



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 51 OF 2016

(FORMERLY CIVIL APPEAL NO 469 OF 2015 NAIROBI)

JAMES NGANGA KIMANI.....1ST APPELLANT

GICHUHI HANNAH.....2ND APPELLANT

-VERSUS-

JANE NYAMBURA KAMAU.....1ST RESPONDENT

KIRINYA JOSEPH.....2ND RESPONDENT

FRANCIS NGURE K.....3RD RESPONDENT

(Being an appeal from the judgment of the Honourable S.K. Arome Resident Magistrate

delivered on the 24th September 2015 at Nairobi)

JUDGMENT

1. This Appeal is against the trial magistrate's award of damages to the 1st Respondent being compensation for pain and suffering following injuries in a road traffic accident involving the Appellants vehicles KBG 366E and KBK 196Y wherein she was a lawful passenger on the 2nd May 2014 along Kiambu-Nairobi road.

The trial magistrate found the appellants liable at 90% and awarded general damages in the sum of Kshs.800,000/= to the 1st respondent.

2. The Appellants were aggrieved by the award on general damages as being inordinately too high for the injuries sustained.

3. Two medical reports on the 1st Respondent's injuries were produced: **Dr. N. H. Banji's** report is dated 23rd June 2014 while **Dr. Eric Mungai's report** is dated 12th August 2014, but produced by Dr. Jeniffer Nyawira on his behalf.

4. Both doctors agree on the injuries as

- **Pain over wound on the right lower leg**
- **Swelling of right leg**
- **Pain over the achillis, tenderness over the right ankle joint and knee, hence unable to wear shoes**
- **Headache at times and**
- **Restriction in movement of the neck**

Dr. Banji recommended surgical excision of the scar as necessary to remove any blockage of blood circulation and release muscle from the scar tissue at an approximate cost of Kshs.300,000/= in a private hospital. He also recommended a local infiltration of the achillis tendon at a cost of Kshs.25,000/=.

5. On the other hand, Dr. Eric Mungai did not agree with Dr. Bhanji on the mode of treatment of the achillies tendon and stated use of drugs or infiltration that costs Kshs.50,000/= in a public or mission hospital. He denied there having been any blood blockage as he did not do an ultrasound to detect the blockage, and stated if any, it would be treated for a lesser amount in a mission or public hospital. It was her opinion that Dr. Bhanji had exaggerated the injuries and the cost of the future treatment.

6. I have re-evaluated the entirety of the evidence before the trial magistrate and the findings - **Mbogo –vs- Shah (1968) EA, Butt –vs- Khan (1987) KLR.**

There is no doubt that the 1st Respondent’s injuries were of soft tissue nature.

The appellant submits that Dr. Erick Mungai never stated that there was a blood blockage but recommended a surgical excision of the scar if there was a blood blockage, and disagreed with the suggestion that such procedure would require about Kshs.300,000/=.

Citing several authorities, the appellant is of the opinion that Kshs.150,000/= would be sufficient for the procedure.

7. The 1st Respondent in support of the trial magistrate’s awards submitted that the court’s discretion was properly exercised and should not be interfered with.

In **Civil Appeal No.9 of 2011 Patrick Mwiti M’imanene -vs- Kevin Mugambi Nkunja (2013) e KLR** the court upheld an award of Kshs.170,000/= for pain and suffering for soft tissue injuries – swollen and bruised left shoulder, bruised knee, tender neck and back, complaints off on and on headaches and lower back pains.

8. The plaintiff in **Kenyatta University –vs- Isaac Karumba Nguthe NBI HCCA No.193/2012 (2014) e KLR**, was awarded Kshs.350,000/= in 2014 for a fracture of right femur soft tissue injuries to the head and bruises on the knee.

Futher in **HCCA No.5 of 2016 Samson Macharia Mwangi –vs- Abdifatah Mohamed Khalif** the court set aside an award of Kshs.550,000/= for multiple soft injuries and substituted it with Kshs.250,000/= in 2017.

9. The court on appeal will not disturb an award of damages unless it is demonstrated to be inordinately high or low as to be an erroneous estimate of the damages – **Shabari –vs- City Council of Nairobi (1985) KLR 516.**

I agree with the appellant that the injuries sustained by the Respondent having been of soft tissue nature the awards by the trial Magistrate were way above comparable awards as shown in the cases I have cited above.

Compensation for injuries must be evaluated and determined by the nature and extent of the injuries and comparable awards made in past decisions.

10. Having reviewed the entire judgment I find the awards to be excessive, and not comparable to similar awards for comparable injuries. I therefore set aside the sum of Kshs.550,000/= and substitute it with a sum of Kshs.380,000/= damages for pain and suffering.

11. I have considered the two medical reports. I do not agree with Dr. Bhanji’s report of the need for surgical excision of the scar if there is any blood blockage. In plain language, there was no blood blockage and none was established by ultra sound.

12. As to the treatment of the tenderness of Achellies tendon of the right foot, Dr. Bhanji gave an estimate of Kshs.25,000/= in a private hospital. Dr. Erick Mwangi reported that no future treatments were required. Considering the rival opinions by the two doctors, I am of the view that for both surgeries and future treatments, a sum of Kshs.180,000/= would be reasonable in a public hospital. The said awards for future medical expenses stated at Kshs.300,000/= are reduced to Kshs.180,000/= as being more reasonable and fair in public hospital.

13. The appeal therefore succeeds in part. The awards are varied in the following manner

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|---|--------------------------|
| (1) Damages for pain and suffering- | Kshs.380,000/= |
| (2) Future medical expenses | - Kshs.180,000/= |
| Total | Kshs.560,000/= |
| (3) Less 10% contributory | - Kshs. 56,000/= |
| Negligence | - Kshs. 504,000/= |
| (4) Payable to 1st Respondent | - Kshs. 504,000/= |

Interest shall accrue at court rates from the date of the trial court judgment.

14. The appeal having succeeded in part, each party shall bear own costs.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE