



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

*Coram: D. K. Kemei – J*

**CIVIL APPEAL NO. 81 OF 2019**

**HENRY NGILA.....APPELLANT**

**VERSUS**

**HK (minor suing through his father and next friend DKM).....RESPONDENT**

*(Being An Appeal from the Judgement of the Honourable CC Oluoch (CM)*

*At Mavoko Chief Magistrate's Court Delivered on 15/05/2019*

*In Civil Suit No. 434 of 2018)*

**BETWEEN**

**HK (minor suing through his father and next friend DKM).....PLAINTIFF**

**VERSUS**

**HENRY NGILA.....DEFENDANT**

**JUDGEMENT**

1. The appeal herein arises from the judgement of Hon. Oluoch Chief Magistrate in **Mavoko CMCC No. 434 of 2018** dated 15/05/2019 wherein she awarded general damages of Kshs. 700,000/- plus special damages of Kshs 473,000/which were subject to liability of 85:15 in favour of the Respondent to cater for injuries sustained in a road traffic accident which took place on 28/01/2017 involving the Appellant's motor vehicle registration number KCB and the Respondent.

2. The issue of liability had been settled by the parties in the lower court when they entered a consent thereon in the ratio of 85% to 15% in favour of the Respondent. The Appellant raised the following grounds of appeal challenging the award of general damages:

***(i) That the learned magistrate erred in law and in fact in awarding Kshs. 700,000/- as general damages which was not consistent with the injuries sustained as well as submissions of counsels for all parties plus legal precedents.***

***(ii) That the learned magistrate erred in law and in fact in arriving at the said general damages an amount not supported by the evidence on record.***

***(iii) That the learned magistrate erred in law and in fact in considering extraneous issues while arriving at the said general damages or decision contrary to the evidence on record.***

***(iv) That the learned magistrate erred in law and in fact in awarding quantum of damages that is manifestly excessive in the circumstances.***

***(v) That the learned magistrate erred in law and in fact in awarding quantum of damages without having regard to the fact that the Plaintiff had healed completely with no permanent incapacitation.***

*(vi) That the learned magistrate erred in law and in fact in failing to consider the documentary evidence tendered by the Appellant.*

*(vii) That the learned magistrate erred in law and in fact in failing to consider the submissions tendered by the Appellant.*

*(viii) That the learned magistrate erred in law and in fact in applying wrong principles in arriving at the said judgement.*

3. The Appeal was canvassed via written submissions. The Appellant's submissions are dated 5/5/2021 while those of the Respondent are dated 28/06/2021.

4. Learned counsel for the Appellant proposed the sum of Kshs.500,000/- as general damages for pain and suffering and placed reliance on two cases namely: **Julie Alioth Onyango –vs- Daniel Otieno Owino & Another [2020] eKLR** where a sum of Kshs.500,000/- was awarded for injuries involving fracture of tibia –fibula of left legs; **Tirus Mburu Chege & another vs JKN & Another [2018] eKLR** where the sum of Kshs.800,000/- was reduced on appeal to Kshs.500,000/- for fracture on tibia and fibula on both legs, blunt injury on forehead, broken upper right second front tooth, nose bleeding and loss of consciousness. Learned counsel submitted that the trial court considered wrong principles and arrived at an excessive award of general damages which should be interfered with.

5. Learned counsel for the Respondent submitted that the trial court duly considered the injuries sustained and the attendant medical reports and arrived at reasonable award of general damages. It is the view of counsel that the award should not be disturbed and that the appeal be dismissed with costs.

6. I have considered the submissions of both learned counsels as well as the grounds of appeal herein. It is not in dispute that the parties had entered into a consent on liability before the trial court and further that the Respondent's list of documents were admitted without calling the makers. The issue for determination is whether the award of general damages by the trial court was manifestly excessive.

