



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 451 OF 2019

HACO INDUSTRIES (K) LIMITED.....APPELLANT

= VERSUS =

TABITHA NJOKI NJERU.....RESPONDENT

(An Appeal from the Judgement and Decree of Honourable D.W. Mburu (Mr.) Senior

Principal Magistrate delivered on the 12/07/2019 in Milimani CMCC No. 2422 of 2017)

JUDGMENT

This is an appeal by Haco Industries (K) Limited against the judgement and decree of the Honourable D.W. Mburu (Mr.), Senior Principal Magistrate in Milimani CMCC No. 2422 of 2017 delivered on 12th July, 2019. The Appellant was the Defendant while the Respondent was the Plaintiff before the trial court. The firm of Muma Nyagaka & Co. Advocates represents the Appellant whilst the firm of Mang'erere, Bosire & Associates represents the Respondent.

The respondent instituted a suit against the appellant herein for damages arising from the death of the deceased via a plaint dated 9th June 2014 filed before the Chief Magistrate's court. The respondent pleaded that the Appellant was in the possession, management and/or policyholder and in control of Motor Vehicle Registration No. KBP 599E having leased it from Vehicle and Equipment Leasing Limited. The facts are that on or about the 2nd of February, 2015 the respondent was a lawful passenger travelling in Motor Vehicle Registration No. KBP 599E along Thika Road near All Sops, when the defendant by itself, its agents, servants and/or employees so negligently, carelessly and/or recklessly, drove, managed and/or controlled the suit motor vehicle causing an accident as a result of which the respondent sustained severe bodily injuries.

The trial court found the appellant 100% liable for the accident as there was no evidence tabled before court showing that the respondent contributed to the accident. The trial court made the following award:-

Liability	100%
Pain and Suffering	- Kshs. 1,500,000
Future Medical Expenses	-Kshs. 140,000
Special damages	- Kshs. 2,700

Costs and interest at courts' rates awarded to the plaintiff.

Being dissatisfied with the judgement and decree of the subordinate court the appellant has preferred this appeal by way of a Memorandum of Appeal dated 2nd August, 2019 and filed in court on 2nd August, 2019. The four grounds of appeal are: -

- 1. THAT the Learned Trial Magistrate erred in fact and in law by misapprehending the injuries sustained by the Plaintiff/Respondent and thereby proceeded on wrong principles in assessing General Damages for pain and suffering.**
- 2. THAT the Learned Trial Magistrate erred in fact and in law in assessing General Damages for pain and suffering at a sum**

that was manifestly excessive and inordinately high as to constitute an entirely erroneous estimate having regard the nature of the injuries sustained by the Plaintiff/Respondent.

3. THAT the Learned Trial Magistrate erred in fact and in law in assessing damages and failed to apply the trite principles in awarding damages and especially on General Damages and Special Damages and comparable awards for similar injuries.

4. THAT the Learned Magistrate's decision was arrived at in a cursory and perfunctory manner in consideration of the irrelevant factors while leaving out relevant ones and the General Damages awarded to the Plaintiff/Respondent are unjustly excessive and oppressive.

On 1st March, 2021 Hon. Mbogholi Msagha J. (as he then was) admitted the appeal for hearing and on 11th March 2021 this court directed that the appeal be canvassed by way of written submissions. The appellant filed its submissions dated 27th May, 2021 while the respondent's submissions are dated 7th June, 2021.

Appellant's Submissions:

The sole issue for determination as outlined by the appellant is on general damages which it submits was erroneously awarded by the trial court and prays for its reduction. The appellant has relied principles of law set out in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, it was held 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 demeanour of a witness is inconsistent with the evidence in the case."

The appellant further highlighted the principles of interfering with the discretionary power of the trial court on the assessment on quantum as was stated by Lord J.A in **Bashir Ahmed Butt —vs- Uwais Ahmed Khan [1982-881 1 KAR 1** at page 5 as follows;

"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."

Additionally, on the assessment of damages on personal injury claims, the appellant has cited the case of **H. West & Son Ltd -vs-Shepherd (1964) AC. 326** in which Lord Morris of Borth-y-Gest stated as follows;

"... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional"

The appellant submit that this court should interfere with the trial court's assessment of damages for the reason that the same is erroneous having been arrived at upon consideration of inapplicable authorities. It is the appellant's submissions that the case of **Nelson Muraya Murage —vs- Sparr Drilling Company Limited[2016]eKLR**, relied on by the trial court is distinguishable from the present case especially on the injuries and the permanent incapacity. In the Nelson Muraya's case, the plaintiff was awarded Kshs. 2,500,000 for compound fracture and dislocation of the left ankle joint, extensive degloving injuries on the right leg and fractures of the right foot metatarsals and tarsal bones with a permanent disability of 45%. In the present case, the respondent sustained the following injuries;

- i) a compound (open) fractures of the tibia
- ii) Left fibula talus bones
- iii) The big toes was dislocated
- iv) An extensive degloving injury on the right leg in the region of the ankle joint.

