



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 130 OF 2007**

**THE CLERK NYAMIRA COUNTY COUNCIL.....1<sup>ST</sup> APPELLANT**

**NYAMIRA COUNTY COUNCIL.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPH RASUGU (*minor suing through next friend***

***and father* RONALD RASUGU).....RESPONDENT**

**JUDGMENT**

1. The Respondent was a minor suing through next friend and his father one Ronald Rasugu who was the plaintiff in the Chief Magistrate's court Civil suit No. 708 of 2006 at Kisii. He filed a suit against the appellant claiming general and special damages following an accident that occurred on 19<sup>th</sup> March, 2005 stating that while he(respondent) was lawfully walking off the Kisii-Kisumu road at a place called Embassy, the appellant's driver, servant, employee or agent so negligently drove motor vehicle registration Number KAB 324Q causing the same to collide with the respondent as a result of which the respondent suffered serious injuries, loss and damage. With regard to the particulars of negligence of a motor vehicle registration number KAB 324Q the same were particularized as hereunder:

1. *Driving without due care and attention.*
2. *Driving at speed which was excessive in the circumstances.*
3. *Driving a defective motor vehicle.*
4. *Driving off the road.*
5. *Failing to stop, slow down, swerve or in any other way to control motor vehicle registration Number KAB 324Q so as to avoid colliding with plaintiff.*
6. *Driving whilst under the influence of alcohol and/or other intoxicating substances.*
7. *Failing to observe the high way code.*
8. *Driving a defective motor vehicle.*

With regard to the injuries the same were particularized as hereunder;-

- i. *Fracture of the right humerus bone.*
- ii. *Cuts on the right shoulder.*
- iii. *Dislocation of the right hip joint.*
- iv. *Cuts on the right iliac fossa.*
- v. *Multiple cuts on the face.*

2. The appellant in turn filed a statement of defence and denied the respondent's claim in total. The appellant denied particularly the 2<sup>nd</sup> appellant of being the owner of motor vehicle registration Number. KAB 324Q calling the respondent to prove that fact. Further they denied all the particulars of negligence specifically the fact that an accident occurred on the 19<sup>th</sup> March, 2005 as alleged or at all and put the respondent strict into proof thereof. In addition to this, as an alternative and without prejudice the defendants averred that if indeed an accident occurred as alleged the same was wholly occasioned and substantially contributed by negligence on the part of the respondent particulars of the alleged negligence were set out in the defence and inducted inter alia, allegation that the respondent (minor failed to walk with a guardian.
3. During the hearing the respondent's father one Ronald Rasugu Ntabo testified as PW1. He told the court that the respondent (minor) was his child and that he was seeking for damages for an accident involving him(minor) which occurred on the 19<sup>th</sup> March, 2005 whereby the minor was hit by a vehicle while he was beside the Kisumu-Kisii road. That the minor was treated at Kisii District Hospital and produced treatment notes as (MFI-1). He also produced a p3 form filled by Dr. Ajuoga which was marked as Exh.2, a police abstract from Kisii Police station which was marked as Ex.3 and a receipt emanating from Dr. Ajuoga who filled the medical report as Exhbiit.4. Furthermore, he produced the said report by doctor Ajuoga which was marked as MFI.5.
4. Moreover, he stated that the minor was injured on the head (as he had some cuts on the head) on the stomach and arm. Lastly, he stated that he was asking the court to assist in recovering damages plus costs. On cross examination, he revealed that the child (minor) was now fully healed.
5. Dr. P.M. Ajuoga, a consultant Surgeon running a private clinic at Awendo testified as PW2. He recalled that on 11<sup>th</sup> January, 2006 he examined the minor (Joseph Rasugu) who had been involved in an Road Traffic Accident on 19<sup>th</sup> march, 2005. He particularized the injuries inter alia as that the minor suffered a fracture of the right humerus, cut wound on the right shoulder, dislocation of right hip joint, cut wound on the right illaca fossa which is hip joint and multiple cut wound on the face. He also revealed that at the time of examining the minor, he could see multiple scars.
6. In concluding his report he observed that the minor had suffered fracture of the right humerus bone and other soft tissue injuries which healed well but with scars. He explained that in making his report, he relied on treatment notes, X-rays and history from the patient which were all marked as MFI-4. In addition to this, he produced treatment notes as Ex.2 . Also, he produced the P3 from which he filled and further confirmed that in the P3 form he recorded multiple cut wounds on the face, right shoulder, illiaca foss, dislocation of hip joint and fracture of right humerus. As the author of the P3 form he produced the same as exhibit.5.
7. On cross-examination he revealed that the sign in the treatment note means that there was no fracture in the shoulders but that there was a fracture in the humerus bone. Moreover he also revealed that the treatment notes had not mentioned a fracture of the humerus bone. Lastly, he also confirmed that the minor was put on P.O.P. and this does not occur in soft tissue injuries.
8. On 20<sup>th</sup> April, 2007 a consent was recorded stating as follows:-

*“by consent the treatment notes marked PMF-1 are hereby produced as pExh.1”.*

This marked the close of the plaintiff's case. Furthermore still on the same date another consent was recorded stating inter alia.....

