REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 40 OF 2020

OMN (minor suing through next friend EM W.....APPELLANT

VERSUS

JASPER NCHONGA MAGARI ….....1ST RESPONDENT

JACKLINE DAMA KARANI ….....2ND RESPONDENT

(Being an Appeal from the Judgment of the Honourable D.Wasike - Resident Magistrate in Malindi Civil case No.30 of 2019 delivered on 22nd October, 2019)

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo & Co. Advocates for the appellant

Jasper Nchonga Magari – 1st Respondent

Jackline Dama Karani – 2nd Respondent

JUDGMENT

This appeal was filed by the Appellant solely challenging the award of damages by the Learned trial Magistrate at Kshs.70,000/- for pain and suffering and loss of amenities for being inordinately low in the circumstances of the injuries suffered at that accident.

Regarding the set of the appellant's ground of appeal, Mr Wambua submitted that the award to the respondent by the learned trial magistrate was unjustifiable, considering the injuries suffered which hampered her in pursuit of happy life. According to Mr Wambua, the evidence adduced by the Appellant, as corroborated by the treatment notes and medical report of Dr Adede, the injuries depicted were of a serious nature capable of attracting a higher award than the one founded by the Learned trial magistrate. It was further submitted by Mr Wambua, that the Learned trial magistrate failed to apply the principles developed over time. That comparable injuries should attract comparable awards.

In seeking a variation of the decision of the trial court to increase the award Mr Wambua cited and relied on the following authorities;- ***Arrow Car Limited V Elijah Shamall Bimomo & 2 Others[2004]eKLR,James Guturi Kimani V Kamanga Wairegi(HCCA No.4133 of 1992), Mombasa Maize Millers Ltd & Another V Francis Mwalungo Wanje[2020]Eklr, Nyambati Nyaswambu Erick V Toyota Kenya Limited & 2 Others(HCCA No.66 of 2018).***

For this reason and the enuciated principles in the cited cases, Mr Wambua urged the court to vary the Kshs.70,000/- award by substituting it with an earlier proposed quantum of Kshs.200,000.

DETERMINATION

When examining the way in which the Courts interprete and apply the legal rules developed over time on assessment of damages, it is clear that there is no uniformity or consistency. Unfortunately, the decisions on assessment of damages remain in the realm of discretion. However, notwithstanding that dilemma, in so far as the exercise of discretion is concerned there are clear principles underpinning the assessment of damages in ***Livingstone Rawyards Coal Co.[1880] 5 App Cas 25***. The court stated;-

"I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong"

This decision effectively created the guidelines as formatted by ***Wooding CJ in Cornilliac V St Louis(1965) 7 W.L.R 491*** to place certainity as far as this aspect of assessment of damages is concerned. The account is on the following;-

a) The nature and extent of the injuries sustained

b) The nature and gravity of the resulting physical disability

c) The pain and suffering hence had to be endured

d) The loss of amenities suffered

e) And the extent to which consequentially the claimant's pecuniary prospects have been materially affected. (*See also* ***H.West & Son Ltd v Shephard(1964)AC 326).***

As a first appellate Court in deciding whether to interfere with the assessment of general damages, the guiding principles are outlines in ***Rahma Tayab & Another V Anna Mary Kinaru[1987-88]1KAR 90 and Hassan V Nathan Mwangi Kamau Transporters[1985] eKLR 250CAR*** in which the Court stated that;-

"on appeal, the Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out on account a relevant one, or that, short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."

There are concerns, however, that the task of assessment of damages remains particulary a difficult one and that it is complexity and obsecurity make it both incomprehensible and misunderstood to the non legal or other specialist

An important principle in this area on the assessment of damages for personal injury is as illustrated in ***Cuossens Vs Attorney General [1999] 1EA 40*** in which the court addressed the issue in the following terms.

"That is the object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered and the heads or elements of damage recognized as such by the law and divisible into two main groups pecuniary and non-pecuniary loss. The aim of compensatory damages as seen from the above case law is to restore the plaintiff to the position he or she would have been in if the relevant tort had not been commited by the tortfeasor".

In the instant case it is clear from the plaintiff's testimony(Pw 1) that during the accident she suffered injuries on the right upperlimb and at the back of the head. She was treated at Gongoni hospital and thereafter the P3 issued and treatment notes formed part of the documentary evidence in support of the claim.

