



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 639 OF 2008**

**JOHN KUNGU.....APPELLANT**

**VERSUS**

**LAZARUS MUISYO KITANG'A.....RESPONDENT**

***(Appeal from the judgment of S.A Okato (Mr.) delivered on 31/10/2008 in PMCC No. 133 of 2007)***

**JUDGMENT**

On or about 12<sup>th</sup> May, 2007, at about 8.00 am, the Respondent was cycling by the road side along Kangundo-Tala road when the Appellant's driver, whilst driving motor vehicle registration number KYQ 796 Isuzu Lorry caused the same to veer off the road and knock the Respondent. The Plaintiff suffered injuries, the particulars of which are pain and tenderness on the right shoulder, swelling and pain on the right elbow and multiple bruises on the left elbow. The Respondent in his Amended Plaintiff dated 30<sup>th</sup> May, 2008 filed a suit claiming general damages for negligence, special damages of Kshs. 3,200, interest and costs of the suit.

The claim was denied by the Appellant who filed a Statement of Defence dated 25<sup>th</sup> September, 2007 and averred that if the accident ever occurred, the same was caused by or substantially contributed to by the negligence of the Respondent.

The case was heard and a judgment was delivered on 31<sup>st</sup> October, 2008. The trial Magistrate held that liability was agreed by consent to be determined by the outcome of PMCC No. 134 of 2007 which was selected as a test suit, and held the Appellant 100% liable as was held in the test suit. On quantum, the Respondent submitted on Kshs. 100,000 in general damages whilst the Appellants proposed the sum of Kshs. 20,000. The trial magistrate awarded Kshs. 60,000/- in general damages and Kshs. 6,000 in special damages.

Aggrieved by the decision, the Appellants filed this Appeal on the grounds that the award of Kshs. 60,000/= in general damages was excessive as well as Kshs. 6,000/= in special damages which was not proved and that the trial magistrate erred in holding the appellant wholly liable for the accident. This Court will seek to determine whether the award was excessive and whether special damages were proved as well as whether the Appellant was wholly liable for the accident.

The Plaintiff called two witnesses whilst the Defendant called none.

The Respondent who was the Plaintiff's witness PW1 testified that he was an army officer and that on

12/5/2007 he was carrying one Stella Kimanathi as a pillion passenger on a bicycle and he was carefully riding the bicycle off the road along Kangundo – Tala road. That the driver of the lorry emerged from behind and he ought to have seen him. That he was injured on the right leg, right shoulder and left hand.

Dr. Wairagu Ann (PW2) testified that the Respondent was treated at Kangundo hospital. He had tenderness on the right shoulder, right elbow, and bruises on the left elbow and had suffered soft tissue injuries. She prepared a medical report and charged Kshs. 3,000/=

This Appeal was canvassed by way of written submissions and the Appellant proposes an award of Kshs. 20,000/= in general damages. During the trial, he had relied on the cases of **Evanson Babu Njuru Vs. Paul Nyamotenyi Nrb HCCC 778 of 1991** and **Ramji Kalyanji Parmar & 2 Others Vs. Universal Carriers Ltd. Nbi HCCC No. 299 of 1997** in which first case the court gave an award of Kshs. 20,000 in general damages and the later a possible award of Kshs. 20,000/=

The Respondent submitted that he suffered serious injuries with pain and tenderness on the right shoulder, swelling and pain on the right elbow and multiple bruises on the left elbow and that the award of KShs. 60,000/= was reasonable due to the seriousness of the injuries.

I have considered the grounds of appeal and the written submissions filed as well as the authorities cited. An appellate court is tasked with re-evaluating the evidence before the lower Court in order to make its own conclusion and in so doing it will not interfere with the exercise of discretion by a lower court unless the exercise of that discretion was erroneous in law. This is well captured in **Mbogo & Another -v- Shah (1968) EA 93 at 96**, where it was stated that;

***“an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong conclusion.”***

On liability, the same was settled by consent when the parties agreed to be bound by the outcome of PMCC no 134/2007 which was selected as a test suit in which the court found the defendant 100% liable to the plaintiff for negligence.

The assessment of general damages is not a mathematical exercise 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. In **Denshire Muteti Wambua vs KPLC Ltd (2013) e KLR** the Court of Appeal observed that ***“further we observe that the learned trial judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that is comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases (see Arrow Car Ltd vs Bimomo & 2 Others (2004) 2 KLR 101)”***

In this case the Respondent sustained soft tissue injuries and bruises to the shoulder and elbows. I have considered the submissions of both parties on the award of general damages. This court is guided by the medical examination of PW2 in assessing the injuries.

Taking into account the extent of the Respondent’s injuries, the rate of inflation on the Kenya shilling and in comparison with decided authorities, the award of ksh 60,000 in general damages was reasonable and not excessive. I make an award of ksh 3000 in special damages being the amount pleaded and proved.

In the end, the Appeal is dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> Day of **October, 2017**.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Appellant

..... for the Respondent