REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 28 OF 2017

STANLEY KIRWA ARUSEI.....APPELLANT

- VRS -

JOHN MKWALAFU WANJOFU.....RESPONDENT

Being an appeal against the Judgement of Hon. C. Obulutsa – CM Eldoret dated and delivered

on the 21st day of April 2017 in the original Eldoret Chief Magistrate's Court

Civil Case No. 245 of 2016

JUDGEMENT

The respondent filed a claim against the appellant vide Eldoret CMCC No. 245 of 2016 for compensation for personal injuries sustained in an accident alleged to have occurred along the Eldoret – Webuye road on 7th January 2016 and was awarded damages as follows: -

1. **General damages – Kshs. 1,800,000/=**
2. **Special damages – Kshs. 6,910/=**

Total – Kshs. 1,846,910/=

The damages were then subjected to the agreed ratio of contribution leaving the respondent with a net award of Kshs. 1,477,528/=. This appeal is on the quantum of general damages only and the appellant's contention is that the same was excessive; that it was not consistent with the injuries sustained by the respondent and that it was also not consistent with awards in cases where the plaintiffs had suffered similar injuries.

Relying on the case of **Jitan Nagia v Abidnego Nyandusi Oigo [2018] eKLR**, Counsel for the appellant submitted that an award of Kshs. 200,000/= would have been adequate. Counsel submitted that in proposing the said sum he had taken inflation and effluxion of time into account.

The respondent however opposed the appeal and submitted that the award was reasonable and commensurate with the injuries suffered and also consistent with past awards. Counsel relied on the following cases: -

1. **NBI HCCA 134 of 1998 – Texcal House Service Station Ltd & another v Timo Kalevi Jappinen & Another.**
2. **Mombasa HCCC No. 3 of 1993 – Humprey Kango v KPA.**

Counsel contended that the plaintiffs in those cases sustained injuries very similar to those of the respondent herein and were awarded Kshs. 1,750,000/= and Kshs. 1,500,000/= respectively. Counsel contended that the respondent herein suffered 10% permanent disability an indication that his injuries were serious. On the special damages, Counsel submitted that the same were specifically pleaded and strictly proved by way of receipts. He urged this court to dismiss the appeal with costs to the respondent.

This court can interfere with an award of the court below only where it is demonstrated that the trial court took into consideration an irrelevant fact or left out a relevant one, or that the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage or that a wrong principle was applied – **(see Butt v Khan 1[1981] KLR 349).**

It was also observed in **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR** that: -

> **"The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries."**

The respondent who is stated to have been sixty years old at the time of the accident sustained the following injuries: -

q. Blunt injury with bruises to the right hand.

2. Fracture of the left femur proximal.

3. Open segmental fracture of the right tibia/fibular (proximal with knee dislocation).

In the doctor's opinion and prognosis, the respondent sustained soft tissue and bony injuries and he would develop early osteoarthritis of the right knee. He assessed the respondent's permanent disability at 10%.

Counsel for the respondent supplied this court with case summaries from which the court cannot accurately determine the nature of the injuries. However, from the said summaries the plaintiffs there sustained much more severe injuries. In the case of **Texcal House Service Station Ltd & another v Timo Kalevi Jappinen & Another (supra)** the plaintiff had to undergo 5 operations and was severely psychologically scarred. Permanent incapacity was assessed at 35%. His injuries and their effect on his life are in no way comparable to those of the respondent. Similarly, in **Humphrey Kaingu v KPTA (supra)** the plaintiff was hospitalized for 6 months and had to under operations 3 times. The fracture to the femur healed with deformity, left foot was deformed by osteoarthritis and changes in the dislocated ankle joint. In his case permanent disability was assessed at 40%.

In the case of the respondent, osteoarthritis was only an expected eventuality but it had not occurred and 10% permanent disability was also just but an estimate. It is noteworthy that at the time of discharge his condition was indicated as good. The trial Magistrate therefore misdirected himself in basing the award on those two cases where the injuries were much more severe and this court is justified in interfering with the award. In the case of **Jitan Nagia v Abidnego Nyandusi Oigo [2018] eKLR** decided on 12th October 2018 where the respondent sustained almost identical injuries to those of the respondent herein, the respondent's award was reduced to Kshs. 450,000/=. Taking inflation into account I would reduce the respondent's award to Kshs. 500,000/= (five hundred thousand shillings only). The special damages were not contested and they are upheld. Both shall be subject to the agreed contribution. The appellant shall get the costs of this appeal.

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