She was later to be seen and examined by Dr Adede on 10.11.2018. The medical report documents the injuries suffered to constitute cut on the head, multiple abrasions and bruises on the right upper limb. Dr Adede opined that the injuries had healed with no permanent disability. Given the significance of pain and suffering damages the loss should be fully compensated. Pain and suffering to me is an irreplacable loss that a victim of the accident suffers immediately or soon thereafter the injuries is inflicted. The basic framework is adopted by in **McGregor on damages(15th Edition)(1988) para 1517**;-

"on the expression pain and suffering is now a term of art so far as they can be distinguished, pain means the physical hurt or discomfort attributable to the injury itself or consequence upon it. It thus includes the pain caused by any medical treatment which the plaintiff might have to undergo. Suffering on the other hand denotes the mental or emotional distress which the plaintiff may feel as a consequence of the injury, anxiety, worry, fear, embarrassment and the like".

Examples of matters which would be included under said the head are;-

"Excruciating pain due to medical treatment without anaesthetic, initial shock on impact. The injuries may also be of a nature as to deprive plaintiffs of the capacity to do the things which before the accident they were not able to enjoy and to prevent them from full participation in the normal activities due to the of loss, that injury would qualify for an award for loss of amenity".

The question in this appeal is whether the appellant sense of assessment is one which calls for a reassessment by the Court. It is recognizable that the judicial tariff in the system of award of damages in this matter has been to award a fair and reasonable compensation keeping in mind

similar awards through precedents as a guiding pillar. Therefore an appellate Court ought to tread carefully before interfering with the decision of the trial court on assessment of damages. That is what the Court of Appeal in the case of Gitobu Imanyara & 2 Others V Attorney General [2016]eKLR held that;-

> ***"it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgement of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled"***.

This is the principle enunciated in ***Rook V Rairrie[1941]KLR 349*** when it held as per Law; J.A that;

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low"***

That was also the position in ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini V A.M.Lubia and Olive Lubia[1982-88] 1 KAR 727 at p. 730 Kneller J.A*** said**;-**

> ***"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 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, this amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage".***

These principles purports to secure the best of both worlds on assessment of damages in personal injury claims. In the present case considering the evidence in Dr Adede's medical report and the insights on the gravity of the pain, the age of the appellant, any factor on pre-injury hobbies, or any pre-existing disability relevant to the personal injury the argument by the appellant is misconceived on the assessment of damages. These were soft tissue injuries with no permanent disability. By the fourth month as opined by Dr Adede the appeallant had recovered fully. It is a fact that in the nature of things the combination of injuries in past awards tends to vary from case to case and comparisons are therefore difficult to make. There can be no doubt from the evaluation of the impugned judgment I find no misdirection or misapprehension of the evidence to call upon this Court to review and substitute the award on pain and suffering and loss of amenities.

In deciding what sum constitutes fair and reasonable compensation, the learned trial magistrate took into account overall view of the appellant's injuries and the total effect they had on the appellant's enjoyment of life. After re-viewing various proposals by the appellant for pricing pain and suffering suffered in that accident, I will argue that all of these are analytically problematic and undesirable as a matter of fact to this appeal. It is not possible to have an optimal award in a tort system to compensate pain and suffering damage which the claimant can satisfactorily appreciate it was fair and proportionate. As the main source of discomfort about pain and suffering damages seem to be first of being difficult to assess with precision. Second to compare the magnitude of pain and suffering in concrete terms with comparable past cases is sometimes difficult to assess on the strength of monetary awards.

In our legal system, the intensity of the pain, the type, severeity, duration of the injury, the reduction in health, loss of amenities etc. are supposed to play a major role in the calculation of pain and suffering damages. So what is the reality? Pain and suffering for similar and even same injuries differ greatly between persons. I think with that insight and trite law the result of this appeal is for non interferance with the award by the trial court.

The learned trial magistrate cannot therefore be faulted for awarding Kshs.70,000/- as general damages for pain and suffering and loss of amenities. The upshot of it is that the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED *via Email* AT MALINDI THIS 3rd DAY OF JUNE, 2021

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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.

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