



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL APPEAL CASE NO. 114 OF 2017

GNM (MINOR) Suing thro' his father and next friend SMG...APPELLANT

-VERSUS-

ALEX WACHIRA WAURA.....1ST RESPONDENT

ANDREW MOSE ONGERI.....2ND RESPONDENT

JUDGMENT

1. The Appellant who was the Plaintiff in trial court lodged loss of amenities claim for general damages and special damages Kshs.64,280/- plus costs and interest.

2. This was as a result of injuries sustained in a road traffic accident which occurred on 30th June, 2015 in Nyahururu – Ol Kalou Road when motor vehicle KBY 742L knocked him occasioning serious injuries due to owner of motor vehicle negligent driving. He sustained injuries pleaded.

3. The Respondent denied claim via defence filed and attributed negligence on the part of the Appellant.

4. The matter went into trial and the trial court held Respondent 100% liable and awarded Appellant;

- **General Damages Kshs.350,000/-**

- **Special Damages Kshs.64,180/-**

5. This aggrieved the Plaintiff thus lodged instant appeal in which 4 grounds of appeal were set as hereunder:

i. That the learned trial Magistrate erred in law and in fact in awarding an inordinately low award to the Appellant.

ii. That the learned trial Magistrate erred in law and in fact in failing to take into consideration the injuries suffered by the Appellant while assessing quantum of damages payable to the Appellant.

iii. That the learned trial Magistrate erred in law and in fact in failing to take into consideration the reliefs sought by the Appellant in the plaint dated 5th November, 2015 and to award the amounts sought in the written submissions dated 17th December, 2016 under the following heads:

a. Pain and Suffering - Kshs.2,000,000/-

b. Loss of Amenities - Kshs.300,000/-

iv. That the learned trial Magistrate erred in law and in fact in failing to award damages under the head loss of amenities and in awarding a low award for pain and suffering.

6. The parties were directed to canvass appeal via written submissions but only Appellant filed.

APPELLANT'S SUBMISSIONS:

7. The appellant submitted that the Appellant herein testified calling three witnesses as seen from pages 105 – 122. The Appellant was a

minor suing through his father as at the time of the accident he was aged 10 years and a student at [Particulars Withheld] Boarding School at class three.

8. There was no contention that an accident occurred and at the Judgment delivered by the trial court at pages 134 of the Record of Appeal the trial court found and held the Respondents to be 100% liable for the accident.

9. The injuries suffered by the Appellant as a result of the accident were;

i. Loss of consciousness for 5 days due to severe head injuries.

ii. Head injuries with bruises on the left parental side of the head.

iii. Tender swollen left side of the neck.

iv. Tender chest on palpation bilateral.

v. Tender swollen left shoulder joint with bruise.

vi. Bruises and tenderness and mild swollen left hip joint.

vii. Bruises and lacerations of left ankle joint with swell.

10. The Appellant was treated both as an inpatient and outpatient at Nyahururu Private Hospital. A P3 form was produced as **P-Exhibit 5** confirming the injuries and a medical report by Dr. Mburu produced as **P-Exhibit 5**. A bundle of receipts was also produced as **P-Exhibit 3** confirming that indeed the Appellant was treated for the injuries. The exhibits are at page **42 – 57** of the Record of Appeal. **P-Exhibit 5** found at pages **53 – 55**, Dr. Mburu upon re-examining the Appellant about 3 months after the accident described the degree of injuries as corresponding to 15% for compensation purposes.

11. At pages **105** where the proceedings of the testimony of **PW1** who was at the time a minor, he confirmed he was a minor and yet to resume school. Further, he indicated that he was yet to recover fully thus unable to concentrate and follow proceedings in school.

12. **PW2** confirmed he has Rheumatism fever which makes his neck to stiffen leading to paralysis especially during cold weather.

13. The Defendants never called for a second medical re-examination neither were the injuries refuted.

14. The court is urged to find that those were the injuries suffered by the Appellant and that the Appellant proved his case on a balance of probabilities.

15. The prayers sought by the Appellant in his plaint dated 5th November, 2015 at pages 5 of the Record of Appeal, the Appellant seeks for General Damages for pain, suffering and loss of amenities under prayer.

16. On Pain and Suffering: he relied on ***Paragraph 883 in Halsbury Laws of England 4th Edition Volume 12(1) page 348*** and also cited the case of ***Nakuru High Court Civil Suit No. 189/2009 Muriri v Suera Flowers Ltd.***

17. He submitted that the testimony and documents produced in court, made it is clear that Appellant suffered both physical and mental anguish. And thus submitted that an amount of Kshs. 3,000,000/- would suffice under this subheading.

