



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 14 OF 2019**

**THE BOARD OF MANAGEMENT SASURA GIRLS**

**SECONDARY SCHOOL.....1<sup>ST</sup> APPELLANT**

**DIDO GUYO WARIO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**GRACE WANGARI MWANGI.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising out of the judgment of Honourable F.W. Macharia (Senior Principal Magistrate) Karatina in CMCC No.74 of 2017 delivered on 7/02/2019; the appellant herein was sued by the respondent for special and general damages for injuries arising out of an accident involving motor vehicles registration numbers KBR 298U Nissan Bus and motor vehicle registration number KAD 541Y in which the respondent was a passenger.

2. A consent judgment was entered on the issue of liability on a ratio of 90:10; the parties were directed to file written submissions on quantum and the trial court made an award in favour of the respondent as set out hereunder;

- i. General damages at Kshs.800,000/-
- ii. Special Damages at Kshs.149,075/-
- iii. Costs of the suit and interest from the date of delivery of judgment.

3. The appellant being dissatisfied with the trial Court's decision filed this appeal and sought to have it set aside; the grounds of appeal in the Memorandum of Appeal are as summarized hereunder;

- i. The award of Kshs.800,000/- was an exorbitant award for damages for pain and suffering and was contrary to the prevailing range of comparable awards;
- ii. The award was made without taking into consideration the medical evidence on the nature of the injuries; the trial court failed to consider the appellant's submissions;
- iii. No reasons were given by the trial court for arriving at such an award;
- iv. The awarded special damages were neither pleaded or proved.

4. The parties agreed to dispose of the Appeal by filing and exchanging written submissions; hereunder is a summary of the respective parties written submissions;

**APPELLANT'S SUBMISSIONS**

5. It was the appellants' contention that the contents of its medical document prepared by Dr. Joab Bodo was not considered in the award made for general damages; the trial court misdirected itself by placing too much emphasis on the respondent's medical report and her submissions which led to an erroneous, unfair, unreasonable and exorbitant award that was not commensurate to the nature of the injuries

sustained which had healed with no permanent incapacitation;

6. That an award above the sum of Kshs.400,000/- as general damages was not commensurate to the nature of the injuries sustained; the appellant relied on **Jadessa Dida t/a Dikus Transporters & another vs Joseph Mbithi Isika HCCA No.96 of 2011 Machakos** where an award of Kshs.350,000/- was made for injuries similar to this instant case; and also relied on **Catherine Gatwiri vs Peter Mwenda Karaai HCCA 69 of 2016 Consolidated with CA No.70 of 2016 Meru** where an award of Kshs.1,500,000/- was reduced on appeal to Kshs.500,000/- for similar injuries as sustained by the respondent;

7. That it was clear that the award was inordinately high that warrants that it be disturbed by this appellate court; and the appellants urged the court to allow the appeal with costs

### **RESPONDENTS SUBMISSIONS**

8. In response the respondent submitted that as a result of the accident she sustained serious bodily injuries; that liability was agreed between the parties; the trial court was left with the duty of making a decision on quantum which it awarded general damages of Kshs.800,000/- and special damages in the sum of Kshs.149,075/- which is the subject of this appeal;

9. The respondent sustained the following injuries;

- i. Fracture of clavicle
- ii. Injury right shoulder
- iii. Cut wound parietal region of the head, left ear, medial angle of left eye and left foot;
- iv. Bruises on the face
- v. Broken molar on upper jaw.

10. The respondent was admitted at Tumu-tumu Hospital; and treatment included open reduction and internal fixation of the left clavicle with a plate; these injuries were contained in the medical reports; the trial court considered the submissions made by the parties when it arrived at its decision;

11. The respondent relied on **HCCA No.17 of 2016 John Mwanza Mwilu vs Githinji Wahinya (Kajiado)** that sets out the duties of an appellate court; and on the following authorities on when an appellate court can interfere with an award made by a trial court; **HCCA No.59 Of 2013 James Kinyua Gachoki (Deceased) vs John Njagi Timothy & 2 Others (Embu)** where it was held that an appellate court can interfere with the award if the trial court in assessing damages took into account an irrelevant factor or left out a relevant one or the award was inordinately low or inordinately high thereby arriving at an erroneous estimate of damages;

12. For the award for damages the respondent relied on **Nairobi HCC No.86 of 2008 Joseph Musee Mua vs Julius Mbugu Mugi & Others** where the court awarded the sum of Kshs.1,300,000/- for almost related injuries; and in **Eldoret HCCA 121 of 2013 Sammy Mugo Kinyua & Anor vs Kairo Thuo** the court awarded Kshs,600,000/-; **Naivasha HCCA 95 of 2015 Kweli Peter and 2 Others vs Ann Wanjiku Maina** where the court awarded Kshs.600,000/-;

13. As for special damages the same was pleaded in the plaint and proved by production of the receipts; and at the trial the appellants did not dispute any of the receipts in support of payment and even consented to the production; that a consent judgment or order has a contractual effect and can only be set aside on grounds that justify setting aside a contract;

14. The respondent prayed for the dismissal of the appeal with costs.

### **ISSUES FOR DETERMINATION**

15. Upon reading the parties rival written submissions this court has framed the following issues for determination;

- i. Whether the trial court took into account an irrelevant factor or left out a relevant one or acted on wrong principles of law in making the award for general damages;
- ii. Whether special damages were pleaded and proved.

