



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 297 OF 2019

DANIEL KAVEKE KISIVA.....1ST APPELLANT

TAHA MOIZ MOHAMEDALI.....2ND APPELLANT

-VERSUS-

LEONARD KAMAU MBUGUA.....RESPONDENT

(Being an appeal against the judgment and decree of Hon. D.W Mburu (Mr.) (Senior Principal Magistrate) delivered on 10th May, 2019 in MILIMANI CMCC NO. 2598 OF 2017

JUDGMENT

1. The respondent in the present instance instituted a suit against the 1st and 2nd appellants by way of the plaint dated 12th April, 2017 and amended on 27th April, 2018 in which he sought reliefs in the nature of general damages, special damages in the sum of Kshs.109,775/ and future medical expenses in the sum of Kshs.200,000/ together with costs of the suit and interest thereon. The 1st appellant was sued in his capacity as the driver of motor vehicle registration number KCC 008H (“*the subject motor vehicle*”) while the 2nd appellant was enjoined in the suit as the registered owner of the subject motor vehicle at all material time.

2. The respondent pleaded in his plaint that sometime on or about the 18th day of February, 2017 he was lawfully walking along Waiyaki Way near Nuclear, when the 1st appellant while negligently/recklessly driving the subject motor vehicle caused it to lose control, veer off the road and onto the pedestrian track, knocking down the respondent and leaving him with serious injuries.

3. The respondent set out the particulars of negligence and the particulars of his injuries in the plaint.

4. The 1st and 2nd appellants entered appearance and put in their joint statement of defence dated 18th August, 2017 and amended on 7th May, 2018 to deny the respondent’s claim.

5. When the suit came up for hearing before the trial court the respondent relied on the evidence of two (2) witnesses while the appellants closed their case without calling any evidence. The parties thereafter filed and exchanged written submissions.

6. The trial court finally entered judgment in favour of the respondent in the manner hereunder:

a. Liability	100%
b. General damages	Kshs.800,000/
c. Future medical expenses	Kshs.200,000/
d. Special damages	Kshs.109,775/
TOTAL	Kshs.1,109,775/

7. The appellants have now moved this court by way of an appeal against the aforesaid judgment by putting forward the following grounds of appeal in their memorandum of appeal dated 3rd June, 2019:

i. THAT the learned trial magistrate erred in law and fact and thereby awarded manifestly excessive quantum of damages payable by the appellants to the respondent.

ii. THAT the learned trial magistrate erred in law and in fact by basing his decision on irrelevant matters and failing to base his said decision on the facts and evidence on record and thereby making an award in general damages that is not supported by law.

8. This court called upon the parties to put in written submissions on the appeal. In their submissions dated 21st January, 2020 the appellants argued that the award of Kshs.800,000/ made on general damages for pain and suffering and loss of amenities was inordinately high and not commensurate to the injuries suffered by the respondent. It was the proposal of the appellants that this court substitutes the above award with a more suitable award of Kshs.400,000/, while citing the following cases:

a. Tirus Mburu Chege & another v J K N (minor suing through the next friend and mother D W N & another [2018] eKLR where an award of Kshs.800,000/ was on appeal substituted with one of Kshs.500,000/ in the instance of a plaintiff who had sustained fractures of the tibia and fibula on both legs, blunt injury on the forehead, broken upper right second front tooth, nose bleeding and consistent loss of consciousness.

b. Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR: in this case, the plaintiff had sustained cut wound on the head with bleeding, loss of consciousness, tenderness on the anterior chest, cut wound on right leg below the knee without fracture, and a fracture of the left tibia and fibula. She was awarded a sum of Kshs.300,000/ on general damages and challenged the award on appeal by stating that it was inordinately low. The High Court in the end upheld the award on appeal.

9. It was also the appellants' submission that the future medical expenses awarded by the trial court were not based on the facts and evidence on record. According to the appellants, the medical report by Dr. Ashwin Madhiwala ought to have been considered since it stated that the respondent's injuries have since healed and the removal of the implants in the future will cost approximately Kshs.100,000/ to Kshs.125,000/. On this basis, the appellants urged this court to interfere with the award of Kshs.200,000/ made under this head and substitute it with a sum of Kshs.100,000/.

10. In reply, the respondent through his submissions dated 5th February, 2020 stood in support of the trial court's award and contended that the trial court took into account all the relevant facts and evidence placed before it and having done so, correctly exercised its discretion in awarding damages.

11. According to the respondent, the appellants have fallen short of satisfying any of the principles for interfering with the discretion of a trial court as pronounced in the case of **Peter Mburu Echaria v Priscilla Njeri Echaria [2001] eKLR** in the following order:

“(1) that in the exercise of the discretion the single judge took into account irrelevant matters;

(2) that he did not take into account a relevant factor;

(3) that he misapprehended the law applicable to the situation; or

(4) that the decision is plainly wrong.”

12. The respondent similarly cited the renowned case of **Mbogo v Shah [1968] EA 93** where the Court of Appeal for Eastern Africa reaffirmed the above principles. In the end, the respondent was of the view that the appeal warrants an automatic dismissal.

13. I have considered the contending submissions on appeal alongside the authorities cited. I have equally re-evaluated the evidence placed before the trial court. For clarity purposes, the appeal lies against quantum, more specifically assessment made on general damages and future medical expenses.

