



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 28 OF 2016

VINCENT MOGAKA MOKAYA.....APPELLANT

=VRS=

JAMES A. NYAGAKA.....RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. N. Kahara – RM dated and delivered on the 17th day of October 2016 in the original Keroka Principal Magistrate’s Court Civil Case No. 160 of 2013}

JUDGEMENT

This appeal is on the quantum of damages awarded to the appellant but which the appellant considers to be inordinately low in comparison to the injuries he sustained. From the record the appellant sustained the following injuries: -

- Deep cut wound on the head.
- Bruises on both hands.
- Fracture on the left leg thigh (femur).
- Deep cut on both ankles.
- Deep cut on the right mid-3rd.

In the lower court, Counsel for the appellant had proposed an award of Kshs. 3,000,000/= but the trial magistrate awarded Kshs. 200,000/=. It is Counsel’s submission that the nature of the injuries sustained by the appellant were not controverted by the defence and that the trial magistrate was enjoined to take into account the extent of the injuries as well as past precedents in arriving at the award. Citing several cases, Counsel urged this court to enhance the award to Kshs. 3,000,000/= given the prevailing circumstances of our economy, the diminishing value of the Kenyan shilling and the nature of the injuries sustained by the appellant.

The respondent neither responded to the appeal nor filed submissions despite being duly notified. There is proof that the respondent’s Advocate was served with notices on the two occasions that this matter was mentioned in court. Acknowledgement of receipt of the notices by stamping on the copies filed in court is evident.

Be that as it may, this is an appeal and this court has a duty to reconsider and evaluate the evidence in the

lower court so as to arrive at its own conclusion. It is also required to keep in mind the principles it must consider in an appeal where it is called upon to interfere with the lower court's assessment of damages. These principles were restated in the case of **Paul Kipsang Koech & Another Vs. Titus Osule Osore [2013] eKLR** where the court stated: -

“It is a well established law that assessment of quantum of damages in a claim for general damages is a discretionary exercise. The law has, however, set the dimensions for the exercise of discretion; must be exercised judicially, with wise circumspect and upon some defined legal principles. Invariably, when the trial court has violated a legal principle(s), the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court: -

(a) Took into account an irrelevant factor or

(b) Left out of account a relevant factor or

(c) The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

In the court below the appellant relied on treatment notes which indicated that he stayed in the ICU at Tenwek Hospital for 12 days and a medical report by Dr. Ogando Zoga which indicated that although he was in stable condition as at the time of examination, he had some memory loss associated with difficulty in talking. He was also walking with a limping gait and support of a cane. Dr. Zoga opined that post traumatic epilepsy was definite but the injuries had healed well. There was no evidence however that by the time he gave evidence in court he had suffered any epileptic fit. I do however agree with Counsel for the appellant that given the nature and extent of the injuries the award in this case was inordinately low. The proposal for an award of Kshs. 3,000,000/= is much on the higher side as the injuries sustained by the appellant are in no way comparable with those of the plaintiffs in the cases cited. In the case of **Sophinaf Company Limited and James Gatiku Ndolo Vs. Daniels Ng'ang'a Kanyi [2006] eKLR** where Kshs. 2,000,000/= was awarded the plaintiff used to have fits, could not do any hard labour to sustain his 9 children and was buying drugs at Kshs. 2,360/= per month. In the case of **Reins Onduso Omondi Vs. Tectura International Ltd & Another [2012] eKLR** the plaintiff, although she stayed in ICU for only three days became very forgetful and absent minded, developed a staggering walk with inability to write properly coupled with abnormal behaviour. She also became incoherent. It would appear that in that case the plaintiff's mother testified on her behalf. In the instant case the appellant gave very coherent testimony and narrated what happened clearly which means that he could still remember the events. It is my finding therefore that the effect of the injuries was not that bad even though he was in ICU for 12 days. It could be that he had undergone considerable healing between the time he was examined by Dr. Zoga and the time he gave evidence in court.

Doing the best I can, I am satisfied that an award of Kshs. 800,000/= (eight hundred thousand shillings only) would be adequate compensation for pain, suffering and loss of amenities. I accordingly set aside the Kshs. 200,000/= award of the lower court and substitute it with one for Kshs. 800,000/= (eight hundred thousand shillings only). The costs of this appeal are also awarded to him. It is so ordered.

Signed, dated and delivered in Nyamira this 7th day of March 2019.

E. N. MAINA

JUDGE