**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 14 OF 2020**

**HB (Minor suing through mother & next friend DKM).....APPELLANT**

**VERSUS**

**JASPER NCHONGA MAGARI.....1ST RESPONDENT**

**JACKLINE DAMA KARANI.....2ND RESPONDENT**

**(Being an appeal against the judgement of the Hon. W. Wasike,**

**SRM delivered on 22/10/2019 in Malindi CMCC No. 26 of 2019)**

**Coram: Justice Reuben Nyakundi**

**Wambua Kilonzo & Co. Advocates**

**JUDGEMENT**

This is an appeal by the successful plaintiff in the trial court against the judgement of **Hon. Ivy Wasike (SRM)** whereby she ordered the respondent to pay Ksh.60,000/= as general damages for pain and suffering.

**Background**

The appellant who was also the plaintiff filed suit against the defendants for loss and damages arising out of an accident which occurred on or about 14/7/2018 along Malindi-Gongoni-Lamu road. In that accident the appellant was travelling in motor vehicle registration KTWB 532K when the respondents authorized driver, drove, managed and controlled the aforesaid motor vehicle resulting in it overturning and occasioning physical injuries. The respondents were duly served with the court process on the accident but failed to enter appearance or file defence. The matter proceeded exparte and upon entry of judgement liability for assessment of damages only.

After a full hearing the learned trial magistrate entered judgement for the appellant at Ksh.60,000/= for pain and suffering and loss of amenities, special damages Ksh.2,550/= plus costs and interest.

On appeal, the appellant's counsel submitted that the award of damages of Ksh.60,000/= was too low and that this court should interfere with it.

**Determination**

It is trite that the assessment of damages is a question of the conferred discretion of the trial court, hence an appellate court should not interfere with any award unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those reasons made wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court acted on wrong principles. See **Loice Wanjiku Kagunda v Julius Gacheru Mwangi CA No. 142 of 2003, Butt v Khan [1981] KLR, KeMFRO Africa Limited t/a Meru Express Service, Gathogo Kanini vs A.M. Lubia and Olivia Lulua [1982-88] – KAR 727.**

The context of this principles goes hand in hand with the jurisdiction and duty of the first appellate court as instructive in the case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123** and **Williamson Diamonds Ltd v Brown [1970] EA 1** in which the courts observed that:

**"On a first appeal on assessment of damages only, the court has to re-evaluate the evidence, assess it and make its own conclusions remembering that it has neither seen nor heard the witnesses and hence due allowance must be made for this."**

In cases of this kind as the one being challenged by the appellant, what would be the general expectations of the trial court? There is obviously a relationship between the award and the nature of injuries suffered. The burden upon the claimant is in justifying the compensation on the threshold outlined in **Cornilliac v St. Louis [1965] 7 WIR 491.** This is simply for the trial court to take into account:

**(a) The nature and extent of the injuries sustained.**

**(b) The nature and gravity of the resulting physical disability.**

**(c) The pain and suffering which had to be endured.**

**(d) The loss of amenities suffered; and**

**(e) The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.**

Secondly, this is the area of law where the approaches should be **"that comparable injuries should as far as possible, be compensated by comparable awards keeping in the correct measure of awards in similar cases." (**See **Rahma Tayab & Another v Ann Mary Kinaru [1987-88] 1KAR 90**).

Given the above background, the decisive factor for the trial magistrate was the measure of damages based on the oral evidence of (PW1), documentary evidence of the treatment notes, the P3 form and the medical report by Dr. Adede.

According to the intermediary who testified as (PW1) the claimant suffered injuries to the forehead. The stated injuries were confirmed and treatment dispensed at Gongoni Hospital. The medical report dated 10/11/2018 by Dr. Adede indicates that the claimant sustained blunt object injury to the head and neck, thorax, abdomen and limbs. On routine examination Dr. Adede opined that the injuries suffered were soft tissue in terms of gravity.

Based on this primary evidence and the clinical findings as diagnosed by the doctor it's clear the claimant never suffered any skeletal fractures at the time of the accident. The aforesaid injures and prognosis recognizes and conveys the fact that the claimant intensity of pain and suffering was mild.

On the other hand, its incumbent upon the trial court to award damages on the same cluster for loss of amenities. The phrase loss of amenities arises from the reasoning of the court in **Angeleta Brown v Petroleum Co. of Jamaica Ltd CA No. 2004 HCV 1661 "to mean an award for loss of amenity to compensate the claimant for the loss of quality or reduced enjoyment of life."**

Regarding this element, the claimant was involved in an accident on 14/7/2018, the circumstances under which he suffered personal injuries. The evidence by PW1 and corresponding medical report correlated the guideline principles in the **Cornillac case (Supra)** which the lower court had to contend with in the assessment of compensation favourable to the claimant.

In the case before me its capable of being compared with the following past decisions on soft tissue injuries. In **Eldoret Still Mills Ltd v Charles Owino [2013] eKLR** and **Robert Ngari Gateri v Mango Transporters [2015] eKLR.** The court was faced with appellants who had suffered soft tissue injuries with no permanent disability. On consideration of the facts and evidence the court awarded Ksh.60,000/= for pain and suffering and loss of amenities.

On appeal it was contended on behalf of the appellant that the award of general damages is erroneously low and therefore not a fair estimate of the compensation for the injuries suffered. That this part of the award should be set aside and a more appropriate sum be substituted with impugned quantum of Sh.60,000/=. The difficulty I always face when dealing with appeals of this nature is how to figure out precisely compensation for the injured party in an accident and how to put a shilling value on pain and suffering. Infact, in my view sprained ankle can sometimes be more painful and persistent than a fractured humerus or tibia/ulna bones. It's even more challenging when it comes to assessment of soft tissue injuries, particularly those within the scope and lamentation involving only muscles and soft connective tissues. Clearly, even with the general method of assessment based on comparable awards. It's my view that the reaching of various awards on general damages for pain and suffering is somewhat an artificial task clothed with the discretion of the court.

What follows to the affront of this appeal, the appellant has not discharged the burden of proof that the learned trial magistrate misapprehended the settled principles on awards of damages rendering it unfair and unreasonable to the claimant.

I take the position that from all the evidence on record and grievances raised by the appellant that the award of Ksh.60,000/= was disproportionate to the injuries sustained when viewed in the context of awards of damages commonly made involving such kind of soft time injuries lacks merit. The trial court decision on assessment of damages is not amenable to an appeal.

In the result, the appeal fails by confirming the judgement of the trial court. That that extent no costs are awarded to this appeal.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.**

**.....**

**R. NYAKUNDI**

**JUDGE**

***NB:***

*In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (wambuakilonzoadvocates@gmail.com )*