



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 23 OF 2016

JOSEPH OGARO.....APPELLANT

-VERSUS-

REBECCA NYAMBUGA.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. Omwansa in Sotik PMCC No. 59 of 2015)

JUDGMENT

It is common ground that the issue to be determined in this appeal is that of quantum only, as liability was agreed by consent in the lower court in the ratio of 75%:25% in favour of the plaintiff and as against the defendant.

In the case of *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini –Vs- M. Lubia and Olive Lubia (1982-88) I KAR 727 pg 730*.

Kneller J.A. observed “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 court were held by the former court of Eastern Africa to be that, it must be satisfied that either that the Judge, in assessing the damages, took into consideration an irrelevant factor, or left out of account of relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage”.

In the present case the learned trial magistrate in his decision delivered on 29th September 2016 awarded Kshs.985,000/= to the Respondent subject to 25% contribution amounting to Kshs.737,750/= as general damages and Kshs.43,280/- as special damages.

The medical report prepared by Dr. Ezekiel Ogendo Zoga shows that Rebeccah Nyaboga sustained the following injuries

- i. Tenderness of the neck
- ii. Bruises on the forehead
- iii. Complete right clavicular fracture with displacement
- iv. Tenderness to the lower back

The Doctor was of the opinion that the soft tissue injuries were healing well. The fracture may heal with complications.

In the case of *Wesh(H) 6 Sons Ltd –VS- Shepherd (1964) A.C 326 at page 345 Lord Morris of Berth –V- Quest* held “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 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 of comparable awards. When all this is said it must be that amounts which are awarded are to a considerable extent conventional”;

The appellant in the submissions before the lower court stated that an award of Kshs.150,000/= would be sufficient as general damages. The Respondents submitted for an award of Kshs.1.2 million.

Counsel for the appellant submits that the award of damages was inordinately too high, and therefore call for the interference of this court.

He relies on the case of *Rachel Mwhiki –VS- Karim Simion & Ano (2015) eKLR* where an award of Kshs.450,000/= was entered where the appellant had sustained.

- i. Fracture on the left ankle with a degloring injury
- ii. Cut wound on the scalp
- iii. A deep cut on the right knee.
- iv. Permanent disability assessed at 30%.In the case of Edwin Otieno Jepasa –VS- Easy Coach Bus Limited (2016) eKLR.

An award of Kshs.1.5 million reduced to kshs.500,000/=. The plaintiff had sustained

- i. Fracture of dislocation of the right little finger
- ii. Soft tissue injuries to the chest.
- iii. Dislocation of the right lip with a fracture of the ocertabulum
- iv. Fracture of the left pelvis involving both superior and inferior pubic ramin bilaterally
 - lacerated cut wound on the anterior left leg
 - lacerated wound on the anterior right leg
 - permanent disability assessed at 25%

Counsel also relies on the case of Harun Mnyoma Boge –VS- Daniel Otieno Aguto (2015) eKLR where an award of Kshs.300,000/= was made in a case where the plaintiff sustained

- Blunt chest injuries
- Cut wound right wrist
- Deep cut wound on the right foot
- Fracture right tibia and fibula
- Multiple soft tissue injuries

Reliance is placed on the case of China WUYI Company Cimito –VS-

Andrea Githinji Gitonga (2016) eLR where one court awarded Kshs.300,000/= to the appellant who had sustained

- Multiple facial bruises
- Blunt injury to the right shoulder
- Fracture of the 3rd ribs
- Humero-clavicular displacement

Counsel for the appellant submits for an award of Kshs.300,000/-.

Counsel for the Respondent submits that the injuries sustained by his chest were life threatening and there is no reason to disturb the award.

Dr. Ogando Zoga was of the view that the Respondent sustained complete right clavicular fracture with displacement and multiple soft tissue injuries which would ultimately heal but the fracture would heal with complications.

Those injuries cannot be classified as life threatening. They were not so serious as to attract an award of Kshs.985,000/= which is close to Kshs.1 million.

I have perused the cases cited by the appellant and its noted that they are for the years 2015 to 2016 with the awards ranging from Kshs.300,000/= to Kshs.500,000/=

I am of the considered view that the award of Kshs.985,000/= was inordinately high and therefore calls for this courts interference.

Subsequently I find an award of Kshs.600,000/= to be fair and reasonable in the circumstances of this case.

I allow the appeal by substituting the sum awarded by the trial court of Kshs.985,000/= with Kshs.600,000/=. This is subject to liability ratio of 75%:25%. Costs of this appeal to the appellant.

Judgement delivered dated and signed this 12th day of April 2018 in the presence of Mr. Kenduiwa holding brief Otieno for the

appellant. Nyagosi is for respondent.

M. MUYA

JUDGE

12/4/18