7. As this is a first appeal, the duty of this court is to review and re-evaluate the evidence and reach its own findings and conclusions as to whether or not to uphold the decision of the trial court. (See **Selle & Anor –vs- Associated Motor Boat Co. limited [1968] EA 123**). It is noted that a trial did not take place in the trial court as the parties entered into a consent on liability at 85:15 in favour of the Respondent and that the Respondent's documents were admitted in evidence without calling the makers. Vide paragraph 5 of the amended plaint dated 2/10/2018, the Respondent's injuries comprised of head injuries, bruises on right side of the face, deep cut above the right eye, upper and lower jaw injuries, dental fractures, loss of two upper and three lower teeth, cut wound below the nostrils, blunt injury below the cervical spine, dento alveolar fractures and bruises on the right ankle. The Respondent was examined by Dr. Ndeti vide his report dated 14/06/2018 and who assessed the degree of injury as grievous harm and formed the opinion that the victim sustained dental and soft tissue injuries and that he will require replacement of the missing teeth with dentures. The victim was also examined by doctors Muendo and Wambugu who all formed the opinion that the victim sustained dental and soft tissue injuries. According to Dr. Muendo, the teeth replacement (dentures) would cost the sum of Kshs. 470,000/-. The learned trial magistrate duly considered the rival submissions and the medical reports and arrived at a sum of Kshs. 700,000/- as general damages for pain and suffering. The learned trial magistrate also awarded the sum of Kshs. 470,000/- being future medical expenses for replacement of the lost teeth.

8. The principles which guide appellate courts in interfering with award of damages by lower courts have been laid down in several court decisions. In the case of **Kemfro Africa limited –vs- Lubia & Another (No.2) [1987] KLR 30**, Kneller JA held as follows:-

*“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 for 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 wholly erroneous estimate of the damage”.*

Also in the case of Catholic Diocese of **Kisumu –vs- Sophia Achieng Tete – Civil Appeal No. 284 of 2001 [2004] 2KLR 55** the court of Appeal held as follows:-

*“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court applied only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so inordinately high or low as to represented and entirely erroneous estimate.”*

The same Court of Appeal in the case of **Sheikh Mustag Hassan –vs- Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457** held as follows:

*“The Appellate court is only entitled to increase an award of damages by the High court if it is so inordinately low that it represents an entirely erroneous estimate of the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect..... A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that the other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..... The judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country”.*

9. Based on the above principles, I need to consider whether the award of the trial court should be interfered with. Indeed, the award was in the discretion of the learned trial magistrate. It is not noted that the trial court was presented with a set of two cases namely **Ahmed Mzee Famau T/A Najaa Coach limited & another –vs- Veronicah Ngii Muia [2017] eKLR** where the plaintiff had sustained a fracture of the lower jaw (right mandible), deep cut on left forearm, blunt injuries on right ear and blunt injury on chest and was awarded several damages of Kshs.500,000/- **Kweri Peter & 2 others –vs- Ann Wanjiku Maina [2017] eKLR** where the plaintiff suffered skeletal injuries and loss of two teeth (upper incisor) and was awarded Kshs. 600,000/-. The learned magistrate relied on the latter case and pointed out that the Respondent herein had lost five teeth and hence should get slightly higher award than the Kshs.600,000/-. The Respondent is noted to have sustained several injuries namely deep cut wound above the right eye, bruises on right side of the face, cut wound below the nostrils, blunt injury to the jaws, missing 2 upper and 3 lower teeth, subluxation of the following teeth: 21, 22, 31, 41, 42 and 43, blunt injury to cervical spine, dental alveolar fractures and bruises on right ankle. All the doctors who examined the Respondent confirmed that he sustained grievous harm and that one of them opined that the missing teeth would require replacement at a cost of Kshs. 470,000/-. Indeed, the injuries were severe and hence I find the award by the learned trial magistrate was not manifestly excessive in the circumstances. It is noted that the Respondent was aged about ten years at the time of the incident and hence the injuries must have had an effect on his growth. His dental formula was severely affected and has to do with dentures for the lost teeth and this might impact on him psychologically. I am thus unable to find fault with the finding of the learned magistrate as she did not consider wrong principles in arriving at the award of Kshs. 700,000/-. The authority relied upon was sound in that the effects of inflation since 2017 would definitely lead to an award higher than the Kshs. 600,000/- awarded in 2017. Hence the award by the learned magistrate must be upheld.

10. As regards the aspect of special damages, I note that the appeal herein only targeted the general damages and therefore the said special damages as awarded by the trial court shall remain intact.

11. In the result it is my finding that the appeal lacks merit. The same is dismissed with cost.

It is so ordered.

**DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.**

**D. K. KEMEI**

**JUDGE**

**DELIVERED AT MACHAKOS THIS 14TH DAY OF OCTOBER, 2021.**

**G. V. ODUNGA**

**JUDGE**