



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**HIGH COURT CIVIL APPEAL NO. 6 OF 2016**

**WASHINGTON MUKUNYA KARANJA.....1<sup>ST</sup> APPELLANT**

**STEPHEN KAGUNYI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARGARET WAMBUI MAINA.....RESPONDENT**

*(Being an appeal from the judgment of Hon P Gesora, CM delivered on 1<sup>st</sup> February, 2016*

*in Naivasha CMCC No 522 of 2009)*

**JUDGMENT**

**Background**

1. This appeal challenges only the award of damages awarded following a road traffic accident on 30<sup>th</sup> September, 2008, in which the respondent pleaded the following injuries:

- a. Swelling of upper part of mouth
- b. Alveolar fracture of both incisor teeth
- c. Soft tissue injuries on right leg
- d. Sustained superficial wound

The trial court found that although the plaintiff's teeth were loose, no fracture occurred, and a "K" wire used on the teeth was intended to cure the injury.

2. In the trial court, liability was agreed by consent at 90:10 in favour of the plaintiff, and general damages of Kshs 300,000/- and special damages of 2,000/- were awarded. The learned magistrate made the award, having noted that the authorities relied on by the parties had "offered me a good guide".

3. The appellants contest the general damages as being excessive for the injuries sustained; and that wrong principles were applied in reaching the award. The appellants seek reduction of the award to between Kshs 100,000/- to 150,000/-.

4. The appellants cited the cases of: **Paul Kipsang Koech & Anor v Titus Osule Osore [2013]eKLR** where the plaintiff had suffered a fracture of the incisor tooth and the High Court reduced the award to 200,000/- from 300,000/-; also cited was **Fast Choice Company Ltd & Anor v Joseph Wanyiri Mwangi[2011]eKLR** where the plaintiff suffered injuries on right upper incisor tooth and the High Court reduced the award from 450,000/- to 150,000/-.

5. The respondent submits, relying on **Ephantus Mwangi & Anor v Wambugu (1983) KCA 100**, that it is a strong thing for an appellate

court to differ from a finding of fact of a court of the first instance. They also remind the court, following **Mbogo & Another v Shah [1968] EA 93** that it can interfere only if the trial court exercised a wrong discretion, misdirected itself, acted on or took into account a factor it should not have, or failed to take into account a factor it should have. Finally, they pointed out that in **PN Mashru Ltd v Omar Mwakoro Makenge [2018] eKLR** the High Court declined to interfere with an award of Kshs 1,200,000/- for broken teeth and a fracture.

6. I have carefully perused the record of proceedings and re-evaluated the evidence. The only issue impugned by the appellants is the actual amount of damages awarded for the injured teeth. They do not dispute the trial court's finding on injuries – which is a finding of fact – after he assessed the differing medical reports of Dr Wellington Kiamba and Dr Eric Mungai.

7. The core principles for award of damages are that there should be uniformity and consistency of awards, and that comparable awards should fetch similar compensation within affordable limits. See **Cecilia W. Mwangi & Another v Ruth W. Mwangi [1997] eKLR**, where guidance was given as follows:

*“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd –vs- Shephard [1964] AC 326 at page 345:*

*‘But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.’ ”*

8. In **Paul Kipsang's case**, the High Court found that there was a fracture of the right incisor tooth, loosening of two others and post-accident pains, and reduced the award to 200,000/- in 2013. In the **Fast Choice Company Ltd case**, the injuries determined were numerous and included broken left incisor jaw and loose incisor tooth and soft tissue injuries to gum of upper jaw. The High Court awarded Kshs 150,000/- in 2011.

9. In the present case, the award was made in 2016 and relates to an injury sustained in 2008. There is nothing in the authorities that suggests that award was not made within proper discretion, or within the proper legal parameters and principles so as to merit interference by this court.

#### **Disposition**

10. In light of the foregoing, nothing has been placed before me on quantum that would persuade me to interfere with the trial court's determination on damages, and I so determine. The appeal is therefore dismissed save as to the clarification hereunder.

11. The trial court, having found that Kshs 300,000/ was adequate recompense on account of the injuries, pain and suffering, and 2,000/- for special damages, he gave a final award of 302,000/-. Liability having been agreed at 90:10 in favour of the plaintiff, the final award should have been calculated to take into account the apportioned liability.

12. The final award payable to the respondent shall therefore be 302,000/- less 30,200/- (10%) = **271,800/-**. The appellant shall bear the costs of the appeal.

#### **Administrative directions**

13. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

14. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

15. Orders accordingly

**Dated and Delivered via videoconference at Nairobi this 16<sup>th</sup> Day of July, 2020**

**RICHARD MWONGO**

**JUDGE**

Delivered by video-conference in the presence of:

1. Ms Moragwa h/b for Kariuki for the Appellant

2. Ms Kithinji h/b for P Njuguna for the Respondent

3. Court Clerk - Quinter Ogutu