



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 65 OF 2018**

JESKY ENTERPRISES LIMITED.....1<sup>ST</sup> APPELLANT

OBADIA KINYUA NJERU.....2<sup>ND</sup> APPELLANT

VERSUS

NANCY WACHINGA WANJIRU.....1<sup>ST</sup> RESPONDENT

LAWRENCE KINYUA NYAGA.....2<sup>ND</sup> RESPONDENT

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

**A. Introduction**

1. This is an appeal against the judgment of the Chief Magistrate Embu in CMCC No. 92 of 2012 delivered on 10<sup>th</sup> September, 2018.
2. The 1<sup>st</sup> respondent's suit was against the appellant and 2<sup>nd</sup> respondent for damages loss of school life plus costs of the suit for injuries sustained after an accident. The trial court awarded the 1<sup>st</sup> respondent Kshs.2.5 million for pain and suffering and loss of amenities, Kshs. 480,000/= for loss of school time and Kshs. 230,358/= for special damages culminating in a total award of Kshs. 3,210,358/=.
3. Being dissatisfied with the said judgment, the appellants filed this appeal based on 4 grounds that can be summarised as follow;
  - a) *The learned trial magistrate erred in law and fact in finding and awarding the 1<sup>st</sup> respondent excessive and unjust general damages for pain and suffering of Kshs. 2,500,000/=.*
  - b) *The learned trial magistrate erred and misdirected himself by awarding damages under the head loss of school life at Kshs. 480,000/= without justifying or giving reasons for the same as the same was not pleaded by the 1<sup>st</sup> respondent.*
  - c) *The learned magistrate erred in awarding an excessive amount for the injuries sustained in the face of evidence adduced.*

**B. Appellant's Submissions**

4. The appellant submitted that the trial magistrate erred by relying on wrong principles to arrive at such a high award of Kshs. 2,500,000/= as general damages for a single fracture of the tibia fibula an award which was inordinately high, manifestly excessive and unjustified. The appellants relied on the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** where it was held that the general method of approach for assessing damages is that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
5. The appellant further submitted that an award of between Kshs. 300,000/= – Kshs. 450,000/= is fair, just and adequate in the circumstances. The appellants relied on the cases of **Elizabeth Mulwa v Tawfiq Bus Services [2003] eKLR**, **Michael Adeka Khaemba & 2 Others v Rassangylo Muli Kumuyu [2018] eKLR**, **S.D.V Transami K. Ltd v Scholastic Nyambura [2012] eKLR** and **Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] eKLR**.
6. The appellants further submitted that the award on loss of school time was not merited and was thus erroneous as it amounted to duplication as any such award should fall under the rubric of general damages. It was submitted that the purpose of damages was to put the party whose rights have been violated in the same position so far as money can do as was held in the case of **Victoria Laundry (Windsor) Ltd v Neman Industries Ltd [1949] 2 KB 528**.

7. Further reliance was placed in the case of **Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR** where it was held that the assessment of general damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured. The appellants also submitted that the multiplicand of Kshs. 20,000/= per month adopted by the trial magistrate was literally plucked from the air and was thus speculative and whimsical.

#### **C. 1<sup>st</sup> Respondent's Submission**

8. It was submitted that the appellants had not demonstrated that the lower court in assessing the damages took into account an irrelevant factor which may make the general damages it awarded so inordinately high that it can be said to be erroneous thus necessitating this court's interference with the said award.

9. It was further submitted that given the nature of injuries suffered and the trial court having seen the actual scars, as well as having heard the evidence, an award of Kshs. 2,500,000/= cannot be said to be inordinately high.

10. It was also submitted that the award of Kshs. 480,000/= for loss of school life was justified. Reliance was placed on the case of **Embu High Court Civil Appeal No. 54 of 2013 PW (A minor suing through her next friend and mother PW) v Peter Muriithi Ngari** held that one needs to be compensated for loss of school life.

