



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 79 OF 2017(CONSOLIDATED WITH NO 75 OF 2017)

KENNEDY OGANDO.....APPELLANT

VERSUS

DENNIS BOSIRE NYANGENA.....RESPONDENT

(Being An Appeal From The judgement And Decree Of Hon. Kelly (Rm) In Civil Case No. 669 Of 2013 Dated 26th May 2017)

JUDGEMENT

1. The appellant was involved in a road traffic accident on **23rd January 2013** along Ravine /Nakuru road while he was driving his motor vehicle registration number KBH 273X which collided with motor cycle registration number KMCE 585U ridden by the respondent.
2. As a result of the said accident the Respondent sustained the following injuries;
 - (a) **Compound fracture of the left femur**
 - (b) **Displaced fracture of the right radius**
 - (c) **Fractures of two upper incisor's teeth.**
3. He then filed the suit claiming both general and special damages. While the matter was ongoing the parties entered into a consent where liability was agreed at **80:20%** in favour of the respondent and appellant and respectively.
4. In its judgement the trial court awarded the sum of **Kshs. 690,207** as the final award which covered both special and general damages.
5. Aggrieved by the said award both parties filed separate appeals which were thereafter consolidated into the current appeal. Essentially the appellants are complaining that the award is low and excessive in the circumstances. That the trial court according to their memorandum of appeals failed to take into considerations the nature of the injuries and the authorities cited and relied upon by the parties.
6. When the matter came up for directions the court ordered that the same be determined by way of written submissions which the parties have complied.

APPELLANT'S WRITTEN SUBMISSIONS.

7. The appellant submitted that from the evidence tendered by the respondent, the injuries he suffered were compound fracture of the left femur, and the displaced fracture of the right radius as per the discharge summary from AIC Kijabe Hospital that was produced as PEX 5. However, the discharge summary being the first record of the respondent's injuries does not mention any fractures to the respondent's two upper incisors teeth neither does it indicate that any treatment was administered in respect of the alleged injuries to his upper incisors teeth. The said injuries only appear in Dr. Kiamba's medical report. He however does not indicate that he relied on any other document apart from the discharge summaries from AIC Kijabe Hospital. As such, it is not known where the injuries to the respondent's teeth emanated from. They remain unsupported by any medical evidence and/or treatment notes.
8. The appellant further submitted that due to the lapse of time between the time the respondent was treated at AIC Kijabe and when he was re-examined by Dr. Kiamba, the injuries to his teeth may have been sustained at a later date, hence the reason why they do not appear in the Discharge Summaries. The appellant thus submitted that the trial magistrate erred and misdirected herself as to the exact nature of the Respondent's injuries and therefore awarded damages to the Respondent which were manifestly excessive.

9. The appellant submitted that the respondent had suffered a compound fracture of the left femur and displaced fracture of the left radius and the award ought to be commensurate to the injuries, hence an Award of **Kshs. 350,000** ought to be reasonable to the respondent herein. He placed reliance on the case of **Kenya Power Lighting Co. Ltd & Anor v Zakayo Saitoti Naingola & Anor [2008] eKLR Civil Appeal 522 of 2004**, where the High Court on appeal upheld an award of **Kshs. 350,000** to the 1st Respondent who had suffered a fracture of the nasal bridge, a fracture of the left femur and soft tissue injury to the left shoulder girdle and the case of **Mwavita Jonathan v Silivia Onunga [2017] eKLR Civil Appeal No. 17 of 2017** where the high court reduced the Trial Court's award general damages to **Kshs. 400,000** where the respondent had suffered a left hip commuted intertrochanteric fracture, blunt chest injury, dislocated right knee, sprains at the cervical spine of the neck and the lumbar sacral spine of the back and deep wound on the left lower leg which caused loss of lots of blood and permanent disability was assessed at 85%.

10. During the hearing the respondent produced an invoice from AIC Kijabe Hospital for Kshs. 104,707.23 and several receipts for Kshs. 6,500 and Kshs. 1,770 as PEX6. The appellant placed reliance on the case of **Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR Civil Appeal No. 445 of 2003** and submitted that an invoice is not sufficient proof of a claim for special damages. Further a letter from AIC Kijabe Hospital was produced as PEX 11 and the contents therein were to the effect that the Respondent had only paid Kshs. 6,500 as medical expenses to the facility. Hence, if any medical expenses were to be awarded, then the same should be in the tune of Kshs. 8,270 as proved by way of receipts produced as PEX 6.

11. The appellant submitted that any finding by the trial court on quantum ought to have been apportioned to the parties in the ratio of 80:20 with the court deducting 20% from its award of quantum being general damages and special damages to the respondent as is the court's practice. The appellant placed reliance on the case of Joseph **Munyoki Kalonzo v Kenya Wildlife Services [2015] Eklr Civil Case No. 5 of 2014** and submitted that deducting 20% from the general damages and not special damages was erroneous.

