



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 151 OF 2013

PATRICK MUDAVA KWEYU.....APPELLANT

VERSUS

PAN AFRICA CHEMICAL LTD.....RESPONDENT

(Being an appeal for the judgment/decree of Honourable TOWETT, Resident Magistrate, delivered on 15th August, 2013)

JUDGMENT

1. The Appellant Patrick Mudava Kweyu was injured in a traffic road Accident on the 13th November 2009 when three vehicles collided. He sued all the vehicle registered owners for compensation for pain and suffering. In a test suit in the trial court, being **Molo SPMCC No. 437 of 2009**, the Respondent was held 100% liable for the accident.

This judgment on liability was adopted by the trial Magistrate in **PMCC No. 484 of 2009**. The court proceeded to assess damages for the injuries sustained by the Appellant and awarded Kshs.30,000/= on the 15th August, 2013. The Appellant was not satisfied with the award on damages giving rise to this appeal. The Appellant has urged the court to set aside the trial court's award and re-assess the same.

2. This is the first Appellate court. It is mandated to re-evaluate the evidence adduced in the trial court and come up with its own findings and conclusions. While doing so, it is not bound by the trial courts findings of fact See **Selle -vs- Associated Motor Boat Co. Ltd & Others (1968) EA 123**. This appeal is against quantum of damages only.

In **Bashir Ahmed Butt -vs- Uwais Ahmed Khan Civil Appeal No. 40 of 1977, Law J.A** pronounced himself that:

“An appellate court will not disturb an award of damages unless it is so in inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

3. The appellant's injuries as stated in the medical records and specifically Dr. Wellington Kiamba's medical reported bated 30th November 2009 were:

- **Dislocation of the right elbow joint**

- **Loose lower incisors teeth.**

As at date of examination, the appellant's complaints were

- **Pain and swelling of the right elbow joint**
- **Loose lower incisors teeth**
- **Temporary incapacitation was assessed at one month.**

4. In his submissions before the trial court, the appellant, relying on the case of **Mark Oluoch Oyieke & 3 others -vs- Nyabichiku Farm & Another Nbi HCCC No 1540 of 1998** proposed an award of Kshs.300,000/=. The court in the above case awarded Kshs.100,000/=.

The injuries sustained by the plaintiff in **Mark Oluoch case** were dislocations of the elbow joint and of the right ankle, cuts and lacerations on elbow, right shoulder, right thigh and burns to the neck, chest and lumber spine, and was admitted in hospital for seventeen days. He was awarded Kshs.100,000/=. The appellant has referred this court to the case **Patrick Kinoti Miguna -vs- Peter Mburunga Muthama (2014) e KLR** where the **High Court in Meru HCCA No. 92 of 2012 upheld the trial court's award of Kshs.300,000/=** General Damages for the following injuries.

- Bruise on the right parental region,
- Two loose lower incisors,
- Dislocation of the right shoulder cut on the left leg,
- Bruises on the leg and dorsum of the right hand.

5. In urging the court to set aside the trial court's award of damages, the appellant submits that the trial court reached an erroneous estimate of damages that was too low, and that the learned Magistrate overlooked the Doctor's report that the appellant was yet to recover from the injuries.

The Respondent in opposing the appeal submitted that all relevant factors, injuries and complaints were taken into account and the award by the trial court was reasonable. The court was urged not to interfere with the award as it was not an erroneous estimate, and the trial Magistrate did not act on wrong principles on arriving at the said award. He relied on the **Butt -vs- Khan case (Supra) and Kitan -vs- Coastal Bottlers Ltd (1985) e KLR**. It was further relied upon on quite some old cases, to wit, **Loise Nyambeki Oyugi -vs- Omar Haji Hassan HCCC No. 4150 of 1991 NBI, Cyrus Gachanja Muya & 3 others -vs- Abass Mohammed and Another HCCC No. 73 of 1995 and Kitele Mwendwa -vs- Jeremiah Kaingu Yaa Hccc No. 599 of 1995**. In these cases, for close to or similar injuries, the court awarded Kshs.20,000/= in 2001, Kshs.20,000/= in 1999 and Kshs.40,000/= in 1989 respectively.

6. The court has considered the evidence as adduced and the trial court's judgment. It is evident that the trial magistrate did consider the injuries sustained by the appellant, and in her own words stated

“All in all, the plaintiff must have suffered a great deal of pain --- inconvenience of bandage and applied arm sling. He also went through the ordeal of having loose lower incisors.”

However, it is this court's considered view that even after considering all the injuries and inconveniences, the award arrived at was too low as to constitute a wrong estimate of the damage. As stated in the case **Kemfro Africa Ltd t/a Meru Express Service -vs- A.M. Lubia and Another (1982-88) KAR 727**, the amount was so low as to call for this court's interference. Case law cited in support of the award of Kshs.30,000/= were over fifteen years old. The appellant too did not help by citing more recent cases taking into account the date the judgment was delivered in 2013, save for the case **Patrick Kinoti Miguna(Supra)** which judgment was delivered in March 2014, but the injuries were more serious than the appellants injuries – (See injuries above).

7. This court has considered the case **Eldoret Steel Mills Ltd -vs- Charles Owino (Civil Appeal No. 81 of 2005 - Judgment delivered in July 2012 (2012)KLR** and **Kenya Tea Development Agency Limited -vs- Josephine Kwamboka (2012) KLR (In Kisii Civil Appeal No. 307 of 2000-) Judgment**

in November 2012 -

In these cases, for soft tissue injuries, cuts, bruises and blunt injuries the respective courts awarded Kshs.80,000/= and Kshs.100,000 general damages as reasonable compensation.

8. The court has considered that the appellant sustained injuries to his lower incisor teeth which were mobile in addition to the dislocation of the elbow joint. I am satisfied that this is a case where this court ought to disturb the award of damages considering the incidence of inflation.

In **HCA No. 6 of 2012 (Bungoma) Paul Kipsang Koech & Another -vs- Titus Osule (2013) e KLR**, the respondent had sustained bruises on lowerlip, right cheek, left elbow and left knee. He also had a fracture of the right upper lateral incisor tooth loosening of the right upper canine tooth and upper medial incisor tooth.

The trial court had awarded a sum of Kshs.300,000/= to the respondent but on appeal the said sum was reduced to Kshs.200,000/= in general damages as being a more realistic award comparable to awards for similar injuries. This was in May 2013.

In **HCA No. 28 of 2012 (Eldoret) George Kinyanjui t/a Climax Coaches -vs- Equity Bank Ltd (2016) e KLR**, the High Court reduced an award of Kshs.650,000/= for soft tissue injuries (including loss of two molars, but not related to the accident) to Kshs.120,000/= for multiple bruises, severe head injury and trauma to the neck, lumbar spine, left shoulder and left knee.

Injuries in the above decisions compare well with the ones in the present appeal.

9. It is trite that an award of damages is at the discretion of the court. See **Catholic Diocese of Kisumu**.

10. For those reasons and in exercise of its discretion, the court shall allow the appeal, set aside the award of Kshs.30,000/=: and substitute the same with an enhanced award of Kshs.250,000/= in general damages for pain and suffering with interest at court rates from the date of this judgment.

The award on special damages remains undisturbed.

Each party shall bear its costs of the appeal.

Dated, signed and delivered in open court this 21st day of April 2016

JANET MULWA

JUDGE