



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 233 OF 2018**

**HANISH SHAH.....APPELLANT**

**-VERSUS-**

**SHERRY KYANG'U..... RESPONDENT**

*(Being an appeal from the Judgment in respect of quantum of Hon. Senior Resident Magistrate Mr. D. O. Mbeja delivered on the 8<sup>th</sup> day of May, 2018 in Nairobi, Milimani CMCC no. 2691 of 2015)*

**JUDGEMENT**

- 1) Sherry Kyang'u, the respondent herein, was knocked down by motor vehicle registration no. KAR 896H, while lawfully walking along Eastern By Pass Embakasi at Transami Stage, Nairobi on 15<sup>th</sup> February 2013.
- 2) The aforesaid motor vehicle at the time was owned by **Shah Hanish**, the appellant herein.
- 3) As a result of the aforesaid accident the respondent suffered the following injuries:
  - *Trauma of the lumbo-sacral spine (lower back)*
  - *Trauma for the cervical spine neck*
  - *Trauma of the abdomen*
  - *Trauma to the head, occipital areas*
  - *Trauma to the right leg posterior aspect.*
  - *Blood loss.*
- 4) The respondent filed a compensatory suit against the appellant before the Chief Magistrate's Court and the appellant filed a defence to deny the respondent's claim.
- 5) On 28<sup>th</sup> day of August 2017, a consent order was recorded apportioning liability in the ratio of 85:15 in favour of the respondent. The parties thereafter filed written submissions on quantum.
- 6) On 8<sup>th</sup> May 2018, **Hon. D. O. Mbeja**, learned Senior Resident Magistrate delivered a judgment awarding the respondent a sum of ksh.900,000/= as general damages as well as interest and costs of the suit.
- 7) The appellant being aggrieved preferred this appeal and put forward the following grounds.
  - a) THE learned magistrate erred in law and in fact in awarding the sum of kshs.900,000/= as general damages which amount was inordinately high taking into account the injuries sustained by the respondent.***
  - b) THE learned magistrate erred in law and in fact in not addressing himself to the injuries pleaded and proved by both medical reports on record in order to give an award.***

c) **THE learned magistrate erred in law and in fact in not considering the submissions as well as authorities tendered by the appellant.**

d) **THE learned magistrate erred in law and in fact in arriving at an award of general damages that was not founded nay outlined legal principle.**

8) When the appeal came up for hearing, this court directed the appeal to be disposed of by written submissions. It is the submission of the appellant that the trial magistrate failed to apply proper legal principles in assessing quantum.

9) It was argued that the learned Senior Resident Magistrate did not identify the pleaded and proved injuries sustained by the respondent for purpose of awarding general damages. The appellant pointed out that the respondent sustained **soft tissue injuries consisting of blunt trauma to the neck, blunt trauma to the head and blunt trauma to the right thigh or leg.**

10) The appellant further submitted that the award of ksh.900,000/= as general damages for soft tissue injuries was excessive and therefore an erroneous estimate. The learned Senior Resident Magistrate was accused of failing to apply the principle that comparable injuries should attract comparable awards. Consequently, this court was invited to interfere with the award.

11) The respondent opposed the appeal arguing that the award of ksh.900,000/= is not excessive but commensurate with the injuries sustained. The respondent further stated that the trial magistrate applied the relevant principles in assessing general damages.

12) Having considered the rival submissions and having re-evaluated the case that was before the trial court, it is clear to this court that the appeal is only against the award of general damages.

13) There is no dispute that the learned Senior Resident Magistrate awarded the respondent a sum of ksh.900,000/= for general damages.

14) It is also not in dispute that the respondent sustained soft tissue injuries to wit:

· *Blunt trauma to the neck*

· *Blunt trauma to the head*

· *Blunt to the right thigh or leg.*

15) The question is whether the trial magistrate made an award which is excessive.

16) The appellate court's power to interfere with an award of damages by a trial court is restricted and not discretionary. In the case of **Butt vs= Khan (1978) eKLR** the Court of Appeal held inter alia:

**“An appellate court will not disturb an award of 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.”**

17) In this appeal, the appellant stated that the award of the trial court was inordinately high and that it was way apart from comparable awards.

18) With respect, I agree with the submissions of the appellant that the award of kshs.900,000/= for soft tissue injuries is excessive and for away from comparable awards. In the case of **Eliezer Kiplimo Keronei & Another vs= Sally Jepkemboi (2019) eKLR**, the claimant was awarded a sum of kshs.250,000/= as general damages for soft tissue injuries which included *inter alia*:

· *Blunt trauma to the neck*

· *Blunt trauma to the lumbo-social spine*

· *Swollen knees and legs*

19) The aforesaid amount was reduced on appeal to ksh.150,000/=.

20) Taking into account comparable awards and the nature of injuries the respondent suffered, I am convinced that an award of ksh.400,000/= is reasonable.

21) In the end the appeal as against quantum is found to be meritorious. The appeal is allowed. Consequently, the award of kshs.900,000/= for general damages is set aside and is substituted with an award of kshs.400,000/=. Since there is no appeal as against special damages, the award of ksh.2,000/= shall remain undisturbed.

The total award on appeal therefore is ksh.402,000/= less 15% contribution i.e

**Total Ksh. 402,000/=**

**Less 15% contribution Ksh. 60,300/=**

**Net total Ksh.341,700/=**

The aforesaid award to attract interest at court rates from the date of judgment in the trial court until the date of full payment.

In the circumstances of this appeal I think a fair order on costs is to direct which I hereby do that each party meets its own costs on appeal. However, the respondent is entitled to costs in the trial court based on the award made on appeal.

**Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 3<sup>rd</sup> day of July, 2020.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent