



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CIVIL APPEAL NO. 6 OF 2019**

**HUSSEIN DAIRY LIMITED**

**KHASSIM BEJA KAULI.....APPELLANTS**

**-VERSUS-**

**1. ASHA MOTEQ ATHMAN**

**2. TOP CARRIERS LIMITED**

**3. JOHN IGUKA**

**4. SIMBA COACH LIMITED.....RESPONDENTS**

*(Being an Appeal from the Judgment of Hon. Onkoba (SRM) in the Principal Magistrate’s Court*

*at Voi, PMCC No.69 of 2013, delivered on 13<sup>th</sup> December 2018)*

**JUDGMENT**

1. Vide a **Plaint** dated **18<sup>th</sup> July, 2013**, the 1<sup>st</sup> Respondent sued the Appellants in the lower court seeking general damages, special damages, costs of the suit and compounding interest for injuries sustained in a road accident which occurred on **7<sup>th</sup> March, 2011** at **Mwangoni Taru** area along Mombasa - Voi highway. The 1<sup>st</sup> Respondent blamed the accident on the Appellants negligence, particulars being as set out at paragraph 6 of the **Plaint**.

2. The Appellants filed a **statement of defence** dated **13<sup>th</sup> August, 2013** denying the claim and called for its strict proof. The Appellant went on to assert that if at all the accident occurred the same was caused by or contributed to by the Respondents’ drivers of Motor Vehicles Registration Nos.**KBN 769F** and **KBJ 348L-ZD 0376**.

3. The matter proceeded to full hearing vide a test suit filed at **Kwale Law Courts**, being **Civil Suit No.162 of 2011, Esther Nelima vs Hussein Dairy Limited & 3 Others**, and Judgment was delivered on **30<sup>th</sup> January, 2013**, whereby liability was apportioned at 50% against the Defendants, 25% against the 1<sup>st</sup> & 2<sup>nd</sup> third party’s and 25% against 3<sup>rd</sup> third party. The damages were as follows;

*General damages.....Kshs.1,600,000/=*

*Special damages.....Kshs.793,896/=*

*Costs and Interest thereof from*

*the date of Judgment.*

*Total.....Kshs.2,393896/=*

4. Dissatisfied with the award, the Appellant filed this appeal vide a **Memorandum of Appeal** in which four(4) grounds were set out as follows;

a) *That the assessment and award of general damages for pain and suffering and loss of amenities for the fracture of the femur a Kshs.1,600,000/= is inordinately high as to represent an entirely erroneous estimate.*

b) *That the learned trial Magistrate in assessing damages for pain and suffering and loss of amenities failed to apply the correct principals by leaving out of account, the age of the plaintiff, the length of suffering of the plaintiff and the fact that the plaintiff had fully recovered without any deformity hence arrived at an erroneous estimate of damages, which the plaintiff suffered.*

c) *That the trial Magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principals and judicial precedent and submissions by parties that she made an award for pain and suffering and loss of amenities that was erroneous and inordinately high.*

d) *The learned trial Magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in falling to apply the doctrine of stare decisis and take into account public interest. He thus made an award for pain, suffering, and loss of amenities that was arbitrary, inordinately high and erroneous.*

5. The Appeal was admitted for hearing and directions taken out that the same be canvassed by way of written submissions. Accordingly, the Appellants and the 1<sup>st</sup> Respondent complied and filed their respective submissions on **19<sup>th</sup> May, 2020**.

### **SUBMISSIONS**

6. **Mr. Jengo**, learned counsel for the appellants submitted that the trial Magistrate erred in relying on a decision, which was not for comparable injuries and ended up making an inordinately high award.

7. Counsel further submitted that the trial court misdirected itself when it delivered its Judgment without considering the Appellant's submissions filed on **4<sup>th</sup> December, 2018** before Judgment, and which contained more relevant case law to guide the trial court in assessing damages for pain, suffering, and loss of amenities.

8. **Mr. Macharia**, learned counsel for the 1<sup>st</sup> Respondent submitted that the injuries suffered were as confirmed by **Dr. Hanif** and **Dr. Udayan Seth**. Therefore, the trial court relied on the case of **Richard Otila Mbari –vs- Akamba Public Road Services LTD[2009]**, where the court awarded Kshs.1,500,000/=for comparable injuries over 10 years ago.

9. On the issue of the Appellant's submissions not being considered, counsel argued that the appeal is an attempt to steal a match and have a second bite at the cherry since the trial court had noted that the Appellant's and the third parties submission were not in the file when the matter was listed for mention to confirm filing of submissions on **29<sup>th</sup> November, 2018**.

### **DETERMINATION**

10. Having considered the grounds of appeal, the rival submissions and entire Record of Appeal, it is clear that this appeal is purely on the issue of quantum of damages. Accordingly, the only issue for determination is whether the quantum of damages should be disturbed.

11. On this, I am guided by the principles that were set out in the case of **Kemfro Afria Ltd t/a Meru Express Service Gathogo Kanini – vs- AM Lubia and Olive Lubia (1982-88) 1 KAR 727** and aptly restated by the Court of Appeal in the case of **Arrow Car Ltd –vs- Elijah Shamalla Bimomo & 2 Others (2004) eKLR** that:-

*“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 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 be a wholly erroneous estimate of the damage. ...”*

12. In the present appeal, the Appellants contend that the award was inordinately high and that the trial court disregarded authorities on comparable injuries and compensation and based its assessment on cases where the Plaintiff had suffered more severe injuries.

13. The record shows that soon after the accident on **9<sup>th</sup> March, 2011**, the 1<sup>st</sup> Respondent was admitted and treated at the Mombasa Hospital as an inpatient till **15<sup>th</sup> March, 2011**. That she was later examined by **Doctor Udayan** who prepared a Medical Report in which he concluded that the 1<sup>st</sup> Respondent had suffered contusions of the scalp/jaw & chest and a fracture of the lower 1/3<sup>rd</sup> left femur bone which was operated and fixed with a nail and screws. However, there was no shortening of her leg and she only suffered a permanent incapacity of 5%.

14. The Appellants proposed a sum of Kshs.300,000/- as general damages and their Counsel relied on the case of **Eldoret Steel Mills Ltd – vs- Eliphias Victor Esipila Hcca No.72 of 2006**, where the Claimant suffered sub-trochanteric fracture of the right Femur, and a fracture of the metal-tarsal bones of the right foot with a permanent shortening of the lower part of the limb by two (2) centimetres, a permanent incapacity of 35% and he was awarded Kshs.300,000/= for pain, suffering and loss of amenities in 2013.

15. I have considered the authorities submitted by the Appellants and taken the liberty to look at several others. In the case of **Denshire Muteti Wambua –vs- Kenya Power & Lighting Co. Ltd [2013] eKLR**, the Claimant suffered multiple fractures involving the right femur, left femur and left scaphoid bones; dislocation of left elbow joined associated with a fracture of the radial head; dislocation of left lunate bone and bruises parietal scalp. The Court of Appeal awarded **Kshs.1,500,000** general damages when in fact the fractures in the case were

much more serious.

16. In the case of **Kenya Power Lighting Company Ltd & Another –vs- Zakayo Saitoti Naingola & Another (2008) eKLR**, the Plaintiff who sustained a fracture of the left femur mid shaft, blunt injuries to the lower jaw and left shoulder was awarded Kshs.300,000/= in general damages.

17. In the case of **Bhachu Industries Limited –vs- Peter Kariuki Mutura, NRB HCCA No.503 of 2009 [2015] eKLR**, the Plaintiff suffered an injury on the chest, thigh, and a fractured femur, which was fixed by insertion of a K-nail resulting in him walking with a limping gait. He was awarded Kshs.300,000/- in the year 2015.

18. In assessing damages, the general approach should be that comparable injuries should as far as possible be compensated by comparable awards. However, it must be recalled that no two cases are exactly alike as the Court of Appeal observed in the case of **Stanley Maore –vs- Geoffrey Mwenda, NYR CA Civil Appeal No.147 of 2002 [2004]eKLR** that:

*“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”*

19. The trial court in arriving at the award in the instant case, relied on the case of **Richard Otila Mbari –vs- Akamba Public Road Services(supra)** where the Claimant suffered Injury to the mouth with broken incisor, Blunt head injury with brain concussion, Fracture of left ulna, Compound fracture of the left femur leading to the amputation of the left limb above the knee, which in my view were more serious injuries. Since the 1<sup>st</sup> Respondent did not suffer any amputation, brain concussion and fractures to the ulna, I find that the award of Kshs.1,600,000/= as general damages for pain, suffering and loss of amenities was too high and excessive in the circumstances.

20. Accordingly, I am persuaded that this is a suitable case for this Court to exercise its discretion and interfere with the trial court’s finding on general damages for the reason that the quantum that was awarded was so manifestly excessive so as to warrant such interference. In my view, and considering the rate of inflation, the appeal is allowed to the extent that the award of Kshs.1,600,000/- is set aside and substituted with an award of Kshs.600,000/- as general damages for pain, suffering and loss of amenities.

21. The 1<sup>st</sup> Respondent shall have costs of the suit in the lower court and interest on the reassessed damages from date of Judgment in the lower court. The Appellants are awarded costs of this Appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6<sup>th</sup> DAY OF JULY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**