



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 46 OF 2015

JOHN NJUE.....APPELLANT

VERSUS

DANIEL NYAGA MURIUKI.....RESPONDENT

JUDGEMENT

The appellant was involved in a road traffic accident on 13th February 2015. The accident involved motor vehicle registration number **KAV 527 U AND KAV 079 U**. Liability was agreed upon between the parties at 80% against the appellant and 20% against the respondent. The respondent was awarded Kshs 163,000/= as damages. This award is the subject of the appeal.

The grounds of appeal are that

- 1) *The trial court erred in law and fact by finding that the respondent was entitled to general damages that are too high without considering the provisions on how compensation ought to be computed.*
- 2) *The trial court failed to apply the guidelines under cap 405 whereby compensation for soft tissues injuries is lapped at 2% of the maximum compensation which translates to Kshs 60000/=*
- 3) *The trial court erred in law by ignoring an Act of Parliament and applying functional precedents which rank lower than the Act of Parliament.*
- 4) *The trial court erred in law and fact by failing to consider conventional awards for general damages in similar case*

M/S Kairu & Mc court, counsel for the appellant, submit that the respondent suffered soft tissues injuries. The court proceeded to award Kshs.200,000/= as general damages. According to the schedule provided under chapter 405 Laws of Kenya, an award of Kshs 60,000/= was the much the trial court could have awarded. Counsel submit that an award of between Kshs 70,000/= to 110,000/= could have been ideal in the circumstances of this case.

Counsel rely on the case of **MOKAYA MUCHAMA VERSUS JULIUS NYOKWOYO KISII HCCA NO 101 of 2010** where Kshs 70,000/= was awarded for concussion, deep cut wound on the back of the head and bruises on the right forehead. Counsel for the appellant also rely on the case of **PAMELA OMBIYO OKINDA VERSUS KENYA BUS SERVICES LIMITED NAIROBI HCCC NUMBER 1309 OF 2002** where Kshs 50,000/= was awarded for blunt head injury with loss of consciousness, deep cut in the forehead and both legs, soft tissue injury to the neck and blunt trauma to the hip and right eye. There is the case of **PETER KAHUNGA & ANOTHER VERSUS SARAH NORAH ONGARO (2004) eKLR** where the court of appeal assessed damages at Ksh 80,000/= for a cracked left upper molar tooth, bruises on both knees and blunt trauma to the back.

M/S Khan Associates appeared for the respondent and opposed the appeal. Counsel rely on the case of **Law Society of Kenya V Attorney General & 3 others (2016) eKLR** where the court declared the amendments to Cap 405 as unconstitutional. Counsel also rely on the case of **RAIPLY WOODS (K) V JOSEPH SIMIYU SEMEI (2011) eKLR**. Ksh 150,000/= was awarded for soft tissue injuries.

This is a first appeal and this court is duty bound to re-examine the evidence adduced before the trial court a fresh and make its own conclusion. Only the respondent testified. The Appeal concern the amount of damages awarded by the trial court. The respondent sustained injuries on the head, back side, forehead and both legs. One leg was stitched. The right leg sustained abrasions. A medical report dated 5th September, 2014 by **Dr. Njiru G. N.** listed the injuries as follows-

- Cut wound frontal region of the head

- Multiple cut wounds left lower limbs
- Multiple bruise right lower limbs

The above injuries are similar to what is stated on the **P3** form.

Before the trial court, the appellant proposed an award of Ksh. 50,000/= as general damages. The trial magistrate relied on the case of **CHANNAN AGRICULTURAL CONTRACTORS LIMITED VERSUS FRED BARASA MUTAYI (CIVIL APPEAL NO. 29 OF 2012, KAKAMEGA)** that was cited by the counsel for the respondent.

With regards to the application of the guidelines under the Provision of **Cap 405** Laws of Kenya, it is clear that those guidelines were declared as unconstitutional. These were guidelines and the same cannot be used to alter the courts discretion to assess an award of damages. If these guideline are to be followed, then all accident victims who suffer soft tissue injuries will have to be paid ksh. **60,000** irrespective of the differences in the nature of those injuries. This ground of appeal must fail.

The grounds upon which the appellate court can interfere with an assessment of damages by a trial court are well known. In the case of **HELLEN WARUGURU WAWERU (suing as the legal representative of PETER WAWERU MWENJA (deceased) V KIARIE SHOE STORES LTD, Nyeri Civil Appeal No.22 of 2014** where the Court of Appeal stated at para 10 as follows: -

As a general principle, assessment of damages lies in the discretion of the trial court and 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. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. See *Kemfro Africa Ltd t/a Meru express & another V A.M. Lubia and another [1982-88] 1 KAR 727, Peter M. Kariuki V Attorney General CA Civil Appeal No.79 of 2012 {2014} eKLR and Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88]KAR 5*

The case of **MUKAYA MOCHAMA** (Supra) is a 2010 decision. Counsel for the appellant cited the case of **KAIMOSI TEA (K) LIMITED VERSUS THOMAS BUSULO ESIYE, Kakamega HCA NO. 53 OF 2008. Ksh. 65,000/=** was awarded for painful wound on the left leg.

An assessment of damages contain a discretionary element on the past of a judicial officer. That element is normally guided by past decisions and an appellate court has to be satisfied that the award is either manifestly low or high or that the trial court applied the wrong legal principal for it to disturb an award. It should also be noted that inflation is also considered when the trial court assess general damages.

There is no disputes on the injuries sustained by the respondent.

The respondent suffered cerebral concussion and multiple cut wounds on the left lower limbs. The respondent seems to have completely healed. Counsels for the appellant are of the view that Ksh. 70,000/=to 110,000/= can be adequate compensation. The trial court was of the view that since Ksh. 150,000/= had been awarded in the **CHANNAN AGRICULTURAL CONTRACTORS LIMITED** case (supra) in 2013, an award of ksh. 200,000/= was fair in 2015. The appeal was heard in 2017. The accident occurred in 2012. The difference BETWEEN what has been offered by counsel for the appellant (Ksh.110,000) and what has been awarded by the trial court is Ksh. 90,000/=. The trial court is not bound by what has been offered by the appellant. I do find that the award of ksh. 200,000/= in the circumstances of this case is not manifestly excessive. The trial court applied the correct legal principles and I see no need of interfering with the award made by the trial court.

In the end, I do find the appeal lacks merit and is hereby dismissed with costs.

Dated and signed at Marsabit this.....day of May 2018

S. CHITEMBWE

JUDGE

Dated signed and delivered at Embu this 15th day of January,2019

F. MUCHEMI

JUDGE.