#### **D. Analysis & Determination**

11. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

12. I have carefully perused the evidence, the judgement of the trial court, the grounds of appeal thereof and the parties' submissions. The appellant did not appeal against liability but only on quantum of damages. This appeal rests on the determination of the following issues;

a) *Whether the learned trial magistrate erred in law and fact in finding and awarding the 1<sup>st</sup> respondent excessive and unjust general damages for pain and suffering of Kshs. 2,500,000/=.*

13. *Whether the learned trial magistrate erred and misdirected himself by awarding damages under the head loss of school life at Kshs. 480,000/=.*

14. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another (1982-88) I KAR 777**:

*“the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”*

15. The 1<sup>st</sup> respondent suffered the following injuries: -

- a) *Bilateral tibia fibula compound fractures*
- b) *Right hip dislocation*
- c) *Chest pain*
- d) *Multiple bruises and cut wounds on both limbs*
- e) *Multiple cut wounds on the trunk posteriorly*

16. From the record of appeal, it is clear that the respondent had bilateral crutches and still wore orthopaedic shoe on the left lower limb and had obvious surgical scars on both limbs. The appellants submitted during trial that Kshs. 400,000/= was reasonable compensation in general damages whereas the respondent submitted that Kshs. 10,000,000/= was reasonable compensation in general damages.

17. I have perused the authorities relied on by both the appellants and the 1<sup>st</sup> respondents both before the trial court and in this appeal and in my view they are not applicable. In **Ahmed Mohammed vs Abdulhafidh M. Banragah Mombasa HCCC No. 319 RD of 2001** the plaintiff sustained a fracture of the left femur subtrochanteric and compound fracture of the left tibia and fibula was awarded Kshs. 750,000/=. In Solomon **W. Njoroge v Anne W. Mwangi Nairobi HCCC No 4935 of 1991** the plaintiff sustained fracture of the right hip, compound fracture of the right tibia and fibula, soft tissue injuries on the face and left elbow. General damages were assessed at Kshs 500,000/=.

18. In **Soren Peterson & Another vs Charles Muhavi Singa Eldoret Civil Appeal No.149 of 2003** delivered on 3<sup>rd</sup> September, 2008.

The court was of the view that injuries sustained were compound fracture of the tibia and fibula. The other injuries were soft tissue injuries but were extensive. On appeal court reduced the award from Kshs. 500,000/= to Kshs. 400,000/=. In **Zachariah Mwangi Njeru vs Joseph Wachira Kanoga Civil Appeal No. 9 of 2012** judgment delivered. The Respondent sustained a fracture to the tibia and fibula and was awarded Kshs. 400,000/=. In **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR** the plaintiff sustained fracture of the tibia fibula which resulted to a permanent deformity assessed at 3%. The other injuries were soft tissue. The appellate court set aside the award of Kshs. 500,000/= and substituted it for Kshs. 400,000/=.

19. It is noted that no injuries are exactly the same, as in the other case, courts should try and keep damages within limits which has found expression and favour in decided cases. See the case of **Kigaraari vs. Aya [1982-88] 1 KAR 768** where it was stated as follows: -

***“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”***

20. From the foregoing, similar injuries have attracted an award of between Kshs. 400,000/= and Kshs. 750,000/=. Due to the degree of injuries suffered, the lifelong scars from the accident and the alleged diminished opportunity to get a spouse, the trial court awarded the 1<sup>st</sup> Respondent Kshs. 2,500,000/=. However, from the authorities I have cited above and giving due consideration to the rate of inflation, it is my considered view that an award on the upper limit, i.e. Kshs. 850,000/= would suffice as fair compensation for the injuries sustained.

21. Regarding the award for lost school time, the case the 1<sup>st</sup> respondent relied on, **P W v Peter Muriithi Ngari [2017] eKLR** did not award any damages for lost school time. In that case the court awarded the appellant general damages to the appellant who had been hit by the respondent’s vehicle as she left school. I have perused the 1<sup>st</sup> respondent’s further amended plaint dated 19/04/2017 and the prayer of lost school time was pleaded. It is my considered opinion that the same ought to have been considered under the rubric of general damages. Further, the multiplicand of Kshs. 20,000/= per month adopted by the trial magistrate was not explained and in my view it has no legal or factual basis.

22. Accordingly, I find that the trial court did not apply the guiding principles in award of damages which omission calls for intervention of this court. The award of Kshs. 2,500,000/= is definitely on the higher side. I hereby set it aside and substitute it with an award of Kshs. 850,000/= in general damages for pain and suffering and loss of amenities.

23. The upshot of the above is that the appeal is successful on the following terms: -

General damages for pain and suffering	
and loss of amenities	= Kshs. 850,000/=
Special Damages	= <u>Kshs. 230,358/=</u>
<b>Total</b>	= <b><u>Kshs.1,080,358/=</u></b>

24. Each party to bear their own costs for this appeal.

25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for Fatuma for 1<sup>st</sup> Respondent**