



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 5 OF 2019**

**ELIZABETH WAMBOI GICHONI.....APPELLANT**

**VERSUS**

**JOO (*Minor suing through mother and next of friend*)VAA... RESPONDENT**

***(Being an appeal from the Judgment and decree of Ukwala PMCC No. 24 of 2018 dated 16.1.2019 before Hon. C.I. AGUTU – SRM)***

**JUDGMENT**

1. This appeal is against quantum of damages alone. Parties agreed on liability before the trial court, which was apportioned at 75:25 in favour of the Respondent against the Appellant.
2. The Respondent, from the evidence adduced in the Lower Court, is a minor and at the material time of the accident on 10.2.2018 he was aged about one (1) year. He was in the company of his mother and next friend VAO when they were hit by the Appellant's motor vehicle. The Plaintiff and his mother were on a motor cycle as pillion passengers. They both sustained injuries. His mother is the Respondent in **HCCA 4 of 2019** which has also been determined today.
3. In the case of the plaintiff minor, it was pleaded that he sustained injuries involving:
  - **Head injury with loss of consciousness for some time.**
  - **Multiple cut wounds on the right temporal scalp.**
  - **Cut wound on the left upper eyelid and left forehead.**
  - **Facial bruises.**
  - **Bruises on the left shoulder.**
  - **Bruises on the left leg**
4. The Minor's mother testified and stated that her child sustained a cut wound on the head, cut wound on the head, cut wound on the left upper eye lid, cut on the cheek and loss of consciousness for some time. She produced as exhibits, treatment notes from Ambira Sub-County Hospital, discharge summary from Busia County Referral Hospital, Jamu Imaging Centre, P3 form and a Medical Report compiled by Dr. Sokobe.
5. The Plaintiff's Counsel submitted for general damages proposing a sum of KShs. 380,000/= whereas the Defendant's Counsel submitted proposing KShs. 100,000/= general damages.
6. Both Parties' Advocates relied on the same authorities as those cited in **HCCA 4 of 2019** where the Appellant's mother was injured.
7. The trial Magistrate in her brief judgment relied on the authorities cited by the Respondent's Counsel stating that they "relate well to the quoted cases and the fact that the Minor was aged 8 months when he sustained the injuries." She awarded the plaintiff KShs. 350,000/= general damages.
8. It is the above judgment that has given rise to this appeal vide memorandum of appeal dated 21.1.2019 setting out 6 grounds of appeal all challenging quantum of damages and contending that the same were inordinately and excessively high and that the trial Court did not take into account the applicable established principles and case law on award of general damages for personal injuries.

9. I have already reproduced the pleaded injuries as per the plaint dated 19.3.2018 and the evidence adduced in Court by the minor's mother who also produced the treatment notes, P3 form and Medical Report by Dr. Sokobe as exhibits.

10. The treatment notes and discharge summary from Busia County Referral Hospital show that the minor was admitted in Hospital on the date of the accident on 10.2.2018 and discharged on 14.2.2018 having sustained the following injuries as a result of Road Traffic Accident:

- **Frontal lacerations.**
- **Cut on the head.**
- **Cut wound on the left upper eyelid and the left forehead.**
- **bruises on the left cheek, nose and left shoulder.**
- **Injury on the left lateral tibia.**
- **other systems were found to be normal.**

11. The conclusion by the Doctor was that the minor sustained soft tissue injuries secondary to Road Traffic Accident involving a motor vehicle and a motorcycle. The P3 form produced as an exhibit was filled on the same date of discharge from Hospital on 14.2.2018 which enumerated the same injuries and the degree of injury was assessed to be grievous harm.

12. What I find not consistent with the initial medical notes, from Dr. Sokobe's Medical Report dated 20.2.2018 is that Dr. Sokobe claimed the minor suffered head injury with loss of consciousness for some time but the treatment notes do not say so. The rest of the injuries are not disputed.

13. The Complaints as at the time of examination was that he cried a lot. There were multiple healed scars on the scalp, face, left shoulder and left leg. The P3 discounted any fracture but the medical report claimed that a CT scan on the head confirmed left parietal non hemorrhagic contusion. The Doctor's opinion and prognosis is that the minor JO sustained severe soft tissue injuries from which he was recovering well.

14. My observation from the judgment of the trial court is that the Hon. Trial Magistrate in awarding the general damages only relied on the authorities cited by the Plaintiff's Counsel and concluded that they related well, but never compared the injuries sustained by the Plaintiff with those in the cited cases side by side before arriving at her decision. The trial magistrate then stated: "***I also consider the fact that the minor was eight months when he sustained the injuries.***"

15. In my humble view, the trial Magistrate took into account irrelevant factors and failed to take into account relevant factors in awarding the plaintiff KShs. 350,000.

