



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 65 OF 2018**

**CONSOLIDATED WITH**

**CIVIL APPEAL NOS. 67 AND 68 OF 2018**

**BETWEEN**

**EPHRAIM WAGURA MUTHUI .....1<sup>ST</sup> APPELLANT**

**STEPHEN KIPSANG CHEPKWONY ..... 2<sup>ND</sup> APPELLANT**

**WILLIAM OJWANG JABES .....3<sup>RD</sup> APPELLANT**

**AND**

**TOYOTA KENYA LIMITED.....1<sup>ST</sup> RESPONDENT**

**TSHUSHO CAPITAL KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. P. M. Nyotah, RM dated 3<sup>rd</sup> August 2018 at the Magistrates Court at Kisii in Civil Case No. 355 of 2016, 357 of 2016 & 358 of 2016)*

**JUDGMENT**

**Introduction**

1. The appellants in the consolidated appeals contest the award of general damages assessed by the trial court. They were passengers in motor vehicle registration GKB 038F. It lost control and overturned at Enamba along the Keumbu – Igare road on 12<sup>th</sup> June 2015. The issue of liability was settled in a test suit in the ratio 75:25 against the respondents.

2. 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).

3. Counsel for the appellants argued that the award was inordinately low 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 appellants had not established any basis for this court to interfere with the award. He urged that the award of general damages was reasonable given the minor injuries sustained by the appellants.

**General Principles**

4. 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.*

5. 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). I shall therefore consider each claim in light of the principles I have cited.

#### **Ephraim Wagura Muthui**

6. The appellant averred that he sustained contusion on the right elbow leading to subluxation, contusion on the forehead and back. Dr Ezekiel Oganda Zoga, in his report, dated 11<sup>th</sup> May 2015 confirmed the injuries enumerated in the plaint. At the material time, the appellant complained of pain on the right elbow on and off. He was treated with a crepe bandage and analgesics. Dr Zoga concluded that the appellant sustained soft tissue injuries which had healed. He considered traumatic arthritis a likely complication. Based on the injuries and authorities cited by the parties, the trial magistrate awarded **Kshs. 45,000/-** as general damages.

#### **Stephen Kipsang Chepkwony**

7. The appellant pleaded that he suffered contusion on the forehead, neck, lower back and right thigh. Dr Ezekiel Oganda Zoga examined the appellant on 11<sup>th</sup> May 2015 and in his report noted the injuries and confirmed that the appellant was treated with analgesics and antibiotics. At the time the appellant was complaining of pain in the neck and back. He observed that the appellant was in a fair condition and concluded that he sustained multiple severe soft tissue injuries which had healed well without any permanent disability being anticipated. The trial magistrate awarded the appellant **Kshs. 50,000/-**.

#### **William Ojwang' Jabes**

8. The appellant's case is that he suffered cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back. Dr Ezekiel Oganda Zoga examined the appellant on 11<sup>th</sup> May 2015 and in his report he confirmed that the appellant was treated by tetanus toxoid, analgesics and antibiotics. At the time, the appellant complained of chest pains especially on the left side and pain in the neck on and off. He noted that the appellant was in stable condition and concluded that the appellant sustained multiple severe soft tissue injuries which were recovering well and no permanent disability was anticipated. The trial magistrate awarded the appellant Kshs. 55,000/-.

#### **Determination**

9. The parties filed similar written submissions before the trial court which they adopted in this appeal. The appellant's counsel suggested that an award of between Kshs. 300,000/- and Kshs. 400,000/- as general damages would be appropriate. They 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.

10. The respondents suggested that a sum of Kshs. 80,000/- would be appropriate in each of the cases. Counsel for 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

11. I have also re-evaluated the evidence of the appellants and I find that in each of the cases, the plaintiffs sustained soft tissue injuries. I think the issue is what was the appropriate award in light of the cases cited by the parties. I notice that the amount awarded by the trial magistrate was even less than the amount proposed by counsel for the respondents. The injuries sustained by the claimants in the cases cited by the respondents bear closer relation with the respective appellant's injuries. I can only state that the cases cited by the appellant are outliers and bear little relationship to the case at hand. Taking into account the element of inflation since the decisions cited by the respondents were decided in 2013 and 2015 respectively, I find the awards made by the trial magistrate inordinately low.

#### **Conclusion**

12. 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:

Ephraim Wacura Muthui Kshs. 90,000/-

Stephen Kipsang Chepkwony Kshs. 90,000/-

William Ojwang' Jabes KShs. 100,000/-

13. 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.

**DATED and DELIVERED at KISII this 11<sup>th</sup> day of APRIL 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 1<sup>st</sup> and 2<sup>nd</sup> respondents.