



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL APPEAL NO. 14 OF 2018**

**AMAZON ENERGY LIMITED.....APPELLANT**

**-VERSUS-**

**RAMADHAN KALUME KALAMA.....RESPONDENT**

**(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Kaloleni by Hon. L. Wasige delivered on 27<sup>th</sup> February 2018 in PMCC No. 52 of 2016)**

**Coram: Mr. Jengo for the Appellant**

**Mr. Gathuthi for the Respondent**

**JUDGMENT**

1. This appeal concerns assessment of quantum by the trial court.
2. Amazon Energy Limited, the Appellant herein, was sued in PMCC No. 52 of 2016 by Ramadhan Kalume Kalama for both general and special damages in respect of a road traffic accident arising out of negligence attributable to the driver of motor vehicle KBZ 949X, a vehicle whose registered owner is the Appellant.
3. At trial, it was agreed by consent that liability for the accident be entered in the ratio of 80% for the Defendant/ Appellant and 20% against the Plaintiff/Respondent. On consideration of the evidence on hand and submissions by the respective advocates', the learned trial magistrate awarded both General and Special damages as follows:

General damages	- 600,000/-
Less 20%	- 480,000/-
Special damages	- 5,430/-
4. The Plaintiff/Respondent was also awarded the costs of the suit.
5. The Defendant/ Appellant being dissatisfied with the assessment of the trial magistrate, Mr. Jengo counsel for the Appellant filed a memorandum of appeal dated 2<sup>nd</sup> March 2018 citing the grounds of appeal as: -
  - a. That the assessment and award of general damages for pain suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate
  - b. That the learned trial magistrate in assessing damages for pain suffering and loss of amenities failed to apply the correct principals by leaving out of account, the age of the plaintiff, the length of suffering of the plaintiff and the fact that the plaintiff had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.
  - c. That the leaned trial magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct principles and judicial precedent and the submissions by parties that she made an award for pain suffering and loss of amenities that was inordinately high.
  - d. The learned trial magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in

failing to apply the doctrine of *stare decisis* and take into account public interest. He thus made an award for pain suffering and loss of amenities that was arbitrary, inordinately high and erroneous.

6. The Appellate court was asked to reassess the award for general damages for pain, suffering and loss of amenities downwards. The matter was dispensed off by way of written submissions.

### **The Evidence at Trial**

7. This being a first appeal, it is my duty to reanalyze the evidence on the record while bearing in mind that I do not have the benefit of a live testimony from the witnesses as enjoined by **Selle vs Associated Motor Boat & Another [1968] EA 123**.

8. When the lower court matter came to trial, the Respondent herein, Ramadhan Kalume Kalama testified as PW1. His testimony was that on 20<sup>th</sup> July 2015 while working as a conductor, his vehicle was involved in an accident. He sustained injuries on his head. He got cuts on his forehead, a cut wound on the left shoulder, dislocation of the left elbow, a fracture on the left elbow and left hand. He further testified that he sought treatment at Mariakani hospital on the same day and was admitted for two days. He had his hand cast in a plaster for two months. He also had an operation done after the plaster was removed since his bones had not united. He was admitted for two days. He further testified to having healed but not being able to carry heavy objects. That his left hand could not stretch as it used to before. That there was a large scar on his elbow. The witness prayed for compensation and costs of the suit in addition to testifying that he had also been examined by Dr. Udayan Sheth. The Defense did not have any questions on cross examination.

9. For exhibits, PW1 produced: -

- a. Discharges Summaries for July 20<sup>th</sup> 2015 and September 2015.
- b. P3 Form
- c. The medical report of Dr. Ndegwa dated 10<sup>th</sup> December 2015
- d. A receipt of Ksh. 2,000 /-
- e. Receipts for treatment totaling to Ksh. 3,430/-
- f. A radiology report from Mariakani hospital

10. It was further agreed by consent that the medical report of Dr. Udayan Sheth dated 23<sup>rd</sup> March 2016 be produced as the defense's exhibit.

11. Per these reports the Plaintiff's injuries were identified as:

- a. Comminuted fracture of the distal end of the left radius
- b. Fracture of the distal end of the left ulna at the styloid process.
- c. Dislocation of the left elbow
- d. Deep cut wound on the left elbow
- e. 4cm cut wound on the forehead
- f. Bruises on the left shoulder

12. In the medical report dated 10<sup>th</sup> December 2015, Dr. Ndegwa reached the conclusion that the injuries were severe multiple bone, joint and soft tissue injuries. The Plaintiff had suffered 18% permanent disability due to the multiple weak bone unions that can easily fracture over future trivial traumas; surgical together with traumatic scars in exposed areas of his young body that cause him cosmetic embarrassment; risk of recurrence of the elbow dislocation; the expected post traumatic arthritis of the left elbow and left wrist joints; chronic pains and stiffness deformity of the left shoulder and elbow wrist which makes use of the left upper limb difficult.

13. Dr. Udayan Sheth in his report dated 23<sup>rd</sup> March 2016 concurred with the nature of injuries sustained identified in Dr. Ndegwa's report but came to the conclusion that at the time he was conducting the examination, he found a 4cm healed scar mark over the forehead, a 10cm healed scar mark over the left elbow and movement of the left elbow was restricted. He further concluded that there was neither tenderness nor deformity of the left wrist, movement of the left wrist and fingers was full and the rest of the physical examination was normal. He concluded that the Plaintiff had a permanent disability of 10% on account of a mild stiff left elbow.

14. The Plaintiff's advocate submitting on quantum at the lower court had proposed a figure of Ksh. 1,500,000/- basing this sum on **Zipporah Nangila vs Eldoret Express Limited & 2 Others Nakuru HCCC NO. 403 of 2012** where the Plaintiff then had been awarded Ksh. 2,400,000/- and **Joseph Musee Mua vs Julius Mbogo Mugi & Others HCCC NO. 86 of 2008** where the claimant was awarded Ksh. 1,300,000/- in 2013.

15. The Defendant's Advocate on the other hand went with Dr. Sheth's assessment of permanent disability at 10% and had cited 150,000/- as being sufficient for general damages, placing reliance on **Markiso Koko Nyandara vs John Nganga Mwayra & Another HCCC No. 5152 of 1988 (1992)** where the court assessed general damages for pain, suffering and loss of amenities at Ksh. 100,000/- and **Christine Wanguru vs Christine Ngigi Kabui HCCC No. 4833 of 1990(1991)** where the court assessed general damages for pain, suffering and loss of amenities at Ksh. 120,000/-.

16. After paying due regard to the evidence on the record, assessing the authorities referred to the court by the respective advocates and putting into consideration the injuries suffered by the deceased, the learned trial magistrate awarded Ksh. 600,000/ as general damages, the crux of the instant appeal.

### **The Appellant's Submissions**

17. Mr. Jengo, the appellant's counsel submitted that the trial magistrate erred and misdirected herself on awarding exorbitant damages without due regard to prevailing comparable authorities on such awards. The appellant's counsel further argued that the trial magistrate failed in her duty by relying on authorities where the injuries suffered were not comparable to those of the instant case. The court was led by Mr Jengo to take heed from the following authorities as a guide to what ought to have been an appropriate measure of damages:

1. **Mathews Omondi Okut vs Broadways Industrial & Tools Limited [2018] eKLR** where the court assessed damages for pain, suffering and loss of amenities at Ksh. 300,000/- on 22<sup>nd</sup> November 2018.
2. **Samwel Ndirangu Ng'ang'a vs Lucy Wambui Wachira Eldoret HCCA No. 117 of 2008** where the Plaintiff sustained a fracture of the right radial ulna and dislocation of the right hip joint and the court assessed damages for pain, suffering and loss of amenities at Ksh. 250,000/- on 15<sup>th</sup> March 2013.
3. **Gogni Rajope Construction Limited vs Francis Ojuok Olewe [2015] eKLR** where the Plaintiff sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and the court assessed damages for pain, suffering and loss of amenities at Ksh. 350,000/- on 13<sup>th</sup> November 2014.
4. **Paul Kirimi Kithinji vs Joseph Mutai Kireria HCCA No. 75 of 2017** where the court awarded Ksh. 150,000/- on 7<sup>th</sup> June 2018

18. The appellant counsel argued that based on the cited case law, as a whole an award of Ksh. 600,000/- was manifestly and inordinately high and did not fall within the ambit of comparable injuries hence the court ought to vacate the lower court's award and substitute it with an award of 250,000/- enhanced from the Ksh. 150,000/- mooted at the lower court.