16. The Plaintiff's Counsel in his submissions replicates what was submitted in **HCCA 4 of 2019** and so does the defendant's Counsel. In Kisumu **HCCA 99/2010 Omori Motors Garage Ltd v John Ochieng Otiende [2016] eKLR**, the Plaintiff sustained cut wounds on the head, face, nose, right knee injuries and a left hip joint dislocation. These were classified as soft tissue injuries.

17. In **Migori HCCA 23/2015 Francis Ochieng & Another V. Alice Kajimba**, the Plaintiff sustained mild head injury with bilateral temporo-parietal scalp haematoma, sub-conjunctival haemorrhage and peri-orbital scymosis on both eyes. She also lost 7 teeth. She was admitted in hospital on 17.1.2013 and discharged on 23.1.2013. The trial court awarded her KShs.650,000/= but on appeal, Majanja – J., reduced the award to KShs.350,000/=.

18. In my humble view, the Plaintiff in the above case sustained more serious injuries including loss of 7 teeth. Those injuries cannot be compared to those sustained by the plaintiff's child in the instant case hence that authority was not relevant or useful in the lower court.

19. In **Bildad Onditi and Another v Rashid M. Rateng [2013] eKLR**, the injuries sustained by the plaintiff were listed as:

- **Posterior dislocation of the right hip joint.**
- **He was admitted to hospital for 8 days.**
- **He suffered restricted movement due to tenderness in the right hip area 8 months after injury.**

20. He was awarded KShs.350,000/= which was upheld by the High Court (Said Chitembwe J., on 27<sup>th</sup> February, 2013).

21. Indeed, there can be no two similar cases where multiple injuries can be said to be the same. In the same vein, money cannot renew the physical frame that has been battered and shattered. All that Judges and Courts can do is to award sums which must be regarded as giving reasonable compensation and in the process, they must endeavor to secure some uniformity in the general method of approach.

22. According to **Lord Morris of Bothy-Guest**, "***By common consent, awards must be reasonable and must be assessed with***

**moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said. It still must be that amounts which are awarded are to a considerable extent, conventional.” See H. West and Sons Ltd v Shepherd] 1964] AC 326 at P. 345.**

23. Whereas as an appellate court I should be slow in interfering with the discretion of the trial court unless the award is manifestly excessive or inordinately low as to be erroneous, in this case, in my humble view, had the trial court applied her mind to the principles applicable to award of general damages and/or compared well the injuries sustained by the plaintiff minor and those in the cited authorities, she would have made an award that was appropriate and reasonable.

24. The injuries sustained by the minor were soft tissue injuries and were healing well 10 days after the accident. There was no fracture or permanent disability. The injured areas involving bruises and lacerations were stitched and were healing. As a young child, he stood better chances of healing faster than if it was a mature/adult.

25. In my view, the minor sustained injuries similar to those sustained by his mother, perhaps because they fell to the ground together simultaneously after the motor cycle they were riding on as pillion passengers was hit by a motor vehicle and as his mother was carrying him, they fell together and sustained similar injuries.

26. Accordingly, I find that for such soft tissue injuries which were healing well, an award of KShs.350,000/= general damages was erroneous and manifestly excessive. I would interfere with the award.

**27. I allow this appeal against quantum of damages, set aside the award of Kshs 350,000 and substitute it with an award of KShs. 180,000/= less 25% contribution leaving a balance of Kshs. 135,000/=. To this amount, add special damages of Kshs. 7,180 pleaded, proved and not contested in this appeal.**

28. General damages will earn interest at court rates from the date of judgment in the lower court until payment in full whereas special damages will earn interest at court rates from the date of filing suit. The Respondent is also entitled to costs of the suit in the lower court.

29. **Regarding costs of this appeal**, costs are in the discretion of the court and in any event to the successful party. I have considered all the circumstances in this case and the fact that the appeal against quantum has succeeded. However, I shall not award to the appellant full costs of the appeal. Instead, **I order that the appellant shall have costs of KShs.15,000/= for this appeal which has been fast tracked by the court to save the parties on costs occasioned by delays.** This amount shall be deducted from the general damages payable to the Respondent.

30. As the awarded sum was preserved in a fixed interest earning account, t the appellant suffers no loss as the amount has earned interest.

31. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 2<sup>nd</sup> day of December, 2019**

**R. E. ABURILI**

**JUDGE**

Judgment delivered in open court in the absence of the parties or their advocates but who were present on 2/10/2019 when judgment date was set.

CA: Modestar and Brenda