14. That said, the courts have held time and time again that an appellate court can only interfere with an award of damages made by a trial court in certain specific instances which were laid out in the authority of **Kemfro Africa Ltd t/a Meru Express Services 1976 & Another [1976] v Lubia & Another (No. 2) [1985] eKLR** and reaffirmed by the Court of Appeal in **Catholic Diocese of Kisumu v Sophia Achieng Tete-Civil Appeal No. 284 of 2001 [2004] 2 KLR 55:**

a. Where an irrelevant factor was taken into account.

b. Where a relevant factor was disregarded.

c. Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

15. Taking the above principles into account, I will now address the two (2) grounds of appeal under the relevant heads hereunder.

a. General damages for pain and suffering and loss of amenities

16. To begin with, the following are the injuries which were pleaded by the respondent:

- Fracture-left tibia/fibula
- Deep cut wound-right parietal scalp
- Deep cut wound-right temple
- Deep cut wound-lower lip
- Blunt injuries-shoulder and back
- Bruises and cut-right hand

17. Going by the evidence on record, the respondent was examined by two (2) medical professionals at separate times resulting in two (2) medical reports. The first medical report dated 24th March, 2017 was prepared by Dr. G. K. Mwaura and was produced as P. Exh 10 (a). Therein, the doctor confirmed the injuries as pleaded and stated that following the accident, the respondent was admitted at P.C.E.A Kikuyu Hospital for a period of 2 weeks. According to this medical report, at the time of examination, the healing on the left leg was incomplete and the respondent was using crutches, while also experiencing pain on his shoulder, back and chest upon exertion. The doctor categorized the injuries as grievous harm in nature.

18. In the second medical report dated 19th October, 2017 and produced as P. Exh 11, Dr. Ashwin Madhiwala noted relatively similar injuries as those listed hereinabove and further noted progressive healing of the respondent's injuries. The good doctor termed the injuries as "MAIM"..

19. In his submissions, the respondent suggested an award of Kshs.1,200,000/ while referring the trial court to the case of **Kornelius Kweya Ebichet v C & P Shoe Industries Ltd [2008] eKLR** where the court awarded a sum of Kshs.1,000,000/ to a plaintiff with blunt trauma to the forehead and compound fracture left tibia and fibula bones. The appellants on their part maintained a proposed award of Kshs.400,000/ and quoted the case of **Francis Ochieng & another v Alice Kajimba [2015] eKLR** where the court awarded a sum of Kshs.350,000/ for head injuries, sub-conjunctival haemorrhage and periorbital scymosis on both eyes; and **Thomas Muendo Kimilu v Anne Maina & 2 others [2008] eKLR** in which the court awarded Kshs.700,000/ in the instance of fracture injuries and partial amputation of the left index finger.

20. In delivering his judgment, the learned trial magistrate noted the medical evidence and found an award of Kshs.800,000/ to be adequate.

21. From my re-evaluation of the evidence, I established that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made.

22. Upon studying the above-cited authority relied upon by the respondent, I noted that the injuries therein were more severe in nature and that there was a finding of permanent incapacity. Concerning the authorities cited by the appellants, the case of **Francis Ochieng & another (supra)** entailed less serious injuries, while the case of **Thomas Muendo Kimilu (supra)** was decided over a decade ago.

23. I took the step of considering comparable awards previously made and relied on the following cases:

a. Philip Musyoka Mutua v Leonard Kyalo Mutisya [2018] eKLR: here, the High Court on appeal substituted an award of Kshs.400,000/ with one of Kshs.300,000/ made to a plaintiff who had suffered closed fracture injury, Bruising on the forehead and left hand, and cut wound on the face.

b. Blue Horizon Travel Co Ltd v Kenneth Njoroge [2020] eKLR where an award of Kshs.650,000/ was replaced with that of Kshs.400,000/ in the instance of a plaintiff who had suffered various bruises, cut wounds and fracture injuries, all of which were termed soft tissue injuries.

24. In view of the foregoing, I am persuaded that the award made by the learned trial magistrate fell on the higher side in comparison to comparable awards, hence there is need for interference. Upon considering the damages awarded in the authorities I have just cited, I find an award of Kshs.650,000/ to be reasonable, as acknowledged in the case of **Gladys Lyaka Mwombe v Francis Namatsi & 2 others [2019] eKLR** cited by the appellants, where the court held that injuries of a nature similar to those sustained in the present instance typically warrant awards of between Kshs.300,000/ and Kshs.500,000/.

b. Future medical expenses.

25. This head was addressed in the medical evidence, with Dr. G. K. Mwaura estimating the cost for removal of the implants lodged in the respondent's body at Kshs.200,000/ while Dr. Ashwin Madhiwala estimated the cost at between Kshs.100,000/ and Kshs.125,000/. The learned trial magistrate in his decision held that the respondent had proved the claim for Kshs.200,000/ and went ahead to award the said sum.

26. Upon reconsidering the evidence which was tendered before the trial court, I am satisfied that the learned trial magistrate's award was guided by the medical report by Dr. G.K. Mwaura hence there is no basis on which I would be persuaded to interfere with his discretion notwithstanding the fact that the 2nd medical report arrived at a different approximation.

27. In the end therefore, the appeal succeeds to the extent of the award made under the head of pain and suffering and loss of amenities,

which award I find warrants interference in the manner set out hereinabove. It therefore follows that the learned trial magistrate's award of Kshs.800,000/ under the mentioned head is hereby set aside and substituted with an award of Kshs.650,000/.

28. For the avoidance of doubt, the judgment on appeal is as follows:

a. General damages	Kshs.650,000/
e. Future medical expenses	Kshs.200,000/
f. Special damages	Kshs.109,775/
TOTAL	Kshs.959,775/

29. The respondent shall have interest on special damages at court rates from the date of filing suit and interest on general damages at court rates from the date of this judgment until payment in full.

Each party shall meet its own costs of the appeal.

Dated, Signed and Delivered at Nairobi this 7TH day of MAY, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the 1st and 2nd Appellants

..... for the Respondent