RESPONDENT'S WRITTEN SUBMISSIONS

12. The respondent testified that he sustained compound fracture of the left femur, displaced fracture of the right radius, and fractures of two upper incisors teeth as earlier indicated above. These injuries were confirmed by DR. Kiamba who examined him and produced two medical reports in that regard. Other documents confirming the injuries are the discharge summary and the out-patient discharge summary from AIC Kijabe Hospital. The evidence of the respondent on injuries sustained was not controverted by the appellant in evidence hence the respondent's evidence on injuries sustained remains unchallenged.

13. The trial court in making an award of Kshs. 600,000 in the year 2017 was guided by the case of **Beatrice Kaweru v Eliud Njuguna H.C.C.C. 4348/1988** and the case of **George Mathenge Muthingo v M.D Patel Nairobi HCCC No. 2216 of 1993**. The respondent submitted that the trial court misdirected itself by placing reliance on authorities that were too old and which did not stand the test of time in relation to the case placed before her for determination. This being a 2013 matter, the trial court thus, failed to take into consideration factors of inflation and the age of the authorities it relied upon thus making an award that was inordinately low.

14. The respondent submitted that the trial court failed to take into consideration the testimony, submissions and the authorities relied upon by the respondent and the gravity of the injuries sustained thus arriving at an award that was inordinately low. He placed reliance on the case of **Michael Njagi Karimi v Gideon Ndungu Nguribu & Anor HCCC NO. 889 of 2004 and Zachary Kariithi v Jashon Otieno Ochola [2016] Eklr** where the plaintiff sustained fractures of the left femur and radius among other injuries and was awarded Kshs. 2,000,000 in the year 2013 as general damages for pain and suffering and loss of amenities and Kshs. 1,500,000 respectively for compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft and soft tissue injuries. He submitted that Kshs. 4,000,000 would suffice taking into consideration the severe injuries sustained by the appellant and having been awarded a permanent disability of 40%.

15. The respondent submitted that the trial court was proper in deducting the 20% from the general damages and not from the final award because the contributory negligence is what is shouldered by the respondent and so the same should be subjected to the general damages. The special damages should not be subjected to deduction based on contributory negligence since this are specifically pleaded and one is only paid for what is strictly proved. The respondent relied on the case of **Hashim Mohamed Said & Anor v Lawrence Kibor Tuwei [2018] eKLR** where the court was of the opinion that special damages should not be subjected to deduction of the contribution.

16. The respondent submitted that in assessment of damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards. Therefore, the trial court failed to apply the principles applicable when awarding damages and thus reached an erroneous assessment of damages awardable to the respondent hence awarding damages that were inordinately low in the circumstances.

17. The respondent thus prayed that this appeal should fail and be dismissed with costs to the respondent. Both parties in suit no. 75 of 2017 reiterated their submissions in suit no. 79 of 2017.

ISSUES FOR DETERMINATION

18. The court has perused the entire record of appeal and considered the submissions by counsel for both parties and there are only three issues for determination in this suit namely;

- a. **Whether the award on quantum should be disturbed**
- b. **Whether contribution on liability should have been charged on special damages**
- cc. **Whether an invoice is sufficient proof of special damages.**

Whether the award on quantum should be disturbed

19. This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where Sir Clement De Lestang (V.P) stated that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

20. On quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court. That being the case, it is now well settled that an appellate court would rarely interfere and can only do so following the principles laid out in the case of **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICES & GATHOGO KANINI -VS- AZIRI KAMAU MUSIKA LUBIA & ANOTHER (NBI C.A NO. 21 OF 1984)**

21. In that court, the Court of Appeal made the following guiding observations;

"The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 have been a wholly erroneous estimate of the damages."

22. The above decision was in my view premised on the fact that damages must be commensurate with injuries and should not appear like it is greater or conferring a benefit to a party over the injuries suffered.

23. Similarly, the court in **Amos Wenyere & another v Ashford Muriithi Muregi & 2 others [2017] eKLR** stated;

“It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position he/she was prior to the accident”.

24. The respondent submitted that he sustained compound fracture of the left femur, displaced fracture of the right radius and fractures of two upper incisor teeth. These injuries were confirmed by Dr. Kiamba medical's reports that were produced in court as evidence. The appellant disputes the fractures of the two incisors teeth and argues that they were not captured in the initial discharge summary hence they don't understand where the injuries emanated from. Dr. Kiamba testified in court and reiterated the said injuries but the appellant never raised that issue on cross-examination.

25. The fractures to the incisor teeth may not have been captured in the discharge summary but it appears in the P3 forms which is one of the relevant documents that can be used to assess damages. Hence, the trial magistrate did not err and/or misdirect herself as to the exact nature of the Respondent's injuries.

26. Reliance is placed on the case of **BB (A minor suing through his next friend and father GON) Vs Raga Kamau Kanja [2019] eKLR** where the Court of Appeal held that;

“The trial court in evaluating the injuries sustained for purposes of ascertaining the general damages relied upon the P3 filled after the accident. The learned judge in his evaluation of the injuries sustained by the appellant focused on the medical report prepared by Dr. Kinuthia. The judge correctly discounted this report. However, the judge did not address his mind, as the trial magistrate did, to the injuries sustained by the appellant as disclosed in the P3 form. For these reasons, we are satisfied that the judge erred in setting aside and reducing the general damages awarded because he, inter alia, did not take into account the P3 form which was a relevant document in assessing damages.”

