



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 62 OF 2017

FRANCIS NDUNGU WAMBUI.....1ST APPELLANT

DANIEL IRUNGU WAMBUI.....2ND APPELLANT

ISAAC MUTHERERO.....3RD APPELLANT

VERSUS

VK (A minor suing through next friend and mother MCWK).....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal from the judgment of Principal Magistrate Embu in CMCC No. 270 of 2016 in which the respondent instituted a suit for general damages against the appellants for injuries sustained in a motor vehicle accident. Having settled the issue of liability in favour of the 1st respondent against the appellants at the ratio of 75:25, the court proceeded to assess and award the respondent Kshs. 1,000,000/= less 25% leaving a balance of Kshs. 750,000/= as general damages plus special damages of Kshs. 14,590/=.

2. The appellants were dissatisfied with the trial court's judgement and filed a memorandum of appeal dated 14th November 2017 on eight grounds that can be summarised as follows;

- a) That the learned magistrate misdirected himself in awarding excessive damages to the respondent.
- b) That special damages were not proved *per se*.

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

B. Appellant's Submissions

4. It was submitted that considering the nature of injuries sustained by the plaintiff, an award of Kshs. 350,000/= is reasonable as general damages. Reliance was placed on the cases of **Tabro Transporters Ltd v Absalom Dova Lumbasi, Bungoma HCCA No. 31 of 2012** where the plaintiff sustained multiple soft tissue injuries and fracture of the left tibia and fibula, the appellate court set aside an award of Kshs. 500,000 and substituted it with an award of Kshs. 400,000 as general damages, In the case of **Amritlal S. Shah Wholesalers Ltd & Another v Joshua Ekeno, Eldoret HCCA No. 99 of 2010** where the plaintiff sustained compound fractures of the tibia and fibula, the appellate court upheld an award of Kshs. 350,000/=

5. In the case of **Zachariah Mwangi Njeru v Jospheh Wachira Kanoga, Nyeri HCCA No. 9 of 2012** the plaintiff sustained comminuted fracture of the tibia and fibula the court set aside an award of Kshs. 800,000/= and substituted it with an award of Kshs. 400,000/= and finally the case of **Harun Muyoma Boge v Dr. Daniel Otieno Agulo, Migori HCCA No. 86 of 2012** where the plaintiff sustained multiple injuries and fracture of right tibia and fibula the appellate court set aside an award of Kshs. 150,000/= and substituted it with an award of Kshs. 300,000/=.

6. It was also submitted that the award of Kshs. 14,590/= as special damages was allowed without proof of the same and should be disallowed.

C. Respondent's Submission

7. It was submitted that an award of Kshs. 1,000,000/= was reasonable and not excessive. The respondent relied on the cases of **Mwaura Muiruri v Suera Flowers Ltd [2014] eKLR** and the case of **Kornelius Kweya Ebichet v C & P Shoe Industries Ltd [2008] eKLR** where the plaintiffs sustained similar injuries and were awarded Kshs. 1,500,000 and 1,000,000 respectively.

8. The respondent also relies on the cases of **Frankline Chilibasi Spii v Kirangi Liston [2017] eKLR** where the plaintiff compound and comminuted fractures of the right distal tibia and fibula among other injuries and was awarded Kshs. 1,800,000, the case of **Ziporrah Nangila v Eldoret Express Limited & 2 Others [2016] eKLR** where the plaintiff sustained comminuted compound fracture of the distal and fibular, fracture of the left distal and fibular and was awarded Kshs. 2,400,000 as general damages, the case of **Duncan Kimathi Karagania v Ngugi David & 3 Others [2016] eKLR** where the court awarded general damages of Kshs. 4,000,000 for blunt head injury with loss of consciousness for over two hours, lacerations over the face on both sides, comminuted fractures of the maxilla bilaterally at the Le Fort 11 level, compound fracture of the mandible among other injuries and finally the case of **Civil Appeal No. 284 of 2001, Catholic Diocese of Kisumu v Tete [2004] eKLR** where the court awarded the plaintiff sustained head injuries –moderate to severe concussion, comminuted fracture mid-shaft of the left femur, cut wound on the scalp 17cm and other soft tissue injuries.

9. The respondent submitted that he attached receipts to his list of documents as evidence of his special damages.

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, the record of appeal as a whole including the parties' submissions. The issue of liability having been settled, the issues for determination are: -

- a) Whether the learned magistrate awarded excessive damages in view of the injuries sustained.
- b) Whether the special damages were proved.

12. Medical reports by Dr. Mulwa and Dr. Wokabi reveal that the respondent suffered soft tissue injuries to the upper limbs, compound fracture of distal tibia fibula shaft as well as loss of consciousness for more 30 minutes after the accident. It was also noted due to the severity of the fracture he is at risk of secondary stress fractures on the same site.

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 vs Khan [1982-88] 1 KAR 1** and **Mariga vs Musila [1982-88] 1 KAR 57**).

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. In the case of **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR**, the Plaintiff therein sustained multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left subaxillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right upper and lower 1/3 tibia fibula. The court awarded a sum of Kshs 1,750,000/= general damages for pain and suffering and loss of amenities in 2014.

18. In the case of **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR**, the Plaintiff therein suffered a compound comminuted fracture of the right tibia, compound comminuted fracture of the right fibula, fracture of the left proximal radius, fracture of the left ulna, head injury, deep cut wound of the parietal region about 4 cm, soft tissue injury and bruises of both hands, multiple facial cuts and lacerations and pathological fracturing of the right leg. In that case that was decided in 2015, Ougo J. assessed damages at Kshs 1,500,000/= for pain and suffering and loss of amenities.

19. In the case of Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR, the Plaintiff therein sustained extensive fractures of the left tibia and fibula with extensive damage to the soft tissues of the left leg and fracture collar bone. The treatment included internal fixation of the fracture with a metallic plate and subsequent amputation of the left leg. In 2014, HPG Waweru assessed general damages for pain, suffering and loss of amenities at Kshs 2,000,000/=.

20. Having had due regard to the aforesaid cases and the inflationary trends as well as the fact that both doctors who examined the respondent noted that as a result of the fractures to the leg, the respondent was likely to get another fracture as the leg had become weak and subsequently he could not run or play vigorously. All considered, I am of the view that a sum of award of Kshs 1,000,000/= general damages for pain and suffering and loss of amenities was reasonable and adequate. Compensation for the injuries sustained by the respondent.

21. Accordingly, having considered the appeal herein including the written submissions in support of the respective parties arguments cases and the case law, the court is not persuaded that this is a suitable case for it to exercise its discretion to interfere with the trial court's finding for the reason that the quantum that was awarded was so manifestly excessive so as to warrant this court to interfere with the same.

22. It is my considered view that the award of Kshs. 1,000,000/= was based on comparable decisions and injuries and is not excessive or inordinately high.

23. As for special damages of Kshs. 14,590/=, the same was pleaded and proved per se as per receipts.

24. The award of the learned magistrate was based on comparable decisions and is hereby upheld.

25. The appeal therefore fails and is hereby dismissed with costs to the respondent.

26. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthama for Respondent

Ms. Kiai for Omagwa for Appellants