



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 90 OF 2016

BETWEEN

PETER NYANGACHA.....APPELLANT

AND

NYAGAKA BISERA PETER.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Maloba, SRM dated 3rd November 2016 at the Magistrates Court at Kisii in Civil Case No. 504 of 2015)

JUDGMENT

1. The respondent was injured in a road traffic accident which took place on 27th August 2015 near Nyamatara along the Kisii – Kisumu road when motor cycle registration KMDQ 451F which he was riding hit the appellant’s motor vehicle registration number KBZ 625J. The issue of liability was settled by consent and was apportioned in the ratio 70:30 against the appellant. The trial magistrate assessed general damages at Kshs. 280,000/- which award has not precipitated this appeal.

2. The injuries sustained by the respondent as pleaded in the plaint were as follows: cut wound on the parietal area, laceration on the right ear, blunt trauma to the neck, contusion on the chest, laceration on the left elbow, laceration on the left arm, bruises and laceration on both knees and a contusion on the foot. In support of the case, the respondent produced a report by Dr Ezekiel Oganda Zoga who examined him on 9th September 2015. He confirmed the injuries outlined above. He noted that some of the injuries were still raw and in the process of healing. Dr Zoga concluded that the respondent sustained multiple soft tissue injuries which were expected to heal in time.

3. The respondent had proposed Kshs. 400,000/- based on two decisions cited. In the case of *Francis Ochieng and Another v Alice Kajimba MGR HCCA 23 of 2015 [2015]eKLR* where the plaintiff sustained multiple soft tissue injuries without any fractures together with head injuries, the court awarded Kshs. 350,000/- as general damages. In *Catherine Wanjiru Kingori and 3 Others v Gibson Theuri Gichubi NYR HCCC No. 320 of 1998 [2005]eKLR* the plaintiffs had suffered multiple soft tissue injuries were awarded between Kshs. 300,000/- and Kshs. 350,000/- as general damages.

4. The appellant proposed Kshs. 100,000/- based on the case of *Kenya Power and Lighting Company Ltd v Samson Machuma Makori [2008]eKLR* where the court set aside an award of kshs. 160,000/- and substituted it with an award of Kshs. 80,000/- for multiple soft tissue injuries. Counsel also cited the case of *Kithoka Youth Polytechnic v Lucy Kithira [2008]eKLR* where the trial court awarded Kshs. 200,000/- for soft tissue injuries and the High Court reduced it to Kshs. 100,000/- on appeal.

5. I dealing with this appeal, I am guided by the principle laid down in *Butt v Khan [1981] KLR 349* where it was held that 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.

6. The trial magistrate considered the injuries vis-à-vis the decisions cited the by parties as I have summarised above and concluded as follows:

What comes out clearly though is that for various kinds of soft tissue injuries, the court awarded between Kshs. 100,000 – 350,000/- in general damages depending on their multiplicity and effect. Having considered all the above and nothing that the plaintiff has healed save for what appears to be episodes of pain and he said that he was yet to heal and but did not elaborate, I would award him Kshs. 280,000/- as general damages for pain and suffering.

7. I have reviewed that conclusions of the learned trial magistrate and the decisions cited by either party and I cannot say that the trial magistrate erred in arriving at the award. I therefore dismiss the appeal.

8. The appellant shall pay costs of the appeal which I assess at **Kshs. 30,000/-** all inclusive.

DATED and DELIVERED at KISII this 17th day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O.M. Otieno and Company Advocates for the appellant.

Ms Sagwa instructed by Khan and Associated and Advocates for the respondent.