27. The trial court in making an award of Kshs. 600,000 in the year 2017 was guided by the case of **Beatrice Kaweru v Eliud Njuguna H.C.C.C. 4348 /1988** and the case of **George Mathenge Muthingo v M.D Patel Nairobi HCCC No. 2216 of 1993**. The respondent contended that the amount was too low in light of the injuries that he sustained and that the authorities relied on were too old while the appellant contended that the amount was inordinately too high in the circumstances.

28. There is need for courts to appraise themselves with recent authorities although this is not to say that placing reliance on old authorities is acting on the wrong principles. Inflation also has to be taken into consideration.

29. Notably in this matter, the trial court relied on some old authorities which did not assist in establishing what the recent awards of courts were as they did not take into account the inflationary trends over the years. Bearing in mind the nature of injuries that were sustained by the Respondent herein, the sum of Kshs 600,000/= general damages was clearly manifestly low in my considered view. The respondent proposed an award of Kshs. 4,000,000 but the same is excessive and not supported by any authority.

30. I have perused through the authorities that were relied upon by the respondent and I can conclude that the injuries therein are not comparable to the injuries in the instant case. In those authorities the injuries were more severe than the ones that the respondent sustained in the instant suit. Similarly, the authorities relied upon by the appellant are also less severe hence not analogous with the injuries of the respondent herein. For example, in the authority of **Mwavita Jonathan v Silvis Onunga (supra)** there was a single fracture (not bi-lateral) and dislocation of the knee with a sprain of the parts of the spine consistent with a whiplash injury.

31. Dr. Kiamba in his medical report indicated that the respondent sustained **compound fracture of the right femur, displaced fracture of the right radius and fractures of two upper incisors teeth**. Open reduction and internal fixation by plating was done to the fractures of the right radius, Open reduction and internal fixation by plating was done to the fracture of the left femur with a sign nail and he also needed a second operation for removal of the implants. His opinion was that the respondent be awarded 40% disability.

32. Taking into consideration the injuries sustained by the respondent and the element of inflation, I would be inclined to award general damages of Kshs. 1,000,000 less 20% contribution as commensurate to the injuries sustained. I place reliance in the case of **Boniface Njiru – Vs- Tohel Agencies & Another (2011) eKLR** where the plaintiff had sustained blunt head injury with loss of consciousness for over 24 hours, Loss of four upper incisor teeth, Fracture of the shaft of right femur, Compound fracture of the right tibia with loss of soft tissues including tendons. That award was made in the year 2011 and the injuries in the instant suit are slightly less severe than the authority relied upon in that the plaintiff in the Boniface Njiru (supra) lost 4 incisor teeth and got blunt head injury as opposed to the instant suit where the respondent had a fracture of two incisor teeth. It should also be recalled that no two cases are exactly alike.

Whether contribution on liability should have been charged on special damages and whether an invoice is sufficient proof of special damages.

33. The appellant contended that an invoice is not sufficient proof of a claim for special damages. The respondent produced receipts for Kshs. 6,500 and Kshs. 1,770 as PEX6. I agree with the appellant that invoice is not sufficient proof of specials hence the respondent will only be entitled to Kshs. 8,270 as that is the amount that was strictly proved.

34. Taking into consideration the case of **Zacharia Waweru Thumbi v Samuel Njoroge Thuku (supra)** as cited by the appellant, it is my considered view that special damages are only proved through the provision of receipts and not through invoices as was the case herein. As such, I find that the trial court ought not to have awarded special damages relying on invoices.

35. On the issue whether the contribution should also apply to special damages, even though courts have discretion on how to deal with such an issue, I will agree with the appellant that it's only fair that the contribution be also charged on special damages. I place reliance on the case of **Margaret T. Nyaga VS Victoria Wambua Kioko [2004] eKLR** where the court held inter alia **"I see no basis, and no logical reason for not applying the contribution to the special damages, and no reasons nor authorities were provided to this Court to persuade it otherwise"**

CONCLUSION.

36. For the above reasons this court agrees with the respondent that the award by the trial magistrate was inordinately low in light of the injuries sustained. The appeal therefore is allowed as hereunder;

a. The general damages as granted by the trial court is hereby set aside and an award of Kshs. 1,000,000 granted to the respondent Dennis Bosire Nyangena.

b. Special damages as awarded by the trial court is hereby set aside and replaced with a sum of kshs.8270.

c Both above awards are subject to the consent on liability of 80: 20 % as agreed at the trial court.

d. The respondent shall have the costs of the suit at the lower court at the said agreed percentage but each party shall bear its own costs in this consolidated appeal.

e. The above general and special damages shall attract interest at courts rates from the date of the trial court's judgement till payment in full.

DATED SIGNED AND DELIVERED VIA VIDEO AT NAKURU THIS 10TH DAY OF JUNE 2021

H. K. CHEMITEI

JUDGE