

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 25 OF 2017

GEORGE OTIENO.....-APPELLANT

=VRS=

OA (Minor Suing thro' mother & next friend

LAM).....RESPONDENT

Being an appeal against the Judgement of Hon. C. Obulutsa – CM Eldoret dated and delivered on the 3rd day of February 2017 in the original Eldoret Chief Magistrate's Court Civil Case No. 348 of 2015

JUDGEMENT

The background of this appeal is that on 18th April 2015 the respondent then a minor was lawfully travelling in motor vehicle KAR 670B when the same was involved in an accident at a place called Sirikwa Quarry along Eldoret – Kitale Road. Through his next friend and mother, the respondent sued the owner of the motor vehicle for compensation for personal injuries which he particularised in the plaint as **“scalp swollen and tender and severe pains incurred during and after the injury.”** Upon hearing and considering the evidence the trial Magistrate awarded the respondent a sum of Kshs. 250,000/= as general damages for pain, suffering and loss of amenities and Kshs. 3,522/= special damages.

The appellant was aggrieved by the judgement hence this appeal. My reading of the memorandum of appeal and the submissions of learned Counsel for the appellant however reveals that the appeal concerns the quantum of general damages only. Liability is not contested. The gravamen of the appeal is that the damages ought not to have been awarded because firstly the respondent's evidence in regard to the injuries he sustained was at variance with the injuries pleaded and also those in the medical report produced in evidence. Secondly, that the damages were excessive taking into account the nature of injuries sustained and comparable cases.

The respondent opposed the appeal and submitted that the award was just and adequate and therefore the appeal lacked merit.

I will not make any finding on the issue of liability as the same was not challenged. In regard to the award of general damages, Learned Counsel for the appellant correctly articulated the principles that ought to guide this court in considering the appeal and I need not reproduce them here. Suffice it to state that I have considered the evidence in the lower court so as to arrive at my own independent conclusion.

From the record the respondent did not testify as only the doctor (Pw1) and the respondent's guardian (Pw2) were called as witnesses. Both testified that the respondent sustained a cut on the head. With due respect, Counsel for the appellant misapprehended the evidence by stating that the respondent testified that he suffered injuries in the mouth and knee. That ground of appeal therefore fails.

On the quantum of the damages, I have considered the authorities cited by both sides at the trial court and in this appeal and I am persuaded that the sum awarded was excessive. An award of Kshs. 60,000/= would have sufficed for a cut on the scalp which was treated with analgesics. Accordingly, the appeal is allowed and the award of Kshs. 250,000/= is set aside and substituted with one for Kshs. 60,000/=. The special damages shall remain undisturbed.

In his submissions, Learned Counsel for the appellant raised the issue of costs. That ground was not raised in the memorandum of appeal and this court properly ought not to deal with it. I am however forced to find that as costs are in the discretion of the court and follow the event, the trial Magistrate properly exercised her discretion in awarding costs to the respondent. That shall remain the position save that as the appellant has succeeded in the appeal, he shall get the costs of the appeal. It is so ordered.

Signed and dated this 21st day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 5th day of February 2020.

H. A. OMONDI

JUDGE