### **ANALYSIS**

16. In considering the appeal, this court is guided by the Court of Appeal in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**; it held that the duty of an appellate Court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, the Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law.

17. The Court of Appeal also held that:

**“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”** (See also **LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403**).

**Whether the trial court took into account an irrelevant factor or left out a relevant one or acted on wrong principles of law in making the award for general damages;**

18. As a result of the accident, the respondent sustained the following injuries;

vi. Fracture of clavicle

vii. Injury right shoulder

viii. Cut wound parietal region of the head, left ear, medial angle of left eye and left foot;

ix. Bruises on the face

x. Broken molar on upper jaw.

19. A Medical Report was prepared by Dr. Muchai Mbugua, the respondent's doctor and a re-examination was done by the appellant's doctor Dr. Joab Bodo which indicated that the respondent had fully recovered from the injuries without any incapacitation.

20. The appellants in their submissions prayed for damages to be reduced to a sum not greater than Kshs.400,000/- and relied on a case decided in 1992 **Mombasa HCCA 467 of 1991 Manyi vs Gatheche [1992] eKLR** and amount of Kshs.80,000/-; and another decided in 2001 **Kitale HCCA No.12 of 2007 Shah Ramji Punja vs Peter Wanjala Kilwake** where damages were assessed at Kshs.200,000/-; other authorities relied on **Jadessa Dida t/a Dikus Transporters & anor vs Joseph Mbithi Isika HCCA No.96 of 2011 Machakos** where an award of Kshs.350,000/- was made for injuries similar to this instant case; and **Catherine Gatwiri vs Peter Mwenda Karaai HCCA 69 of 2016 Consolidated with CA No.70 of 2016 Meru** where an award of Kshs.1,500,000/- was reduced on appeal to Kshs.500,000/- for similar injuries as sustained by the respondent;

21. The respondent had submitted that the amount awarded by the trial court was in order and prayed there be no interference with its award by this appellate court;

22. The trial court in making its award in the sum of Kshs.800,000/- had relied on the authorities **Luca Osoro & Anor vs Daniel K. Cheryot [2008] eKLR** where the award was Kshs.250,000/- for a fractured humerus and soft tissue injuries to the upper arm; and also relied on **Kakamega HCCA No.16 of 2014 Egara Kabaji vs Gordon Nguka** where an award of 500,000/- was made for fractured bones, cut wounds and bruises;

23. This court has reviewed the evidence on record and notes that the respondent had fully recovered from her injuries with no disability and finds that in making its award the trial court erred in failing to take this fact into account and relied on only the respondent's medical report; this court has also perused one of the authorities relied on by the trial court namely **Kakamega HCCA No.16 of 2014 Egara Kabaji vs Gordon Nguka** where an award of 500,000/- was made for fractured bones, cut wounds and bruises; and finds that the injuries in this case are not comparable with the injuries sustained by the respondent in this instance;

24. This court is satisfied that the trial court failed to take into account and left out a relevant factor and acted on wrong principles of law in making the award for general damages and thereby arrived at an erroneous estimate of damages which is found to be inordinately high and therefore warrants interference;

25. Using the case of **Jadessa Diba t/a Dikus Transporters & anor vs Joseph Mbithi** the award therein was Kshs.350,000/- for a blunt back injury, blunt injury to the right shoulder joint and blunt injury right clavicular region with fractured and dislocated right clavicle; this court finds the injuries therein to be similar to the injuries sustained by the respondent herein; taking into account the passage of time and inflationary trends it is this court's considered view that a sum of Kshs.500,000/- as general damages to be adequate and reasonable compensation.

26. This ground of appeal is found to have merit and is hereby allowed.

**Whether special damages were pleaded and proved.**

27. One of the appellants grounds of appeal was that the special damages were neither specified in the Plaintiff nor proved as required by law; upon perusal of the Plaintiff in the court record this court finds that the respondent pleaded and particularized them in the Plaintiff; the receipts in the total sum of Kshs.144,075/- were produced in support of the claim; and the court record does not reflect any objections raised by the appellants to the production of any of the receipts;

28. This court is satisfied that the special damages were pleaded and proved.

29. This ground of appeal is found lacking in merit and it is hereby disallowed.

**FINDINGS AND DETERMINATION**

30. From the forgoing reasons this court makes the following findings and determinations;

i. The appeal is found partially meritorious and is hereby partially allowed; the judgment of the trial court on the issue of general damages is found to have been inordinately high and it is hereby set aside and substituted with an award for Kshs.500,000/- with costs and interest from the date of judgment;

ii. The special damages are found to have been pleaded and proved as required by law; the trial courts judgment on special damages is hereby affirmed with costs and interest from the date of judgment;

iii. Each party shall bear its/her own costs of the appeal.

**It is so Ordered.**

**Dated, Signed and Delivered Electronically at Nyeri this 4<sup>th</sup> day of February. 2021**

**HON.A.MSHILA**

**JUDGE**