The appellant further submits that the injuries were confirmed by Dr. W. M. Wokabi in his medical report dated 7th March, 2017 in which he opines that the open wounds had healed well and that there was stiffness of the left ankle and left big toe and placed her permanent disability at 15%. The appellant has urged this court to re-evaluate the evidence on the injuries and consider the following case law on the assessment of damages;

- i) **Daniel Otieno Owino & Anor -vs- Elizabeth Atieno Owuor [2020] eKLR**, where Aburili J. reduced an award of Kshs. 600,000/ awarded to the plaintiff to Kshs. 400,000/= for Compound fracture of tibia and fibula bones of the right leg, Deep cut wound and tissue damage of the right leg, Head injury with cut wound on the nose, Blunt Chest injuries and soft tissue injury on the lower left leg.

ii) **Aloise Mwangi Kahari -vs- Martin Muitya & Anor [2020] eKLR** where Ngetich J. enhanced an award of Kshs. 320,000/= to Kshs. 500,000/= for Compound fracture of the right tibia and fibula, Severe soft tissue injuries on the face and soft tissue injury on the left shoulder joint.

iii) **Jitan Nagra —vs- RDO [2018]eKLR**, the Respondent sustained a compound fracture of the right distal femur and a fracture of the right 1st 2nd and 3rd metacarpal bone. The trial court's award of Kshs. 1,500,000/= was set aside and substituted with Kshs. 450,000/= by the High Court.

The appellant has submitted that the principles of awarding special damages and specifically the costs of future medical expenses were set out in the case of **Nizar Virani T/A Kisumu Beach Resort -vs- Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269** where it was stated:-

"Whereas a claim for special damages should not only be pleaded but strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done"

The appellant contends that according to the medical report, the implants in situ could be removed at a cost of Kshs. 140,000/= however there is no indication of whether that cost is chargeable in a private or a public hospital. It is on this ground that this court is asked to interfere with the award and reduce the same to Kshs. 40,000/=.

Respondent's submissions;

In opposition to the appeal, the respondent while pointing out the parameters under which an appellate court would interfere with an award of damages made reference to the holding in the case of **Bhashir Ahmed Butt vs Uwais Ahmed (1982-88 KAR)** where the court held that;

"An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It be shown that the judge proceed 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."

The only issue for determination identified by the respondent herein is whether the trial court acted on wrong principles of law in making the award for damages. The Court of Appeal in the case of **Loice Wanjiku Kagunda vs Julius Gachau Mwangi CA 142/2003**, held that;

"We appreciate that the assessment of damages is more like an exercise of Judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles."

Similarly, the respondent has relied on the case of **Gitobu Imanyara & 2 others vs Attorney General [2016]eKLR** where the Court of Appeal held that:-

"Further, 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 judgment 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] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] 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."

The respondent has also made reference to the case of **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, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *ILANGO V. MANYOKA* [1961] E.A. 705, 709, 713; *LUKENYA RANCHING AND FARMING CO-OPERATIVES SOCIETY LTD V. KAVOLOTO* [1970] E.A., 414, 418, 419. This Court follows the same principles."

It is the respondent's submissions and basing on the above cited authorities that the award of Kshs. 1,500,000 as general damages for pain and suffering by the trial court was just, fair and reasonable and took into account the severity of the injuries and the inflation trends. The Respondent submits that the appellant has failed to demonstrate that the trial court applied wrong principles or took extraneous matters into consideration in exercising its discretion. To buttress this position, the respondent has relied on the case of **Simon Taveta vs Mercy Mutitu Njeru [2014]eKLR** that:-

"The content in which the compensation for the Respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past"

Further reliance has been placed on the case of **Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another [2017]eKLR** where the court said that:

"On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See Butler Vs Butler (1984) KLR 225.

In assessing damages in personal injury case, the respondent states that the court should be 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.**

While relying on the authorities below, the respondent has urged this court not to disturb the award but to dismiss the appeal with costs. In **Nelson Muraya Murage Vs Sparr Drilling Company Limited, Nairobi HCCC No. 339/2004** where Njunguna J. awarded the plaintiff Kshs. Two Million, Five Hundred Thousand (Kshs. 2, 500, 000/-) as general damages for compound fracture on the left leg and dislocation of the ankle joint with external metal fixators and skin grafting, degloving injuries on the right foot involving fractures of the metatarsals and tarsal bones with 45% disability. Similarly, in **Christine Mwingina Akonya vs Samuel Kairu Chege Kiambu Hccc No. 12/2016**, where Ngugi J. awarded the Plaintiff Kshs. 4,000,000 as general damages for pain, suffering and loss of amenities. The Plaintiff sustained Fracture of the right femur, fracture of the ribs 3-6, pain in the right side of the chest and the right thigh and persistent pain in the right knee leading to surgery for metal implants removal and knee replacements. Lastly, Korir J. in **Frankline Chilibasi Spii vs Kirangi Liston, Malindi Hccc No. 30/2015**, awarded the plaintiff Kshs. 1, 800, 000/= as general damages for compound and comminuted fracture of the right distal tibia, compound and comminuted fracture of the right distal fibula, fracture of the distal right radius extending to the wrist joint, severe head injuries involving fracture of the left zygomatic arch extending to the lateral wall of the left orbit, haemotoma on the right temporal scalp and soft tissue contusion on the left peri-orbital and front scalp, 8x3cm large friction burns on the left forearm, 6cm long friction burns on the left forearm and large wound on the right leg and foot.

