

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 26 OF 2018

RICHARD MAISIBA GICHANA.....APPELLANT

-VRS-

KEVIN ONGAKI TENGEYA.....RESPONDENT

(Being an Appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka

dated and delivered on the 4th day of December 2018 in the original Keroka

Principal Magistrate's Court Civil Suit No. 100 of 2017)

JUDGMENT

By a plaint dated 29th May 2017 the respondent herein sued the appellant for compensation for personal injuries sustained following a collision between the appellant's motor vehicle Registration No. KCF 823E and motor vehicle Registration No. KBK 308K in which he, the respondent, was travelling as a fare paying passenger. The respondent attributed the collision to negligence on the part of the driver of the appellant's motor vehicle KCF 832E. He particularized the injuries he sustained in the collision as a deep cut wound on the wrist and a left lateral 1/3 clavicle fracture. He also sought special damages in the sum of Kshs. 19,050/=, the costs of the suit as well as interest.

On 24th April 2018 the respondent testified and produced several documents detailing the injuries he had sustained, a demand letter, P3 Form, a bundle of receipts and a police abstract. Thereafter on 6th November 2018 the Learned Advocates for the parties recorded a consent on liability in the ratio 80%:20% in favour of the plaintiff and left the assessment of the quantum of damages to the court. The Learned trial Magistrate after considering the evidence tendered by the respondent, the rival submissions and the authorities cited awarded the respondent general damages in the sum of Kshs. 350,000/=, Kshs. 19,050/= special damages, costs of the suit and interest.

Being aggrieved by the award the appellant preferred this appeal. The gist of the appeal is that the award is inordinately high and that the trial Magistrate erred in failing to subject the award to the agreed ratio of liability.

The appeal which is vehemently opposed proceeded by way of written submissions. I have considered those submissions and also analysed the evidence in the court below so as to arrive at my own independent conclusion.

The principles that guide an appellate court in an appeal such as this one are; **firstly, that an appellate court should be slow to disturb an award unless it is satisfied that the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage – see *Kemfro Africa Limited t/a Meru Express Services & Another v AMM Lubia & another [1982 – 88] 1 KAR 777, Butt v Khan [1981] KLR 349***. Secondly 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 – see *Stanley Maore v Geoffrey Mwenda (Nyeri C/A No.147 of 2002)***. Each case is however to be decided on its own peculiar circumstances.

In this case it is not disputed that the respondent sustained a deep cut on the wrist and left lateral 1/3 clavicle fracture. In the P3 Form (Exhibit 1) that injury was classified as grievous harm and in the medical report which was prepared almost six months after the accident, it was noted that recovery was expected to take a very long time. Save for prescribing analgesics occasionally the doctor recommended another operation to remove the metal implants which were used to unite the fracture. In assessing the award of general damages the Learned trial Magistrate relied on two High Court cases in which the plaintiffs had sustained somewhat similar injuries. I must however hasten to add that no case is exactly like the other and as I have stated each must be decided on its own peculiar merits. None of the authorities cited by Counsel for the appellant in this appeal warrant a reduction of the award of Kshs. 350,000/=. I am not persuaded that the trial Magistrate took into account an irrelevant factor or left out of account a relevant factor and neither is the award inordinately high as to warrant this court to interfere with it. I am however persuaded that the trial Magistrate erred in failing to subject the award to the agreed ratio of 80%:20% contribution.

Accordingly, the appeal against the quantum of damages is dismissed save that the awards both of general and special damages shall be subject to the agreed ratio of contribution. The respondent shall get the costs of the suit in the lower court but in the appeal each party shall bear his own costs. Interest on the special damages shall be at court rates from the time of filing suit while those on general damages shall be from the date of judgement in the lower court. It is so ordered.

Signed, dated and delivered in open court this 14th day of November 2019.

E. N. MAINA

JUDGE