



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 66 OF 2017

BETWEEN

ERICK RATEMO.....APPELLANT

AND

JOASH NYAKWEBA RATEMO.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. M. Njoroge, CM dated 27th July 2017 at the Chief Magistrates Court at Kisii in Civil Case No. 14 of 2017)

JUDGMENT

1. The respondent was injured in a road traffic accident that occurred along the Kisii – Keroka road on 26th December 2015 while he was riding as a passenger in the appellant’s motor vehicle registration number KBP 398D. According to the plaint, he sustained the following injuries: abrasion and deep cut wound on the face, cut wound on the upper lip, contusion on the anterior chest wall, dislocation on the right shoulder, bruises on the right hand, blunt injury on the left and right knee, epistaxis and fracture of the right femur. The issue of liability was settled by consent in the ratio 80:20 against the appellant. The trial court awarded the respondent Kshs. 800,000/- as general damages and Kshs. 63,910/- as special damages thus precipitating this appeal.

2. The nature and extent of the respondent’s injuries as I have set out above is not in dispute. According to the report of Dr Morebu Peter Momanyi dated 20th December 2016, the respondent underwent treatment at Kisii Teaching and Referral Hospital after the accident. The treatment regimen included analgesics, antibiotics, tetanus, cleaning and stitching. At the time of examination, the respondent had pain on the right hip joint and femur, was unable to walk without support and had an occasional headache. Physical examination revealed the respondent was in fair condition although he had multiple scars on the body and tenderness on the right hip and thigh. The doctor concluded that the respondent sustained multiple severe injuries in the process of healing and that the fracture of the femur would require physiotherapy follow up for proper alignment. He also noted that the soft tissue injuries had healed well.

3. Before the trial court, the respondent proposed Kshs. 1,200,000/- as general damages based on the case of *Charles Mathenge Wahome v Mark Mboya Likanga and Others NRB HCCC No. 87 of 2005 [2011] eKLR*. The plaintiff sustained broken right upper left femur, deep cut at the back of the head and minor bruises on the right hand. He was awarded Kshs. 1,500,000/- in 2011. The appellant submitted that Kshs. 350,000/- was reasonable in the circumstance relying on *Harun Muyoma Boge v Dr Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR*. In that case the court awarded Kshs. 300,000/- in 2015 where the plaintiff sustained a fractured right leg below the knee, deep cut on the right foot and a small cut on the right hand. The doctor who examined him opined that he suffered less than 5% disability. In awarding damages, the trial magistrate concluded that, “*The court has considered the inflation factor in our nation and other comparative awards*” and awarded the sum of Kshs. 700,000/- as general damages.

4. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan [1981] KLR 349*).

5. The appellant complained that the award of Kshs. 700,000/- was excessive in light of the nature of the injuries and the authority cited. He told that court that the trial magistrate placed undue emphasis on the element of inflation to increase the award by over 100%. The respondent’s position was that the case cited on his behalf was apposite and reflective of the serious injuries sustained by him hence the award was neither inordinately high nor excessive to warrant interference.

6. I stated as follows regarding the assessment of general damages in *Harun Muyoma Boge v Daniel Otieno Agulo (Supra)*:

The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

7. In this case, the dominant injury was a fracture of the femur and the other injuries were of soft tissue injuries. I note that the doctor did not detect any permanent disability although the fractured limb required physiotherapy. In my view I do not consider these injuries so serious as to attract an award of Kshs. 700,000/-. The case of *Charles Mathenge Wahome v Mark Mboya Likanga and Others (Supra)* relied on by the respondent is, in my view, an outlier and does not reflect the general trend of damages for similar injuries. For example, in *Naom Momanyi v G4S Security Services Kenya Limited Meru HCCA No. 145 of 2014 [2018] eKLR*, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. He was awarded Kshs. 300,000/- in 2018 while in *Gogni Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR*, the claimant was awarded Kshs. 350,000/= as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks. Even factoring inflation in these more recent awards, the award of Kshs. 700,000/- is obviously an excessive.

8. Before I conclude, I wish to state that it is the duty of advocates to assist the court by providing several decisions illustrating comparable injuries to enable the court reach a fair decision. The use of one decision that turns out to be an outlier does not assist the court.

9. Considering the general trend of awards in comparable cases and the need to maintain consistency, I find the award of Kshs. 700,000/- inordinately high. I set aside the award of general damages and substitute it with an award of **Kshs. 350,000/-** which shall be subject to the agreed contribution and shall attract interest from the date of judgment before the subordinate court.

10. I award the appellant costs of the appeal which I assess at **Kshs 35,000/=** all inclusive.

DATED and DELIVERED at KISII this 28th day of September 2018.

D.S. MAJANJA

JUDGE

Mr Mose instructed by Mose, Mose and Milimo and Company Advocates for the appellant.

Mr Nyangosi instructed by Nyangosi & Company Advocates for the respondent.