



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 61 OF 2017

FRANCIS NDUNGU WAMBUI.....1ST APPELLANT

DANIEL IRUNGU WAMBUI.....2ND APPELLANT

ISAAC MUTHERERO.....3RD APPELLANT

VERSUS

BENSON MAINA GATIA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal from the judgment of Principal Magistrate Embu delivered on 24/11/2017 whereas the respondent instituted a suit for general damages against the appellants for injuries sustained in a motor vehicle accident. The issue of liability was settled in favour of the 1st respondent against the appellants in the ratio of 75:25. The court then proceeded to assess and award the respondent Kshs. 400,000/= as general damages and special damages of Kshs. 13,870/=.

2. The appellants were dissatisfied with the trial court's judgment and lodged this appeal based on seven grounds that can be summarised as follows: -

a) *That the learned magistrate erred in fact and in law in awarding excessive damages to the respondent.*

3. The parties disposed of the appeal by way of written submissions.

B. Appellant's Submissions

4. It was submitted that the injuries sustained by the respondent were soft tissue in nature that healed well and as such an award of Kshs. 80,000/= is reasonable as general damages. Reliance was placed on the cases of **Machakos HCCA No. 68 of 2013 Alex Ogutu v PNMN** where the plaintiff sustained a cut wound on the left 1st finger and cut wound on the left 2nd finger and the Court of Appeal set aside an award of Kshs. 250,000/= and substituted it with an award of Kshs. 80,000/=.

5. In the case of **Nakuru HCCA No. 162 of 2011 Simon Kimani Kuria v Transpares (K) Ltd.** the plaintiff sustained soft tissue injuries to the face, blunt injury to the right eye and soft tissue injury to both hands and the Court of Appeal set aside an award of Kshs. 150,000/= and substituted it with an award of Kshs. 90,000/=, and the case of **Kisumu HCCA No. 52 of 2012 Dickson Ndungu Krembe & Anor v Anna Anyango Chaka** where the plaintiff sustained chest injuries, neck injury, injury to the lower limbs, injuries of the shoulders and facial lacerations where the Court of Appeal set aside an award of Kshs. 200,000/= and substituted with an award of Kshs. 90,000/=.

6. It was also submitted that the award of Kshs. 13,870 as special damages was allowed without proof of the same and should be disallowed.

C. Respondent's Submission

7. It was submitted that the award to the respondent was merited considering the injuries sustained by the respondent. He placed reliance on the case of **Duncan Kimathi Karagania v Ngugi David & 3 Others [2016] eKLR** where the injuries sustained were blunt head injury with loss of consciousness for over 2 hours, lacerations over the face on both sides among other injuries where the court awarded general damages of Kshs. 4,000,000/=.

8. In the case of **Civil Appeal No. 284 of 2001, Catholic Diocese of Kisumu v Tete [2004] eKLR**, the plaintiff sustained head injuries – moderate to severe concussion, cut wound on the scalp-17cm and other soft tissue injuries where the plaintiff was awarded Kshs. 1,300,000 and the case of **P.N. Mashru Limited v Omar Mwakoro Makenge [2018] eKLR** where the respondent suffered loss of consciousness at the time of the accident, fracture of the temporal bone with haematoma, head injury to the right frontal parietal bone with brain oedema where the court upheld the trial court’s award of Kshs. 1,200,000/=.

9. On special damages it was submitted that the 1st respondent attached receipts to the list of documents filed in court and also proceeded to produce the same in court and as such the court’s award of the same was merited.

D. Analysis & Determination

10. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**).

11. I have carefully perused the proceedings, the judgement appealed against contained in the record of appeal as well as the grounds of appeal. The parties’ submissions have also been considered. The issue of liability is not in issues and as such the only issue for determination in my view are: -

- a) whether the learned magistrate awarded excessive damages quantum.
- b) Who will bear the costs of this appeal?

12. From the record, the two medical reports by Dr. Mulwa and Dr. Wokabi reveal that the nature of the 1st respondent’s injuries are soft tissue injuries to the right shoulder and right hip joint as well as mild head injury.

13. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Butt v Khan [1982-88]1KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**).

14. 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 (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**).

15. I would also add what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that: -

“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”

16. In reaching an appropriate award, the court ought to consider the value of the shilling and the state of the economy. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (see **Kigaraari v Aya [1982-88] 1 KAR 768**, **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

17. I have considered the authorities cited by both parties in support of their cases, those cited by the respondent in this appeal are manifestly excessive for the soft tissue injuries sustained by the 1st respondent whereas those cited by the appellants are not of comparable injuries.

18. In the case of **Channan Agricultural Contractors Ltd v Fred Barasa Mutayo [2013] eKLR** the High Court reviewed downwards an award of Kshs. 250,000/ to Kshs. 150,000/= for “moderate soft tissue injuries that were expected to heal in eight months” time. In the case of **George Kinyanjui T/A Climax Coaches & Anor. v Hussein Mahad Kuyale [2016] eKLR** where the High Court reviewed downwards an award of Kshs. 650,000/= to Kshs. 109,890/= for soft tissue injuries.

19. In the case of **Dickson Ndungu Kirembe v Theresia Atieno & 4 Others [2014] eKLR** the High Court reviewed downwards an award of Kshs. 255,000/= to Kshs. 127,500= for soft tissue injuries which produced no complications and finally in the case of **Purity Wambui Muriithi v Highlands Mineral Water Company Ltd [2015] eKLR** the Court of Appeal revised downwards an award by the High Court of Kshs. 700,000/= to Kshs. 150,000/= for injuries to the left elbow, pelvic region, lower back and left knee.

20. Given the factors considered by courts in awarding damages, comparable awards and comparable injuries must be taken in to account in revising quantum of damages.

21. The respondent according to the medical reports, Dr. Mulwa suffered severe head injuries – transient loss of consciousness with

extra-crannial haematoma, blunt trauma on the right shoulder and soft tissue injuries to the right hip point.

22. The respondent proposed Kshs. 500,000/= general damages while the defendant proposed Kshs. 80,000/=. Of course, the proposal of the appellant was too low and inadequate.

23. The respondent suffered a head injury with loss of consciousness while the other injuries were soft tissue. He recovered fully from the injuries according to Dr. Wokabi's report.

24. I have considered all the foregoing factors and I am of the considered view that the respondent will be adequate compensated by an award of Kshs. 300,000/= which I hereby award. The award on quantum of the trial court is hereby set aside.

25. As for special damages, I have perused the record of the appeal together with the original file. I have noted that the respondent annexed receipts of special damages totalling to Kshs. 5,090/= as opposed to Kshs. 13,870/= claimed.

26. I therefore find that the respondent proved special damages of Kshs. 5,090/= which I hereby award and set aside the award of Kshs. 13,870/= given by the trial court.

27. The total award is Kshs. 305,090/= less 25% amounts to Kshs. 228,817.50 payable to the respondent by the appellant.

28. Each party to meet its own costs of this appeal.

29. The appeal stands allowed.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence: -

Ms. Muthama for Respondent

Ms. Kiai for Omagwa for Appellant