18. The Appellant relied on the case of ***Bungoma HCCA No. 123 of 2011 Abbas A Robie & Another v Charles Nyati Waliuba*** where the Court of Appeal upheld the award by the High Court of Kshs.600,000/- for head concussion, cut wounds on the scalp, chest pain and cut wound, back pains, lacerations on left buttock and painful swollen knee joints. In the present case however, the Appellant was assessed to have permanent disability at 15% for purposes of compensation.

19. Also in the case of ***Ann Njeru v The Headmistress Machakos Girls & Another HCCC No. 165 of 2000*** where an award of Kshs.700,000/- was awarded whereas school girl suffered loss of memory and headaches when she read too much leading to poor performance in school.

20. He concluded that, taking into consideration the year the said awards were awarded inflation of Kenya shilling, the injuries sustained by the Appellant who was a minor at the time of the accident and the economic state, the amount of Kshs. 3,000,000/- would be appropriate.

21. On loss of Amenities: he relied on the case of ***Mwaura Muiruri (supra)***, the aforementioned was defined as follows:

“884. In addition to damages for the subjective pain and suffering sustained by a Plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one’s work, loss of marriage prospect and loss of sexual function. Damages under this head are awarded whether the Plaintiff is aware of it or not: damages are awarded for the fact of deprivation rather than the awareness of it.”

Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of his life as result of the accident are diminished. Essentially the quality of life of Plaintiff is reduced due to the inability to do things he would otherwise have done had it not been for the injuries.”

22. Thus submitted that, guided by the said definition and the fact the Appellant dropped from school after the accident, the Appellant does qualify for an award on damages for loss of amenities. He could no longer enjoy playing with his friends and had to lag behind in his studies as he was put on hold. Further, his life span was drastically reduced as there is no telling what more was damaged as a result of the accident. In light of the same, an award of Kshs.500,000/- would be more than appropriate.

23. Under the said subhead of pain and suffering, loss of amenities, the trial court gave an award of Kshs.350,000/- for general damages as at **pages 134** of the Record of Appeal. It was submitted that the amount was inordinately too low and that the same be enhanced to Kshs.3,500,000/-.

ISSUES, ANALYSIS AND DETERMINATION

24. This being a first appeal court over the decision of the Magisterial court the duty of this court is to re-assess the entire evidence tendered at trial and make its own independent findings.

25. In **Timamy Issa Abdalla v Swaleh Salim Imu & 3 Others [2014] eKLR**, it was held that:

“The court’s jurisdiction is to re-assess the evidence and draw its own conclusions but the same must be exercised with caution since its jurisdiction to draw its own conclusions of can only apply to conclusions of law. If such conclusions are erroneous, that is to say, they are not supported by the evidence and the law.”

26. Further, the Court of Appeal in **Mary Kirito Mugeti v Beatrice Nkatha Nyaga & 2 Others [2013] eKLR**, citing while the case of **Selle & Another v Associated Motor Co. Ltd & Others [1968] EA 123**, stated that:

“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge findings of fact if it appears either that he failed to take account of particular circumstances and probabilities or if the impression of the demeanor of a witness is inhabited with the evidence generally.”

27. See also the case of **Patrick Sosio Leka Keny v Tomito Alex Tampushi & 3 Others [2018] eKLR**.

28. Having said that, the facts of the case based on the evidence adduced before the trial court of the record of appeal are that;

29. The Appellant herein testified calling three witnesses. The Appellant was a minor suing through his father as at the time of the accident he was aged 10 years and a student at [Particulars Withheld] Boarding School at class three.

30. There was no contention that an accident occurred and at the Judgment delivered by the trial court at pages 134 of the Record of Appeal the trial court found and held the Respondents to be 100% liable for the accident.

31. The injuries suffered by the Appellant as a result of the accident were;

- ***Head injuries with bruises on the left parental side of the head. Thus Loss of consciousness for 5 days due to severe head injuries.***
- ***Tender swollen left side of the neck.***
- ***Tender chest on palpation bilateral.***
- ***Tender swollen left shoulder joint with bruise.***
- ***Bruises and tenderness and mild swollen left hip joint.***
- ***Bruises and lacerations of left ankle joint with swell.***

32. The Appellant was treated both as an inpatient and outpatient at Nyahururu Private Hospital. A P3 form was produced as P-Exhibit 5 confirming the injuries and a medical report by Dr. Mburu produced as P-Exhibit 5. A bundle of receipts was also produced as P-Exhibit 3 confirming that indeed the Appellant was treated for the injuries.