*“By consent the report by Dr. Nicholas O. Tinega dated 12<sup>th</sup> February, 2007 be and is hereby produced as DExh.1”*

This also marked the close of the defence case.

In its judgment the trial court considered both medical report and stated:-

*‘Dr. Ajuoga admitted that the treatment notes did not sanction a fracture but that a P.OP was*

applied. I have not seen a fracture in the fracture treatment notes. The notes however mentioned a dislocation of the hip. I shall therefore disregard the same and find that the plaintiff suffered a dislocation of the hip joint and several soft tissue injuries?.

9. Thus in quantum the trial court gave an award of kshs. 200,000 in general damages as sufficient compensation, guided by the case of **John Mburu Kahenya v. Leonard Kamau Kirumba & Another. HCC (NKU) NO. 408 of 1998** where the High Court awarded kshs. 120,000 to a plaintiff who suffered head injuries, scalp laceration and dislocation of the left knee. However, the trial court noted that in arriving at that figure, it took into due regard the inflation as a factor since the said judgment it relied on was arrived at 7 years ago and the fact that the plaintiff(minor) in this case suffered more serious injuries than in that case. On special damages the plaintiff was awarded kshs. 3,000 as the only claim proved.
10. The appellant on being dissatisfied with the above judgment and decree has opted to file an appeal to this court. In its Memorandum of appeal dated 6<sup>th</sup> July, 2007, the defendants now appellants have appealed against the entire judgment/decree of the trial court on the following grounds:-
  1. *The learned magistrate erred in law and infact in making an award in general damages that was so excessive as to amount to an erroneous estimate of the damages suffered.*
  2. *The learned magistrate erred in law and infact in misapprehending the injuries suffered by the Respondent and therefore took into account irrelevant facts in assessing damages.*
  3. *The learned magistrate erred in law and in fact in failing to address the evidence and submission tendered by the appellants and therefore failed to take into account relevant facts while awarding the damages.*
11. When the above matter came before Sitati, J on 13<sup>th</sup> March, 2014 it was agreed among other directions that this appeal was to proceed by way of written submissions to be filed and exchanged between both parties.
12. On 11<sup>th</sup> November, 2014 this matter came before me and Mr. Sagwe holding brief for Mr. Akanga for the appellant confirmed that both parties had filed their submissions.
13. This court being conscious of its role as the first appellate court as stated in **Selle vs. Associated Motor Boat Co. Ltd [1968] E.A. 123**, has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.
14. This court has been urged by the appellant to interfere with the trial court finding on quantum of damages. Regarding quantum of damages, as indicated above the learned trial magistrate disregarded correctly I must say the issue that the minor suffered a fracture since the said fracture was never indicated in the treatment notes, the doctor's report prepared by Dr. Tiniga produced for the defence marked as DExh.1 clearly indicated that the minor did not suffer from any fracture and the basis of PW2 stating that he suffered from a fracture was simply because the treatment notes indicated the term P.O.P.
15. Secondly, the learned trial magistrate also referred to an authority **John Mburu Kahenya(supra)** before he arrived at an award of Kshs. 200,000. It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award, must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards for similar injuries and such other relevant factors.
16. In the matter that was before the trial court, two medical reports were produced in evidence. Even though there was some variation in the findings by 2 doctors, both of them seemed to agree that the respondent had no physical abnormality except healed injuries which later became scars which were:-
  - *Cuts on the right shoulder.*
  - *Dislocation of the right hip joint.*
  - *Cuts on the right iliac fossa*
  - *Multiple cuts on the face.*

17. In the case of *Miriam Athumani and Salama Rashid a minor suing through her mother and next friend Mariam Athumani v. Obuya Express and Philip Kipkemoi cheule, in Nakuru HCCC. NO. 477 of 1998* the minor suffered the following injuries:-

- *Deep cut wounds in the forehead and right temporal region.*
- *Fracture on the right femur in the lower one third.*
- *Soft tissue injuries of the right knee joint.*
- *Bruises on the right elbow.*

Kshs. 300,000 was awarded as general damages. This case was decided on 14<sup>th</sup> day of June, 2000.

18. The principles which must be observed by an appellate court in an appeal against an award of general damages were stated in *Kemfro Africa Ltd t/a Meru Express and Another vs. A. M. Lubia and Another (No.2) [1987] KLR 30*. It was held as follow:-

*‘the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that earlier the judge, in assessing damages, took into account an irrelevant factor or left out of account a 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?’*

19. Although the decision I cited above had more serious injuries than in the present case, it was not demonstrated by the appellant that an award of kshs. 203,000 was inordinately high nor was it shown that the learned trial magistrate took into account an irrelevant factor in his assessment of damages. In such circumstances, this court will not interfere with the exercise of discretion by the learned trial magistrate. Consequently, I dismiss this appeal and grant costs thereof to the respondent.

Judgment dated and delivered at **NYAMIRA** this 26<sup>th</sup> day of **February**, 2014.

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Nyamwange hold brief for Nyaundi for the appellants

Onchari Otiso (absent) for the respondent

Mercy - Court Clerk.