



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: D.S. MAJANJA J.)

CIVIL APPEAL NO. 40 OF 2018 CONSOLIDATED WITH CIVIL APPEAL NO. 41 OF 2018

BETWEEN

DAMARIS OMBATI.....APPELLANT

AND

MOSES MOGOKO LEVIS.....1ST RESPONDENT

SAMSON OGENDI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. S. Lutta, SPM

delivered in Kisii CMCC No. 168 and 169 of 2015

delivered on 4th July 2018 respectively)

JUDGMENT

1. The respondents were pillion passengers travelling on motor cycle registration number KMDJ 488Z along Kisii- Keroka road when at Bobaracho, the appellant's motor vehicle registration number KCB 385 C lost control, knocked the motor cycle and caused the respondents to sustain injuries. They filed suit to claim damages. Ultimately the issue of liability was settled in the ratio 75:25 against the appellant. The court proceeded to assess damages as follows:

1st respondent

General Damages Kshs. 800,000/-

Special Damages Kshs. 7,700/-

2nd respondent

General Damages Kshs. 800,000/-

Special Damages Kshs. 103,500/-

2. The appellant has appealed against the award of general damages. Mr Mose, counsel for the appellant, assailed the respective awards of general damages on the ground that they were excessive taking into account the nature and extent of injuries and the decisions cited by the parties. Mr Nyangosi, counsel for the respondents, supported the awards on the ground that they were reasonable bearing in mind the serious nature of the injuries sustained by each respondent.

3. The general principle that animates the exercise of this court's jurisdiction is that the appellate court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see *Butt v Khan* [1981] KLR 349).

4. Regarding the assessment of damages, the Court of Appeal held in **Sosphinaf Company Limited v James Gatiku Ndolo NRB CA Civil Appeal No. 315 of 2001 [2006]eKLR** that:

The assessment of damages for personal injury is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous awards and principles developed by the courts, ultimately what is a reasonable award is an exercise of discretion by the trial judge and will invariably depend on the peculiar facts of each case.

5. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

6. The court must take into account the current value of the shilling and the economy. Although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982]eKLR** and **Jabane v Olenja [1986] KLR 661**). It is in light of these principles that I now turn to consider the case for each respondent.

7. According to the plaint, the 1st respondent sustained the following injuries; tenderness on the neck, cut wound on the pate of scalp, facial bruises, tenderness on the lower back, tenderness on the anterior chest wall, tenderness on the abdomen and a fracture of the right patella (knee joint). The medical report of Dr Ezekiel Zoga was produced by Dr Morebu (PW 3). Dr Zoga examined the 1st respondent on 16th March 2015, two days after the accident. At the time the 1st respondent was complaining of severe headache, chest and back pains and severe pain on the right leg. He was on crutches at the time and still on POP. He determined that the 1st respondent suffered fracture of the right patella and multiple serious soft tissue injuries which had not yet healed. He opined that permanent disability was anticipated.

8. The 2nd respondent sustained a cut wound on the forehead and cheek, dislocation on the left shoulder joint, tenderness on the anterior chest wall and a fracture of the left tibia. The medical report prepared by Dr Ogonoda Zoga was produced by Dr Morebu (PW 1) who confirmed that when the 2nd respondent was examined on 20th March 2015, he was in stable condition, was still on POP and was walking with crutches. Dr Zoga concluded that the 2nd respondent suffered a fracture of the left tibia, dislocation of the left shoulder joint and multiple serious soft tissue injuries which had not yet healed. He opined that permanent disability was anticipated.

9. Before the trial court, counsel for the respondents suggested an award of Kshs. 1,200,000/- based on **Alphonse Muli Nzioki v Brian Charles Ochuodho MSA HCCA No. 141 of 2011 [2014] eKLR** where the plaintiff suffered a compound comminuted fracture of the right tibia and fibula and a degloving injury medial aspect of the right leg and foot. The plaintiff was awarded Kshs. 800,000/- as general damages in 2014.

10. The appellant suggested an award of Kshs. 200,000/- and relied on **Parodi Giorgio v John Kuria Macharia HCCA No. 343 of 2012 [2014]eKLR** where the plaintiff sustained a fracture of the navicular bone of the left foot, blunt trauma on the right hip and blunt trauma to the left foot. The court awarded Kshs. 200,000/- as general damages in 2014.

11. In the judgment in favour of the 1st respondent, the trial magistrate awarded Kshs. 800,000/- which is the same amount given by the court in **Alphonse Muli Nzioki v Brian Charles Ochuodho (Supra)** yet in that case, the injuries were more serious as the plaintiff in that case sustained fractures of the tibia and fibula. Although the case cited by the appellant suffered, an ankle bone fracture, the case cited was more appropriate. The 1st respondent sustained a fracture of the patella which is more serious. The report of the doctor does not assess the nature and extent of the disability hence it is difficult to assess the effect thereof. Having regard to these facts, I find the award by the trial magistrate excessive in the circumstances. I set it aside and substitute it with an award of Kshs. 350,000/-.

12. Likewise, in the 2nd respondent's case, the trial magistrate gave the same award the court gave in **Alphonse Muli Nzioki v Brian Charles Ochuodho (Supra)** yet the injuries in that case were more serious than those sustained by the 2nd respondent. The 2nd respondent sustained a single fracture and serious soft tissue injuries. The case cited by the appellant was apposite although the injuries therein were less serious. I find and hold that the award by the trial magistrate was excessive in the circumstances. I set it aside and substitute it with an award of Kshs. 300,000/-.

13. In conclusion and subject to the agreed apportionment of liability, I allow the appeal on the following terms:

a. The appeal against the judgment and decree in **Kisii CMCC No. 168 of 2015** is allowed to the extent that the award of Kshs. 800,000/= as general damages is set aside and substituted with an award of Kshs. 350,000/=. The sum shall attract interest from the date of judgment before the subordinate court.

b. The appeal against the judgment and decree in **Kisii CMCC No. 169 of 2015** is allowed to the extent that the award of Kshs. 800,000/= as general damages is set aside and substituted with an award of Kshs. 300,000/=. The sum shall attract interest from the date of judgment before the subordinate court.

c. The appellant shall have the costs of this appeal which I assess at Kshs. 40,000/- exclusive of any court fees.

DATED and DELIVERED at KISII this 4th day of APRIL 2019.

D.S. MAJANJA

JUDGE

Mr. Mose instructed by Mose, Mose and Milimo & Company Advocates for the appellant

Mr. Nyangosi instructed by T. O Nyangosi & Company advocates for the respondents