



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 50 OF 2018

BETWEEN

AKEMO VALLEY HOSPITAL AND MATERNITY.....APPELLANT

AND

NAPOLEON MECHA OGAKI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C. Ateya, RM dated 10th July 2018 at Ogembo Magistrates Court in Civil Case No. 117 of 2016)

JUDGMENT

1. The respondent was injured when he was hit by the appellant's motor vehicle registration number KCD 952 on 10th March 2016 while walking along the Nyangusu - Keroka road. He sued the appellant to claim damages for negligence. The issue of liability was settled by consent in the ratio 70:30 in favour of the respondent. The trial magistrate awarded Kshs. 700,000/- as general damages. It is this award that has precipitated this appeal.

2. At the hearing of the appeal counsel for the appellant reiterated the position set out in the memorandum of appeal dated 2nd August 2018. He submitted that the trial magistrate erred in applying an erroneous principle in awarding damages payable thus arriving at an erroneous and grossly excessive estimate of general damages payable despite the injuries sustained by the respondent. He urged that the award of general damages was inordinately excessive and ought to be set aside and that the court should award a more reasonable sum.

3. Counsel for the respondent was of the view that the trial magistrate arrived at a proper assessment of damages particularly given the fracture sustained by the respondent was serious in nature warranting the said award. He pointed out that the appellant had not established any ground for the court to upset the award of the trial magistrate.

4. In considering whether this court should intervene in the award made by the trial court, I am guided by what the Court of Appeal stated in ***Kemfro Africa Ltd ta Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30*** that:

[T]he principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.

5. The nature and extent of the respondent's injuries was not disputed. According to the plaint, the respondent sustained a cut wound on the right forehead, bruises on the right and left hand, contusion on the left elbow and a segmented fracture on the right leg. He was treated at Nyacheki Sub-District Hospital, Nyamache Hospital and Kisii Teaching and Referral Hospital. According to the report by Dr Ogando Zoga who examined the respondent on 5th April 2016, the respondent was treated with analgesics, antibiotics, tetanus toxoid, POP, washing and stitching. The X-ray confirmed the fracture. At the time of the examination the respondent complained of pain on the shoulder and back. His examination revealed that the respondent was unstable, was tender on right shoulder and chest and had a scar on the right leg. The doctor concluded that, "*Napoleon suffered severe soft tissue injuries which are healing well. The fracture is healing with malunion and deformity. The other soft tissue injuries have healed with scars.*"

6. In light of the injuries, the respondent had proposed Kshs. 1,500,000/- as general damages. He relied on the case on ***Joseph Musee Mua v Julius Mbogo Mugi and Others NRB HCCC No. 86 of 2008 [2013] eKLR*** where the plaintiff sustained a fracture of the tibia and fibula of the left leg, a broken molar and canine on the upper jaw, chest injury, injury on the right shoulder and bruises on the left elbow. His disability was assessed at 5%. He was awarded Kshs. 1,300,000/- in 2013.

7. The appellant proposed that Kshs. 200,000/- would suffice as general damages. It cited the case of **Johnson Mose Nyaundi (minor) suing though next friend Wilfred Wadimbe Nyaundi v Petroleum and Industrial Service Limited KSM HCCC No. 183 of 2010 [2014] eKLR** the court affirmed an award of Kshs. 180,000/- in 2014 where the plaintiff sustained bruises on the face, chest contusion, cerebral concussion, bruises on the elbows and the fracture of the right tibia and fibula bone.

8. In arriving at Kshs. 700,000/- as general damages, the trial magistrate relied on the case of **Janet Opiyo and Another v Stephen Tuwei ELD HCCA No. 77 of 2007 [2012] eKLR** where the plaintiff was awarded Kshs. 600,000/- in 2012. He sustained a compound fracture of the right fibula, soft tissue injuries of the scalp, chest, left knee and left hand.

9. It is clear from the judgment that the trial magistrate was not convinced that the cases cited by the parties were useful guides in providing parameters for the award. While the court is guided by the cases cited to it, ultimately the duty of this court is to ensure that award for injuries in similar cases are consistent and fairly compensate the claimant. 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.

10. Unfortunately both counsel cited two cases that were not reflective of the current trend of awards. The case cited by the respondent was on the higher side while that cited by the appellant was quite dated. I think it is the duty of counsel to cite several cases to the court to enable it reach a fair and reasonable decisions. There are other cases that illustrate the range of damages available in cases where the claimants suffered injuries similar to those of the respondent.

11. In **Akamba Public Road Services v Abdikadir Adan Galgalo VOI HCCA 21 of 2015 [2016] eKLR** the plaintiff sustained a fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. He had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. The doctor assessed permanent partial disability at 3%. The court awarded Kshs. 500,000/- in 2015. In **Vincent Mbogholi v Harrison Tunje Chilyalya MLD HCCA No. 32 of 2015 [2017] eKLR** the plaintiff sustained a fracture of the left tibia leg bone (medial malleolus), blunt object injury to the chest and left lower limb and bruises on the left forearm, right foot and right big toe. Kshs. 500,000/- in 2017.

12. The court in **Paul Kithinji Kirimi & another v Gatwiri Murithi MRU HCCA No. 84 of 2017 [2018] eKLR** awarded Kshs. 450,000/- in 2018 where the plaintiff sustained two fractures; of the mandible and femur while **Mwavita Jonathan v Silvia Onunga KSM HCCA 17of 2017 [2017] eKLR** the plaintiff suffered a fracture at the hip joint which required corrective surgery involving insertion of surgical plantings and screws. The other injuries she sustained were in the nature of soft tissue injuries. The latest examination revealed malunion of the joint at the fracture point leaving her to walk with crutches and pain She was awarded. Kshs. 400,000/- in 2017.

13. Counsel for the respondent submitted since the injury sustained by the respondent was a segmented fracture, it was more serious than a simple or compound fracture. Although the doctor noted that the fracture was healing, he observed that there would be a malunion but he did not assign or suggest any permanent disability. In line with the decisions I have cited, I find the award of Kshs. 700,000/- excessive. An award of Kshs. 400,000/- as general damages would be more reflective of the current trend of awards.

14. I allow the appeal, set aside the award of Kshs. 700,000/- and substitute it with an award of Kshs. 400,000/- as general damages subject to the agreed contribution. The amount shall accrue interest from the date of judgment before the trial court and the appellant shall have costs of the appeal assessed at Kshs. 35,000/-.

DATED and DELIVERED at KISII this 11th day of APRIL 2019.

D.S. MAJANJA

JUDGE

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

Mr. K. Gichana instructed by Ben K. Gichana & Company advocates for the respondent.