REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 1 OF 2019

JIANGXI ENGINEERING CONSTRUCTION (KENYA) LTD.....APPELLANT

VERSUS

BM (Minor suing thro'

her next friend and mother KO).....RESPONDENT

(Being an Appeal against the Judgement of Hon. M. O. Wambani – CM Nyamira dated and delivered on the 27th day of November 2018 in the original Nyamira Chief Magistrate's Court Civil Suit No. 1 of 2017}

JUDGMENT

In this appeal the appellant has contested the quantum of general damages awarded to the respondent and has contended that the same is inordinately high as to be a wholly erroneous estimate of the damage and that it is not in line with other awards made to other plaintiffs with similar injuries. Counsel has urged this court to reduce the award of Kshs. 1,500,000/= to Kshs. 250,000/=.

On his part, Counsel for the respondent in opposing the appeal has urged this court to find that the trial Magistrate properly exercised her discretion properly in arriving at the award and this court ought not to disturb it.

I have considered the rival submissions and also analysed the evidence in the court below so as to arrive at my own independent conclusion.

The principles that guide a court in the assessment of general damages are now settled and I need not reproduce them here – ***see the cases of Ugenya Bus Service v Gachoki [1982] eKLR*** as well as ***Kiwanjani Hardward Ltd & Another v Nicholas Mule Mutinda [2008] eKLR*** which speak to the need to have comparable awards for comparable injuries as well as to consider the passage of time. In the case of **Sosphinaf Company Limited & James Gatiku Ndolo v Daniel Ng'ang'a Kanyi [2006] eKLR**, the Court of Appeal however acknowledged that no case is exactly like the other and stated: -

> **"The assessment of damages for personal injuries 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 for similar injuries and the 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."**

I am alive to the principle that as an appellate court I cannot disturb the exercise of such discretion unless it is demonstrated that:-

> **(a) The trial court 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.**

The respondent who was 6 years old sustained the following injuries: -

- **Fracture of the right tibia**
- **Fracture of the fibula**
- **Blunt injury on the head**
- **Blunt injury on the right leg and ankle.**

After an examination conducted on 7th November 2016 less than a month after the accident the doctor opined that the respondent sustained severe multiple injuries which were in the process of healing and that he may have required physiotherapy of the right leg. In arriving at the impugned award the Learned trial Magistrate relied on the case of **Mwaura Muiruri v Suera Flowers Limited & another [2014] eKLR** where the plaintiff had sustained the following injuries: -

(a) Multiple lacerations on the face.

(b) Soft tissue injuries on the chest cage (mainly left cubaxillary area).

(c) Communuted fractures of the right humerus upper and lower thirds of the tibia.

(d) Compound double fractures of the right leg upper and lower 1/3rd tibia fibula.

Unlike the respondent in this case, the plaintiff there was admitted in hospital for six days and thereafter complained of: -

(a) Inability to use the right arm.

(b) Pain in the right upper arm.

(c) Inability to walk without support.

(d) Occasional pain in the right knee especially at night.

It is my finding that save for the fact that both claimants suffered fractures, those of the plaintiff in the afore-stated case were much more severe and are in no way comparable to those of the respondent in this case who less than a month after the accident only complained of pain on the injured leg on and off with no likelihood of any permanent disability. I do therefore agree with Counsel for the appellant that the award for pain, suffering and loss of amenities was inordinately high. Counsel for the respondent cited the case of **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR** to support the award. However, the injuries of the plaintiff in that case were much more severe than those of the respondent which is demonstrated by the fact that he suffered a permanent incapacity which even the doctor for the defendant admitted would last for about 3 years and 3 months. The respondent in this case did not suffer any incapacity.

On the flipside I am not persuaded that an award of Kshs. 250,000/= is adequate to compensate the respondent for the injuries sustained. I have considered all the cases cited and doing the best I can I am of the view that a sum of Kshs. 500,000/= (five hundred thousand shillings only) is what would be adequate and reasonable.

The special damages are not in contention. Accordingly, this appeal is allowed to the extent that the award of Kshs. 1,500,000/= is set aside and substituted with an award of Kshs. 500,000/= subject to the agreed ratio of contribution of 70%:30% in favour of the respondent. The special damages shall remain undisturbed and the awards shall attract interest at court rates in the usual manner. As for the costs of this appeal, the same shall be borne by the respondent. It is so ordered.

Dated, signed and delivered in open court this 14th day of November 2019.

E. N. MAINA

JUDGE