



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 10 OF 2019

MOSES WAKIBI NJOROGE.....APPELLANT

VS.

PMM (minor suing through next

friend and mother PNW.....1ST RESPONDENT

MAXIMILLA KHAKABO.....2ND RESPONDENT

(Appeal from the judgment of the Chief Magistrate's court at Kiambu, J. Kituku, PM, CMCC No. 353 of 2016 dated 7th February, 2018)

JUDGMENT

1. ***PMM (Minor suing through next friend PNW)*** filed a case before the Kiambu Chief Magistrate's Court seeking compensation for injuries he suffered following a road traffic accident on 20th June, 2016. The subject vehicle registration number KAR 273Z which caused the accident was driven by ***MOSES WAKIBI NJOROGE*** (the appellant).

2. Before the trial court, parties entered into a consent on liability at 80% to 20% in favour of the minor. The trial court delivered its judgment on quantum on 5th December, 2018. The trial court awarded the minor Kshs.1 million for pain and suffering, Kshs.1.4 million for future medical expenses and Kshs.189,392 as special damages.

3. The appellant being aggrieved by that award filed this appeal. The appellant has raised two grounds of appeal: that the trial court erred in awarding general damages without considering the appellant's medical report and further that the trial court erred in awarding inordinate amount of Kshs.1.4 million for future expenses.

4. This is the first appellate court in this matter. The approach of this Court in dealing with this appeal is by way of retrial. This Court is not bound to follow the trial court's finding of fact if it appears either that the trial court failed to take account of particular circumstances or probabilities. The caution this Court should exercise is that it neither saw nor heard the witnesses testify: See **SELLE AND ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) E.A.123.**

5. Both the minor's doctor and the appellant's doctor were in accord on the injuries the minor suffered. He suffered:-

- Head injury
- Deep abrasions over the left upper hip and chin.
- Degloving injury to the left shoulder.
- Degloving injury to the right hand and wrist.

Abrasion on the left knee joint.

6. Both doctors assessed the minor's disability at 5%.

7. The learned trial magistrate in his judgment made a finding that the minor's disability was 59%. It is on the basis of that finding that the trial court made an award in general damages of Kshs.1million. In doing so, the trial court rejected appellant's doctor's report on the ground that the said doctor did not attend trial and was not therefore cross examined.

8. I have noted that during the trial the appellant's doctor's report was submitted in evidence, without the attendance of that doctor, by consent of both parties. It is plain that the minor's learned counsel, having opted to have that medical report submitted without cross-examination of the doctor, it should be taken that counsel accepted the evidence in that report as accurate and accepted that the court can rely on it in determining quantum. For that reason, I hold and find the trial court erred in disregarding the appellant's medical report.

9. I am persuaded by what the court in the case **CHARLES ORIWO ODEYO VS. APPOLLO JUSTUS ANDABWA & ANOTHER (2017) eKLR** stated the guide to courts in assessing damages, as follows:-

“The assessment of damages in personal injury case by court is guided by the following principles:-

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.***
- 2) The award should be commensurable with the injuries sustained.***
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.***
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.***
- 5) The awards should not be inordinately low or high (See BONIFACE WAITI & ANOTHER VS MICHAEL KARIUKI KAMAU (2007) eKLR.)***

10. In order to determine whether the general damages awarded by the trial court can either be upheld or interfered with, it is important to consider what was the prognosis was by the doctors who examined the minor.

11. Although *Dr. Bhaji* the minor's doctor referred to the minor having suffered unconsciousness, that was not supported by the Kenyatta National Hospital admission notes. Most importantly, it was not supported by the minor's mother who testified during trial. What is important to note is that doctor Modi, the appellant's doctor noted that there were no deformities on the minor's head and there was no neurological deficit. Both doctors noted the minor suffered healed scarring on the minor's face, on his chin and knee. Both doctors are in agreement that the injury to the minor's head may cause him to develop convulsions in the future.

12. *Dr. Modi* was of the view that the minor would only require future surgery to his middle finger which he estimated would cost Kshs.100,000/-.

13. *Dr. Modi* was of the opinion by his report that the minor would require future surgery for cosmetic purpose which he estimated if carried out at private hospital would cost Kshs.1million. This is something that doctor reiterated when being cross-examined and further said that future medical treatment could cost less if undertaken in a public hospital. He however did not give estimation of how much less it would be.

14. Bearing in mind the injuries suffered by the minor and the prognosis given in the medical report, I find that the trial court erred in its award in general damages. The trial court erred firstly in giving the wrong assessment of disability. The doctors assessed it at 5% and the trial court stated it was 59%. Secondly, the trial court did not set out in its judgment the injuries suffered by the minor to justify the high award made. It is on that ground I find this Court can interfere with quantum damages awarded.

15. I am guided by the case of **H. YOUNG CONSTRUCTION COMPANY LTD VS. RICHARD KYULE NDOLO (2014) eKLR**, a decision of 2014 where the injuries were relatively similar to these suffered by the minor and an award was made of Kshs.250,000/= in general damages. Taking into account the passage of time, the since that decision and inflation, I hold and find that an award of Kshs.500,000/= in general damages to be fair and just.

16. In respect to future medical expenses, the award of Kshs.1.4million by the trial court cannot be justified in the light of the evidence adduced. In my view, an award of Kshs.200,000/= is justified bearing what the doctors testified.

DISPOSITION

17. The judgment of this Court is as follows:-

- (a) The trial court's award in general damages for future medical expenses are hereby set aside.
- (b) The respondent in this appeal is awarded Kshs.500,000/= in general damages.
- (c) The respondent in this appeal is awarded Kshs.200,000/= for future medical expenses.

The awards in (b) and (c) above are on the basis of liability being at 80:20% in favour of the respondent.

(D) THE APPELLANT IS GRANTED HALF OF THE COSTS OF THIS APPEAL. JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 10TH DAY OF JUNE, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For Appellant: Ms. Mutari

For 1st Respondent: Mr. Mwangi

For 2nd Respondent: No appearance

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE