REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. E002 OF 2020

NAHSON NYABARO NYANDEGA.....APPELLANT

VERSUS

PETER NYAKWEBA OMBOGA.....RESPONDENT

{Being an appeal against the Judgement of Hon. M. C. Nyigei – SRM Nyamira dated and delivered on the 9th day of September 2020 in the original Nyamira Chief Magistrate's Court Civil Case No. 171 of 2017}

JUDGEMENT

This is an appeal against the trial court's award of Kshs. 900,000/= to the respondent as general damages for pain, suffering and loss of amenities. Parties had consented to a contribution ratio of 75%:25% in favour of the respondent and liability is not therefore in issue.

The appellant's case is that the award is inordinately high, that it is not commensurate to the injuries sustained by the respondent and that it does not take into account past awards for similar injuries. Counsel for the appellant submitted that whereas the assessment of damages is discretionary this court is clothed with jurisdiction to interfere with the award if the trial court: -

> **"(i) Took into account an irrelevant factor or,**
>
> **(ii) Left out of account a relevant factor or,**
>
> **(iii) The award is so inordinately high that it must be a wholly erroneous estimate of the damages."**

Counsel asserted that the assessment of damages in this case did not take into account the principle in the case of **Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR** and also the case of **Godfrey Wamalwa Wamba & another v Kyalo Wambua [2018] eKLR t**hat comparable injuries should be compensated by comparable awards. Counsel submitted that the respondent having suffered fractures of the tibia/fibula and soft tissue injuries the award of Kshs. 900,000/= was inordinately high and it ought to be substituted with a more reasonable award of between Kshs. 300,000/= to 400,000/=. In support of this submission Counsel relied on the following cases: -

(a) **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR** where Lady Justice R. E. Aburili reduced an award of Kshs. 600,000 to Kshs. 400,000/= for compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, head injury with cut wound on the nose and blunt chest.

(b) **Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014] eKLR** where the plaintiff sustained comminuted fracture of the tibia and fibula and the court set aside an award of Kshs. 800,000/= and substituted it with an award of Kshs. 400,000.

(c) **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR** where the plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 1,500,000/= and substituted it with an award of Kshs. 300,000/=.

(d) **Amritlal S. Shah Wholesalers Ltd & another v Joshua Ekeno [2012] eKLR** where the plaintiff sustained compound fractures of the tibia and fibula and the appellate court upheld an award of Kshs. 350,000/=.

Counsel urged this court to allow the appeal and award the costs thereof to the appellant.

The appeal is vehemently opposed. Counsel for the respondent submitted that the appeal is unmerited and urged this court to find that the

award was in tandem with the law, the nature of the injuries sustained by the respondent and past awards. Counsel stated that in assessing damages the court must also consider the current value of the shilling and the economy generally and also what he described as the ***"galloping inflation rates".*** He relied on the case of **Telkom Orange Kenya Limited v ISO Minor suing through his next friend & mother JN [2018] eKLR** where the court stated: -

> ***"In addition, the current value of the shilling and the economy has to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661)."***

Counsel contended that the award herein was fair and reasonable and there is no error of principle to warrant this court to interfere. Counsel urged this court to dismiss the appeal with costs to the respondent.

It is not disputed that the injuries sustained by the respondent herein were: -

- **Bruises on the face.**
- **Compound fracture of the right tibia bone.**
- **Cut wound on the right leg.**

The issue for determination in this appeal is whether the award for pain, suffering and loss of amenities was so inordinately high as to represent an entirely erroneous estimate of the damage. The principles which must guide this court in determining this appeal have been well articulated by Counsel for the parties and I need not restate the same. Having considered the injuries suffered by the respondent as reflected in the plaint in and the medical evidence tendered in the court below, and being guided by the afore-stated principles, I am in agreement with Counsel for the appellant that the award is inordinately high. Although in her judgement the trial Magistrate stated that she considered past awards for similar injuries and also the passage of time, she misdirected herself by awarding a sum which was almost three times higher than what was awarded in the cases cited before her and where the injuries were similar to those of the respondent. In the more recent case of **Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR,** Kshs. 400,000/= was awarded to a plaintiff with compound fractures of the tibia/fibula bones on the right leg, deep cut wound and tissue damage on the right leg, blunt chest injury and head injury with cut wound on the nose. Although no case is like the other, it is my finding that the injuries in the case of **Daniel Otieno Owino v Elizabeth Atieno Owuor (supra)** are uncannily similar if not more serious than those in this case. However, it is instructive that the medical evidence adduced in this case, unlike in the case of **Daniel Otieno Owino v Elizabeth Atieno Owuor (supra**), was that the respondent's injuries would take a long time to heal and that the respondent required Kshs. 200,000/= to have the metal implant removed. As a matter of fact, at the time of the trial the respondent had not fully recovered.

In the premises, considering the above and also taking into account that a year has passed since the case of **Daniel Otieno Owino & another v Elizabeth Atieno Owuor (supra)** was decided, I find that an award of Kshs. 650,000/= would not only be more reasonable but it would be adequate to compensate the respondent for pain, suffering and loss of amenities. Special damages were not disputed and they shall remain undisturbed. Accordingly, the judgement of the trial court is set aside and substituted with judgement as follows: -

(a) Liability 75%:25% in favour of the respondent against the appellant.

(b) General damages for pain, suffering and loss of amenities – Kshs. 650,000/=

(c) Special damages – <u>Kshs. 70,950/=</u>

Less 25% contribution – Kshs. 144,190/=

Net Award – <u>Kshs. 576,760/=</u>

(d) Costs in the trial court.

(e) Interest at court rates with that on specials being calculated from the date of filing suit and those on general damages from the date of judgement in the trial court.

On the costs of this appeal, while I am alive to the principle that costs follow the event, the appellant herein has succeeded only partially and I accordingly award him half the costs of the appeal. It is so ordered.

Signed, dated and delivered (Electronically via Microsoft Teams) at Nyamira this 8th day of July 2021.

E. N. MAINA

JUDGE