### **Respondent's Submissions**

19. Mr. Gathuthi on his part submitted that there were no compelling grounds placed before this court by the appellant to exercise discretion and impeach the findings of the learned trial magistrate on quantum. The respondent's counsel took the view expressed in **Peters vs Post Limited (1958) EA 424** and further submitted that the appropriate standard of review as established could be stated in 3 complementary principles to wit:

- a. On first appeal, the court is under duty to reconsider and reevaluate the evidence on record and draw its own conclusion.
- b. In reconsidering and evaluating the evidence the court must bear in mind and give allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify.
- c. It is not open to the appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

20. Counsel placed further reliance on **Mary Wanjiku Gachigi vs Ruth Muthoni Kopkoi HCCA No. 172 of 2000** and **Anne Wambui Ndiritu vs Joseph Kiprono Kopkoi & Anor HCCA No. 345 of 2000**.

21. The Respondent's counsel urged that the authorities' relied on by the trial magistrate was spot on and urged that on consideration of the injuries of the deceased and the authorities cited, the award of Ksh. 600,000/- as general damages was reasonable and neither erroneous nor inordinately high. It was further submitted that the appellate court will not interfere with an award of damages merely for the reason that it would have exercised its discretion otherwise. Reliance was placed on **Kemfro Africa Ltd t/a Meru Express Services vs Lubia & Anor No. 2(1985) eKLR**.

22. It was therefore prayed that the appeal be dismissed with costs.

### **Analysis and Determinations**

23. I have dispensed with my duty as an appellate court to reconsider all the evidence and testimonies on the record afresh. I have further considered the submissions by the parties' advocates and having done so, feel it appropriate to restate the legal principle on exercise of discretion by a superior court over jurisdiction of a subordinate court or inferior tribunal. This principle is best summed up by **Sir Clement De Lestang, VP in Mbogo v Shah 1968 EA 93**, where he held as follows: -

***“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”***

24. On the issue of an appellate court interfering with a lower court’s assessment of damages, the court in the case of **Butt v Khan 1982 - 1988 1 KAR** pronounced itself as follows: -

***“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.***

25. This Court in **P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017 [2018] eKLR** rendered itself on the matter of assessment of quantum as below: -

***“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”***

26. In the present appeal, the Plaintiff/Respondent suffered injuries of the nature described below: -

- a. Comminuted fracture of the distal end of the left radius
- b. Fracture of the distal end of the left ulna at the styloid process.
- c. Dislocation of the left elbow
- d. Deep cut wound on the left elbow
- e. 4cm cut wound on the forehead
- f. Bruises on the left shoulder

27. In reaching her decision, the learned trial magistrate noted that the authorities cited by the Plaintiff/Respondent had injuries extremely severe as compared to what the Plaintiff had suffered. In contrast, though she acquiesced that the injuries in the authorities cited by the Defendant/Appellant were at par with the Plaintiff’s injuries, she cautioned that these authorities were from 26 years ago. According to the learned trial magistrate, taking into account the authorities referred to her by the Defendant and the fact that the Plaintiff’s injury had healed though resulting in a 10% permanent disability, an award of Ksh. 600,000/- was sufficient as general damages.

28. In the English Court in the case of **West (H) & Son Ltd v Shephard [1964] AC 345** it stated as follows: -

***“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated, by comparable awards when all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”***

29. Similarly, the Court in **Ramadhan Kamora Dhadho v John Kariuki & another Civil Appeal No. 27 of 2015 [2017] eKLR** opined thus: -

***“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”***

30. Taking my cue from the above and keeping in mind the various cited authorities and the arguments put forth by counsel, I am in agreement with Mr. Gathuthi counsel for the respondent that the award of quantum by the trial magistrate was appropriate and commensurate to the injuries suffered by the Respondent. In addition, given the passage of time since the lower court award was made and taking into account the vagaries of inflation, I find that in the circumstances, the award of Ksh. 600,000/- issued by the learned trial magistrate at the lower court was an appropriate measure of general damages. The grounds advanced by the appellant on error or misdirection by the learned trial magistrate must fail. For the appellate court to interfere with exercise of discretion the nature of legal principles and fact a misdirection has occurred ought to be presented clearly to the court. That is not the case in this appeal. In the premises, this court declines to interfere with the discretion of the learned trial magistrate and instead finds that the same was properly exercised.

31. The upshot of the foregoing is that this Appeal is dismissed in its entirety. The judgement of the lower court is hereby affirmed. Costs of this appeal to the respondent.

32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2019**

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**R NYAKUNDI**

**JUDGE**