33. Dr. Mburu upon re – examining the Appellant about 3 months after the accident described the degree of injuries as corresponding to 15% disability for compensation purposes.

34. PW1 who was at the time a minor, confirmed he was a minor and yet to resume school. Further, he indicated that he was yet to recover fully thus unable to concentrate and follow proceedings in school.

35. PW2 confirmed he has Rheumatism fever which makes his neck to stiffen leading to paralysis especially during cold weather.
36. The Defendants never called for a second medical re – examination neither were the injuries refuted.
37. The trial court found that those were the injuries suffered by the Appellant and that the Appellant proved his case on a balance of probabilities.
38. . Having considered the grounds of appeal, the submissions and entire Record of Appeal, it is clear that this appeal is purely on the issue of quantum of damages. Accordingly, the only issue for determination is whether the quantum of damages should be disturbed.
39. 11. On this, I am guided by the principles that were set out in the case of *Kemfro Afria Ltd v/a Meru Express Service Gathogo Kanini v AM Lubia and Olive Lubia (1982-88) 1 KAR 727* and aptly restated by the Court of Appeal in the case of *Arrow Car Ltd v Elijah Shamalla Bimomo & 2 Others (2004) eKLR* that:
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the 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. ...”***
40. The prayers sought by the Appellant in his plaint dated 5th November, 2015 sought General Damages for pain, suffering and loss of amenities under prayer, Pain and Suffering:
41. Paragraph *883 in Halsbury Laws of England 4th Edition Volume 12(1) page 348* stated as follows:
- “Pain and suffering damages are awarded for the physical and mental distress caused to the Plaintiff both pretrial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the Plaintiff’s condition may deteriorate. It follows that therefore, that the award for pain and suffering is intended to compensate the Plaintiffs for the anguish he has endured as a result of the accident whether physical or mental.”***
42. Also the case of *Nakuru High Court Civil Suit No. 189/2009 Muriri v Suera Flowers Ltd* was relied on.
43. It was submitted that an amount of Kshs.3,000,000/- would suffice under this subhead. The Appellant relied on the case of *Bungoma HCCA No. 123 of 2011 Abbas A Robie & Another v Charles Nyati Waliuba* where the Court of Appeal upheld the award by the High Court of Kshs.600,000/- for head concussion, cut wounds on the scalp, chest pain and cut wound, back pains, lacerations on left buttock and painful swollen knee joints.
44. Also in the case of *Ann Njeru v The Headmistress Machakos Girls & Another HCCC No. 165 of 2000* where an award of Kshs.700,000/- was awarded whereas school girl suffered loss of memory and headaches when she read too much leading to poor performance in school.
45. . I have considered the authorities submitted by the Appellants and taken the liberty to look at several others. In the case of *Denshire Muteti Wambua –vs- Kenya Power & Lighting Co. Ltd [2013] eKLR*, where the Claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp. The Court of Appeal awarded Kshs.1,500,000 general damages when in fact the fractures in the case were much more serious.
46. In the case of *Kenya Power Lighting Company Ltd & Another –vs- Zakayo Saitoti Naingola & Another (2008) eKLR*, the Plaintiff who sustained a fracture of the left femur mid shaft, blunt injuries to the lower jaw and left shoulder was awarded Kshs.300,000/= in general damages.
47. 17. In the case of *Bhachu Industries Limited –vs- Peter Kariuki Mutura, NRB HCCA No.503 of 2009 [2015] eKLR*, the Plaintiff suffered an injury on the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- in the year 2015.
48. 18. In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two cases are exactly alike as the Court of Appeal observed in the case of *Stanley Maore –vs- Geoffrey Mwenda, NYR CA Civil Appeal No.147 of 2002 [2004] eKLR* that:
- “Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”***
49. Accordingly, I am persuaded that this is a suitable case for this Court to exercise its discretion and interfere with the trial court’s finding on general damages for the reason that the quantum that was awarded was so manifestly low so as to warrant such interference. In my view, and considering the rate of inflation, the appeal is allowed to the extent that the award of Kshs.350,000/- is set aside and substituted with an award of Kshs.700,000/- as general damages for pain, suffering and loss of amenities.

i. Thus the award is enhanced to Kshs.700,000.

ii. Plus costs of the appeal.

DATED AND SIGNED AT NYAHURURU THIS 3RD DAY OF FEBRUARY, 2022.

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CHARLES KARIUKI

JUDGE