



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 151 OF 2016**

**1. SHEIKH UNIFORMS**

**2. ATINGA VINCENT.....APPELLANTS**

**VERSUS**

**MAKU MUSEMBI.....DEFENDANT**

**J U D G M E N T**

1. By the appellants' four (4) grounds of appeal in the Amended Memorandum of Appeal filed in court on 20/11/2016, to be found at pages 4 – 5 of the Record of Appeal, the judgment of the trial court is challenged on the sole basis that the assessment of general damages on the head pains, suffering and loss of amenities for being too high, for failing to apply the correct principles of law and *stare decisis* including the principle that similar injuries should attract similar awards.

2. The question of liability is not an issue in this appeal because the parties agreed on the apportionment thereof before the trial court. In the judgment now subject of this appeal the court in its assessment of damages said:-

**“I have considered the submissions on quantum. I am guided by the cited case law, the medical reports and the incidence of inflation in light of the age of the cited cases among other relevant factors. Dr. Sheth is a bone specialist and it is noted that he examined the plaintiff months after Dr. Adede. Some of the cases cited by the plaintiff in reliance involve much more severe injuries relative to those suffered by the plaintiff herein.**

**Taking all the stated relevant factors into account the plaintiff is hereby awarded Kshs.1,500,000/= in general damages for pain, suffering and loss of amenities. The special damages claims for Kshs.15,390/= spent on medical expenses and to obtain the subject vehicle's registration records are substantially proven. However, there is no proof of the sum of Kshs.500/= said to have been expended to obtain the vehicle registration records by production of a supporting receipt. The said sum of Kshs.500/= is discounted from the claim leaving a balance of Kshs.14,890/= which is granted to the plaintiff in special damages.**

**The total amount of general and special damages granted for the plaintiff on 100% liability basis is Kshs.1,514,890/= less 30% liability by the plaintiff”.**

3. With that excerpt in mind the mandate of this court is to determine if that decision can be said to be erroneous having been made pursuant to the duty in assessment of damage known to be an exercise in discretion<sup>[1]</sup>.

4. In urging the Appeal the Appellant filed written submissions on 21/2/2018 while the Respondent did so on 20/3/2019. Counsel then attended court to highlight the same on the 12/7/2018.

5. In both written and oral submissions, both counsel agree on the Particulars and extent of the injuries pleaded and the quality of evidence led in proof thereof. The point of departure seems to be the only issue; whether the award was commensurate. While the Appellant views the award as too high and exorbitant, the respond terms it modest and not excessive at all. In taking those positions both sides have cited to court various decisions to suggest that each side's position is the better contention.

7. I have had a chance to look at the record at trial, the judgment in issue and the submissions by counsel both at trial and in this appeal and the scenario retells the position of law that assessment of damages must be left to the level of judicial discretion, is a difficult task<sup>[2]</sup> and that merely that one judge could have awarded a different figure is never a reason to interfere with the sum awarded at trial.

8. Being aware that this court can only reverse the decision assessing damages when shown that there was an error in principle or that the award is so manifestly excessive, I have executed my mandate as an appellate court and I find no reason to interfere. To the contrary, I do find that incoming to the award the trial court referred to three cases cited to him by the parties. The court cannot be accused for having failed to take such cases with account. Even though he did not explicitly say which of the cases he opted to rely on over the other(s) the fact is that the decisions cited by the Appellant here and at trial which in my view fairly older as compared to those by the Respondent. It must be born in mind beyond, the judicial discretion upon the trial court that an award of Kshs.30,000 made in the 1990's may not be an adequate compensation today some 20 years later.

9. The upshot is that the appellant has fail to demonstrate that the award was manifestly high and I accordingly dismiss the appeal with costs to the Respondent.

**Dated and delivered at Mombasa on this 27<sup>th</sup> day of May 2019.**

**P.J.O. OTIENO**

**JUDGE**

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[\[1\]](#) Gitobu Imanyara & 2 others v Attorney General [2016] eKLR

[\[2\]](#) Sophinaf Company Ltd And Another Vs Daniel Nganga Kanyi[2006]eKLR