Analysis and Determination:

This being a first appeal, it is indeed the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

Before the trial court the respondent testified that she was involved in a road traffic accident on 2nd February 2015. She was taken to Kenyatta National Hospital and was later admitted at Coptic Hospital. She still had metal implants which required removal at a cost of Kshs.140,000. The appellant's witness, GEORGE MAINA testified that the appellant paid all medical bills. The respondent was an employee of Haco Industries and the accident vehicle had been leased by the company.

A medical report dated 7th March, 2017 listed the injuries suffered by the respondent as:-

- Fracture of left tibia and fibula
- Fracture of the left talus
- Dislocation of the big toe at the metacarpal phalangeal joint.

The respondent informed the Doctor that all the wounds healed after a period of six (6) months. There was extensive degloving injury on the right leg at the ankle region. The doctor opined that the stiffness of the left ankle and left big toe will confer a 15% permanent disability.

The only issue for determination in this appeal is on the award of general damages. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well established guidelines. In the case of **BUTT –V- KHAN (1981-88) KLR 349** the court held as follows:-

“The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.”

The respondent sustained compound fractures of the left tibia and fibula bones which were operated on and fixed with metal plates. She also suffered an extensive degloving injury on the right leg in the region of the ankle joint. Skin grafting of the wound was carried out. These injuries are supported by the P3 form dated 25th February, 2015 which classified the degree of injury as grievous harm. The medical report of Dr. Washington Wokabi dated 7th March, 2017 gives a detailed assessment of the injuries and assessed permanent disability at 15%. The doctor further opined that the metal plate on the left tibia could be removed at a cost of Kshs. 140,000.

The trial court awarded Kshs.1,500,000 general damages for pain and suffering. Part of the trial court judgment reads as follows;

“I have carefully considered the parties’ submissions, relevant case law and inflation. In my view, the sum of Kshs. 1,500,000/= would be appropriate for damages for pain, suffering and loss of amenities. ”

Having found that the trial court addressed itself to the parties’ submissions, the only other question in respect of general damages is whether the award made is inordinately high and oppressive as submitted by the appellant. I am alive to the fact that while no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, it is therefore the duty of the trial court to make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions for purposes of certainty and uniformity. This was the reasoning of Lord Morris of Borth-y-Gest in the case of **West (H) & Son Ltd v Shepherd [1964] AC 326 at 345** as cited by Potter JA in the case of **Tayab v Kinanu[1983] eKLR** where he stated;

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”

The appellant proposed an award of Kshs. 300,000 however there was no authority referred to in support of the proposal. Before the lower court, the respondent proposed an award of Kshs. 2,500,000/= and cited the case of **Nelson Muraya Murage (Supra)** in support. The injuries sustained by the plaintiff in the case cited were quite serious leading to a permanent disability of 45% and therefore is distinguishable from the current one where the permanent disability was assessed at 15%. I find that the court neither agreed or disagreed with the authority referred to by the Respondent nor did it make reference to any authority in support of the award of Kshs. 1,500,000.

The parties submitted additional authorities which I have perused and considered. In comparison, I am not persuaded that the plaintiff/respondent herein sustained as serious injuries as sustained by the plaintiffs in the authorities submitted on behalf of the respondent. The authorities submitted by the applicant are more applicable save for the fact that there was no permanent incapacity taken into account as a result of the injuries sustained and the cost of future medical expenses. In the case of **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** Wakiaga J. upheld an award of Kshs. 700,000 where the appellant had suffered broken femurs bilaterally, two degloving injuries of the right knee and the right ankle and allowed an award of Kshs. 100,000 for future medical expenses. Taking into account the decision by Wakiaga J, and the rate of inflation, I would award the respondent Kshs. 1,000,000. I do find that an award of Kshs.1,500,000 is quite excessive given the injuries suffered by the respondent.

Consequently, the appeal partially succeeds, the award of Kshs. 1,500,000 by the subordinate court is hereby set aside and is substituted with an award of Kshs. 1,000,000/- as general damages. The award of Kshs. 140,000 for future medical expenses was pleaded and supported by the medical report. I will not disturb that award. The respondent shall have costs and interest awarded by the trial court. Parties shall meet their own costs of this appeal.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2021.

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S. CHITEMBWE

JUDGE