent disability at 30% as she was unable to walk without support and go about her duties. He expected recovery to take a long time.

21. Dr J. A. S Kumenda examined the 3rd respondent on 6th June 2018. He recorded that the fracture was treated with POP. He further recorded that she had not resumed work due to pains in the right leg and left shoulder. He observed that the 3rd respondent walked with the support of a cane, her scars on the right knee and foot had healed and that there was no loss of leg and the knee and ankle moved well. The left shoulder moved well without limitation.

22. The 3rd respondent proposed Kshs. 2,000,000/- based on **Zachary Kariithi v Jashon Otieno Ochola (Supra)** while the respondent proposed Kshs. 300,000/- based on **Johnson Mose Nyaundi (minor suing through next friend and father Wilfred Wadibe Nyaundi) v Petroleum Industries Limited (Supra)** and **S A O (minor suing through next friend MOO) v The Registered Trustees of the Anglican Church of Kenya Maseno North Parish (Supra)**.

23. In this case the 3rd respondent sustained a single fracture of the right tibia and fibula and fractures of the upper teeth. Although Dr Morebu assessed permanent disability at 30%, Dr Kumenda who examined the respondent, three months' later noted that the scars had healed and that she was walking with the support of a cane. In my view, the case of **Zachary Kariithi (Supra)** was not helpful as the claimant sustained multiple compound and simple fractures. The cases supplied by the appellant were more reasonable but then again, the claimant in **S A O (minor suing through next friend MOO) v The Registered Trustees of the Anglican Church of Kenya Maseno North Parish (Supra)** also sustained multiple fractures. The trial magistrate did not consider the authorities cited in light of the injuries sustained

by the 3rd respondent. I find the award of Kshs. 1,300,000/- excessive. Taking into account the level of disability, I set it aside and award **Kshs. 500,000/-**.

Conclusion

24. For reasons I have set out above, I allow the appeal, set aside the award of general damages by the subordinate court and substitute the following award for general damages for each appellant as follows:

Richard Jomo Omwancha	Kshs. 450,000/-
Gladys Nyakerario Omwancha	Kshs. 450,000/-
Rebecca Nyaboke Machogu	KShs. 500,000/-

25. The awards shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court. The respondents shall pay costs for each appeal which I assess at **Kshs. 20,000/-** exclusive of filing fees for each appeal.

SIGNED

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KISII this 25th day of APRIL 2019.

R. E. OUGO

JUDGE

Mr Otieno instructed by O. M. Otieno and Company Advocates for the appellant.

Ms Sagwa instructed by C. R. Sagwa and Company Advocates for the respondents.