



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 57 OF 2017

MOSES KIRIMI.....1ST APPELLANT

SPARKLES MOBILE CENTRE.....2ND APPELLANT

Versus

GKJ (suing as the next friend of JK minor).....RESPONDENT

JUDGMENT

1. Vide plaint dated 30th January 2017 the Respondent herein had prayed for;

a. General Damages

b. Special Damages of Kshs. 30,170/=

c. Costs of this suit

d. Interest in (a), (b) and (c) above

e. Any other Relief that this Honourable Court may find it just and fit to grant.

2. The facts of the case are that on 30th June 2015 at around 3:00p.m. along Meru-NKubu road near Mariara River **JK** (herein referred to as the minor) was lawfully travelling as a fare paying passenger in motor vehicle Registration No. Kay 579G when the 1ST defendant so negligently, carelessly and recklessly drove Motor vehicle Reg No. KBW 278S such that it collided head on with M/v Reg No. KAY 579G causing the minor to suffer serious bodily injuries.

Testimonies

3. During the hearing two witnesses testified. Pw1 the minor testified that he boarded M/V reg. no. KAY 579G at the main stage. That when they got at Mariara Bridge the motor vehicle collided with another vehicle head on. He stated that he sustained a fracture on his right leg, his knee was dislocated and had a bruise on his chin. He was admitted in hospital for three (3) days. Plaster of Paris was applied and walked in crutches. He testified that he had not fully recovered and that he walked in crutches. He presented the medical records as Exh 1-7 and the medical report of Dr. Koome and Dr. Ashwin Madhiwala as exhibits 8 & 9 respectively.

4. On cross-examination he told the court that the accident affected his grades. He however did not tender evidence to prove his previous performance. He also admitted that during his examination by Dr. Madhiwala he had stated that he did not have any complaints.

5. Pw2 was the mother to Pw1. Her evidence was that she gave consent for her name to be used in the suit as next friend. She also presented the receipts and invoice totalling Kshs. 35,000/=.

6. The trial court found the Appellant to be 100% liable and awarded a sum of Kshs 1,200,000/= as general damages. In assessing damages, the trial court relied on the fact that both medical reports had awarded 5 % permanent disability. The trial court also relied on the cited case of **In Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] eKLR** where the Respondent suffered comparable injuries as the Respondent herein. The respondent had also been awarded 5% permanent disability. In the case, the court awarded Kshs 1,300,000/= as general damages.

7. The trial court also awarded Kshs. 10,750 as special damages.

Appeal on quantum

8. The appellant was aggrieved by the Trial Magistrates decision specifically the quantum of damages in the sum of Kshs 1,200,000/= in general damages and he filed this appeal.

Directions

9. On 25th January 2019 this Honourable court directed that parties to canvass the appeal through written submissions. At the time of writing this Judgement only the appellant has filed its submissions.

Submissions

10. The appellant submits that the trial magistrate erred in her assessment of General damages. He humbly prays that the court gives an award in the sum of Kshs. 500,000/= which he considers to be appropriate and reasonable compensation. He cited the following authorities in support of his proposal; **Denshire Muteti Wambua vs Kenya Power & Lightning Co. Ltd [2013] eKLR**, **Margaret. T. Nyaga vs. Victoria Wambua Kioko [2004 eKLR**, **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR**, **Zacharia Mwnagi Njeru v Joseph Wachira Kanoga [2014] eKLR**.

11. The Respondent submitted that the award herein was in line with the injuries suffered and decided comparable cases. The trial court evaluated the decision of Joseph Musee which had injuries comparable with the ones sustained by the respondent. And therefore there is no reason to interfere with the award of damages.

ANALYSIS AND DETERMINATION

Duty of court

12. I know my duty as first appellate court; to evaluate the evidence afresh and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they testified. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. I am also aware that, in this exercise, the court is not beholden or compelled to adopt any particular style. Except, it must avoid merely rehashing of evidence as was recorded or trying to look for a point or two which support or does not support the finding of the trial court. Of greater concern is to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed

Quantum

13. This appeal is on quantum on damages. In the case of **Butt vs. Khan (1977) 1 KAR** , the court set the test as follows:-

“An Appellate court will not disturb an award for damages unless it is 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.”

14. The Respondent herein suffered the following injuries

1. Fracture right upper 1/3 tibia and fibula

2. Bruises on the chin

15. The medical report by Dr. Ashwin Madhiwala apportioned 5% permanent disability and temporary disability of three months. Dr. Nicholas Koome ascertained the degree of injury as harm and confirms at the time of examination that the respondent had a slight limb to the left.

16. What would such injuries attract as reasonable compensation in monetary terms? I will consider comparable decisions as a guide in my decision. In **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** the Respondent sustained a fracture right tibia leg bone malleolus and right fibular bone and a blunt injury to the right ankle. In his prognosis, Dr Ajoni Adede stated that the Respondent had a permanent partial disability of the right tibia and fibula due to fracture, fracture site weak point, post fracture arthritis and pain. He estimated the permanent partial disability at three (3%) per cent. It was his opinion that the soft tissue injuries would leave no residual disability. The Appellate Court reversed the quantum issued by the trial Magistrate from Kshs. 800,000/= to Kshs. 500,000/=

17. In **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** the respondent sustained the following injuries: lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur. Dr Ogando Zoga (PW 2) examined the respondent on 28th October 2013 and produced the medical report. When PW 2 examined the

respondent, he was complaining of severe headache, severe pains on the chest, back, right hand and right leg. He noted that the respondent could not walk without crutches and was still on plaster of paris. The respondent was initially attended to at Kisii Level 5 Hospital then referred to Tenwek Mission Hospital where he was admitted for 3 for treatment including internal fixation which PW 2 noted would cost Kshs. 100,000/- to remove in the future. He also noted that the injuries were yet to heal and permanent disability was anticipated. The court proceeded to assess damages and awarded Kshs. 1,000,000/- as general damages, Kshs. 100,000/- as future medical expenses. **Majanja J** found the award to be excessive and set it aside; and substitute it with an award of **Kshs. 450,000/=**

18. In **Paul Otieno Obuya & another v Joshua Atuti Ngoto & another [2016] eKLR** the respondent had suffered compound fractures of both tibia and fibula of the right leg. The Court found Kshs. 900,000/= to be inordinately excessive and reduced it to Kshs. 700,000/=.

19. The decisions in **Paul Otieno Obuya & Another v Joshua Atuti Ngoto & another [2016] eKLR** carry injuries comparable to the injuries suffered by the Respondent. The decisions I have cited are fairly recent but some bear injuries more serious than the ones sustained by the Respondent. In light thereof, I find the award made by the trial court in the sum of Kshs. 1,200,000 in general damages to be excessive. I therefore set aside the award and award the respondent general damages in the sum of Kshs 800,000/=. The award in special damages remains as decreed by the trial court. The Respondent will have costs and interest at court rates of the primary suit. Given the outcome of the appeal, each party shall bear own costs of the appeal. It is so ordered.

Dated, signed and delivered in open court this 3rd June, 2019.

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F. GIKONYO

JUDGE

IN PRESENCE OF

Kitheka for Mutegi for respondent

No appearance by appellant

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F. GIKONYO

JUDGE