



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 138 OF 2018

GA (Minor suing thro' her father and next friend

BZ.....APPELLANT

-VERSUS-

PAUL MUTHIKU.....RESPONDENT

J U D G M E N T

1. The suit culminating in the judgment subject in this appeal was commenced by BZ who sued as a father and next friend to GA, a minor. The suit arose from a road traffic accident that occurred on 26th June, 2012 along the road to Mikindani at a place Known as Kongowea Ndogo. In the Plaintiff dated 30th January, 2014, the Plaintiff claimed for Special damages of Kshs.2000/=, General damages and the cost of the suit.
2. During the trial parties recorded consent on liability in the ration of 85%:15% in favour of the Plaintiff and proceeded to let the court assess quantum of damages payable. In a reserved judgment delivered by the trial court on 20th July, 2018 the plaintiff was awarded Kshs. 300,000/= for General damages, Kshs.2,000/= for Special Damages and Kshs.4,000/= for what the court called other incidental costs.
3. The Appellant was dissatisfied the court award on quantum and as such preferred this appeal and set out the following grounds: -
 - a) THAT the learned trial magistrate erred in law and in fact in awarding the Appellant general damages that were inordinately and manifestly low taking into account the severity and real extent of the injuries sustained by the Appellant herein.
 - b) THAT the learned trial magistrate erred in law and in fact in disregarding the medical evidence submitted by the Appellant thereby arriving at an erroneous decision in both law and fact.
 - c) THAT the learned trial magistrate erred in law and in fact and misdirected herself in finding that as at the time of writing the Judgment, the Appellant had not filed his submissions whereas the same were filed on the 14th June, 2018 and confirmed as duly filed on the 9th July, 2018.
 - d) THAT the learned trial magistrate erred in law and in fact in disregarding and or failing to consider at all the Appellant's written submissions and the authority relied on by the Appellant thereby arriving at an erroneous decision.
 - e) THAT the learned trial magistrate erred in law and in fact in taking into account only the Respondent's written submissions, which were filed on the same day the Judgment was written and signed that is, on the 10th July 2018.
4. When the appeal came up for hearing on 2nd May, 2019, the court, with the consent of the parties, directed that the Appeal shall be disposed of by way of written submissions and a date was reserved for highlighting the same. On 23rd January, 2020 Ms Azei appeared for the Appellant whilst Ms Julu was for the Respondent when the respect submissions were highlighted. It is such submissions this court shall accordingly evaluate the in the context of the record at trial and come with is determination it being appreciated that this is a first appeal and the court proceeds by way of a rehearing

Submissions by the Appellant

5. It was submitted for the Appellant that the trial court acted on a wrong principle of law by leaving out some relevant factors and further misapprehending the facts thereby awarding inordinately low damages. As such, the court did not exercise its discretion in assessment

of damages judiciously.

6. It was further argued that the trial magistrate failed to factor in principles which guide the court in awarding damages; for example, she failed to appreciate that comparable injuries should attract comparable awards. Further that the trial magistrate erroneously held that the Appellant's submissions were not on record when she wrote her final Judgment yet the Appellant had filed his submissions on 14th June, 2019. According to the Appellant, his submissions bear a court stamp and receipt of payment of the requisite court fees attached thereof. It is sought that this court does find that the submissions were properly filed.

7. It is the Appellant's case that he had proposed an award of Kshs. 2,000,000/= for the injuries sustained and seeks this court to revise the award of Kshs. 300,000/= by the trial court upwards.

Respondent's submissions

8. For the Respondent, submissions were offered to the effect that the Appellant had failed to establish how the award of Kshs. 300,000/=, as general damages, was inordinately low considering that there were decided cases where similar award was considered fair and justified for the same extent and comparable of injuries as suffered by the Appellant. According to the Respondent even though it is argued that the trial magistrate failed to consider the Appellant's submissions, the learned magistrate extensively gave the reasons for her Judgment.

9. To the Respondent, the trial magistrate exercised her discretion judiciously in making an award of Kshs. 300,000/= and that the Appellant had not laid any basis for this court to interfere with that discretion. It was therefore urged that the appeal lacks merit and should be dismissed with costs to the Respondent.

Analysis and Determination

a) I have perused the court's proceedings at the lower court as well as the judgment. I have equally perused the Memorandum of Appeal together with the parties' submissions herein. I am persuaded that there can only be one issue for determination. I consider that single issue to be *whether the trial court acted on wrong principles of law in making the award of damages and thereby invited this court's mandate to interfere with the award thereby made.*

10. The Appeal being only a challenge on quantum of damages, liability having been agreed on the ratio of 85%:15% in favour of the Appellant, as a matter of law, the court proceeds from the appreciation that assessment of damages is at the discretion of the trial court. Therefore, the Appellate Court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages.

11. The Court of Appeal in **Bashir Ahmed Butt vs. Uwais Ahmed**

Khan (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it 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 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...'

12. When an appellate court would interfere with an award is confined

to the extreme cases justifying interference with judicial discretion. The court ought not to pursue replacing its discretion for that of the trial court. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR** the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

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.*

5) *The awards should not be inordinately low or high.*

13. From the record at trial, the Appellant herein sustained the following injuries as per the medical report prepared and produced by Dr. Adede as P Exh 1:- **Multiple fractures of; (1) frontal left orbital roof.(comminuted) (2) right temporal bones(petrous) (3) Bleeding in the skull airspaces (haemosinus), cut on the head(frontal) and cut on the chin.** The Doctor reached a conclusion that the Appellant would satisfactorily recover since she was of tender age.

14. In her assessment and award of general damages, the trial magistrate found that the Plaintiff had not filed his submissions and considered the Defendant's suggestion that Kshs. 200,000/= would suffice for general damages. This court has gone through the lower court

record with scrupulous attention and indeed confirmed that the Appellant filed his submissions on 14th June, 2018 thus they were properly on record. The impugned Judgment on the other hand was delivered on 20th July, 2018. It is therefore true that the trial magistrate did not consider the appellants' submissions in writing of the Judgment now challenged. That however cannot be the sole reason to interfere with a judicial discretion. The duty remains upon the appellant to prove that in arriving at the award there was consideration of irrelevant matters of failure to consider relevant matter and short of that, that the award as made demonstrate an outright error in the duty to assess damages.

15. In the submissions before the trial court, Appellant had proposed an award of Kshs.2,000,000/= for general damages. He relied on the case of **Terry Kanyua Marangu-vs-Wells Fargo Limited Civil Suit No. 18 of 2013** wherein the awarded Kshs.3,500,000/= general damages for the following injuries;- (a) **Head injury and unconsciousness with Glasgow coma scale of 9/15** (b) **Cut wound on the left upper lip** (c) **loss of two left incisors** (d) **cut wound on left wrist joint with multiple laceration on the distal surface of the hand** (e) **Depressed fracture on left frontal region which healed with obvious deformity** (f) **Peli-Orbital left eye swelling with ecchymosis** (g) **Cut wound on right lower limb pre-tibia region.** further reliance was placed on the decision in **Sospine Co. Ltd & another -vs- Daniel Nganga Kanyi Nakuru Civil Appeal No. 215 of 2001** wherein the court assessed general damages at Kshs.2,000,000/= because the plaintiff had suffered Compound depressed skull fracture of the right frontal bone. It is worth noting that the plaintiff in that case was hospitalized for 4^{1/2} months and underwent an operation for the elevation of the fractured bone.

16. On the other hand, the respondent had suggested for an award of Kshs.200,000/= general damages. He relied on the case of **Francis Ochieng & Another -vs-Alice Kajimba [2015] eKLR**. The Plaintiff in that case **is alleged to have suffered severe head injuries with cerebral contusion, massive haematoma on the right parietal head and subconjunctival haematoma of the right eye.** The court awarded Kshs.280,000/=. The Respondent further relied on **Simon Muchemi Atako & Another -vs-Gordon Osore [2013]eKLR** wherein the court awarded Kshs.120,000/= to a plaintiff who suffered **Blunt Chest Injury, Cut Wound on the left leg, bruises on the knee, Blunt injury to the left shoulder, Cut wound above the right elbow, cut wound over the occipital part of the head and cut wound on the palms of the left thumb.**

17. From the evidence adduced in court, it is not in dispute as to whether the Appellant sustained the injuries listed on the Medical report produced as exhibit 1. In assessing general damages, courts must have presence of mind to ascertain the sum of general damages that other courts and especially appellate courts would ordinarily award in respect of a particular injury. A plaintiff's compensation ought to be comparable to awards by other courts for comparable injuries. In view of the aforesaid, a court must therefore be guided by precedents.

18. This court therefore has reviewed the decisions cited by both parties with a view to establishing whether or not the Learned Trial Magistrate applied the correct principles in awarding the Respondent general damages for pain, suffering and loss of amenities.

19. In the case of **Kyoga Hauliers (K) & another v Philip Mahiu Nyingi [2017] eKLR** the court therein awarded the plaintiff therein a sum of Kshs.1,000,000/= general damages for pain, suffering and loss of amenities for having sustained **Comminuted depressed fracture of the skull at the occipital bone, Intracerebral haemotomia right occipital area, Deep cut wound on the right occipital region, Soft tissue injuries right ankle joint and Severe soft tissue right side of chest.**

20. In the case of **Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR** ,on appeal, the court allowed a sum of Kshs 700,000/= general damages for pain, suffering and loss of amenities where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

21. In the last case and a more recent case of **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** the court observed that

Having considered the decisions cited, I find that the trial magistrate erred in not considering the nature and extent of the injuries in light of the decision relied on to reach the award of Kshs. 950,00/-. The child sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future. The child did not suffer any permanent disability. Consequently, I set aside the judgment of the trial court and substitute it with an award of Kshs. 500,000/- as general damages.

22. On the forgoing I note that the authorities relied by the Appellants had more serious injuries than in the present case. Conversely, the Respondent relied on authorities where the claimants suffered pure soft tissue injuries and ignored the fact that the Appellant herein had suffered multiple scalp Fracture. The authorities relied on did not assist this court in establishing similar injuries as they did not take into account the principle on similar injuries for similar awards. Bearing in mind the nature of injuries that were sustained by the Appellant herein, the sum of Kshs.300,000/= general damages for pain and suffering and loss of amenities was clearly and manifestly low. I have come to the conclusion that the award made fails the test that an award of general damages even though never intended to enrich must serve the purpose of a just compensation. It is just compensation when it is comparable to awards for similar injuries. Where there is disparity showing glaringly different awards for comparable injuries the court risks being seen as failing to apply the law equally

23. It is therefore the considered view of this court that the award of Kshs 300,000 was on the lower side and therefore substitute therefore an award of Kshs.500,000/= general damages for pain and suffering and loss of amenities which I consider to fall within the bracket and requirement that comparable awards needs to meet comparable injuries. I also consider that sum to be the fair and reasonable compensation in the circumstances of the case.

24. For reasons I have set out above, I allow the appeal, set aside the award of general damages by the subordinate court and substitute therefor an award for general damages in the sum of Kshs. 500,000/=. The awards shall be subject to agreed contribution. Costs of the appeal are also awarded to the Appellant being the successful party.

25. It is so ordered.

Dated, signed and delivered at Mombasa this 15th Day of May, 2020

P. J O. OTIENO

JUDGE