



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT

CIVIL APPEAL NO. 443 OF 2013

KANYARI NGICHU.....1ST APPELLANT

STANLEY WANJEMA MWANGI.....2ND APPELLANT

VERSUS

CN (minor suing through next friend and mother EW.....RESPONDENT

(Being an appeal from the Judgment delivered on 29th July, 2013 by Hon. Mr. J. W. Onchuru (Ag. Principal Magistrate) at Thika Law Courts in CMCC No. 585 of 2011)

JUDGMENT

1. The Appellant was sued by the Respondent for damages for injuries arising out of a road traffic accident. Liability was agreed by the parties at 100% against the Appellant. Witness statements and documents which included a P3 form and medical reports by Dr. Moses Kinuthia and Dr. P.M. Wambugu were produced as exhibits. The parties filed written submissions on quantum.
2. The trial magistrate assessed the general damages at Ksh.300,000/= and special damages at Ksh.2,700/=. The total came to Ksh.302,700/= and judgment was entered accordingly. The Appellant was dissatisfied with the said judgment and appealed to this court. The central issue in the grounds of appeal is that the award of general damages was excessive and not commensurate with the injuries sustained.
3. The appeal was canvassed by way of written submissions which I have considered.
4. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

5. The medical report by Dr. Moses Kinuthia, a general practitioner dated 31st March, 2011 reflects the injuries sustained by the minor as follows:

“1. Blunt head injury with swelling of the occipital scalp.

2. Blunt trauma with swelling left clavicle”

6. The X-rays taken of the skull at Thika District Hospital revealed no fractures. The medical report by Dr. Moses Wambugu, a general

practitioner, reflects that the head injury was managed conservatively and resolved well. That the left clavicle was deformed at the middle 1/3. The doctor's opinion was that the left clavicle injury most likely involved a greenstick fracture which was missed and not managed and resolved with mild angular deformity.

7. A medical report by Dr. P.M. Wambugu, a Consultant Surgeon dated 3rd September, 2012 produced by the Appellants reflects that the injuries sustained were a blunt trauma to the occipital scalp. The x-rays taken are stated as normal and that the patient was managed as an outpatient on appropriate medication and recovered adequately with no complications envisaged. Dr. Wambugu further observed that the alleged left collar bone fracture was not clinically demonstrated.

8. The P3 form filled in at Thika Level 5 Hospital reflects a swollen occipital scalp with no other injuries. Thus the P3 form and the medical report by Dr. Wambugu are in agreement.

9. Counsel for the respective parties in their submissions essentially differed on whether the minor sustained injury on the left clavicle leading to deformity. Faced with two differing medical opinions in the medical reports aforesaid, this court is persuaded to accept the report of Dr. Wambugu whose report is in agreement with the P3 form which is the Respondent's own document. There is also no evidence of any medical intervention for injury to the clavicle bone from the date of the accident on 9th January, 2011 to the date of the examination by Dr. Moses Kinuthia on 30th February, 2011.

10. The trial magistrate in his judgment relied on the medical report by Dr. Moses Kinuthia only and made no mention of the report by Dr. Wambugu which was produced on 15th April, 2013 and has been referred to in the submissions herein.

11. In his submission on quantum, the Appellant's counsel relied on the following cases:

1. Lilian Achieng v Nation Media HCCC Ksm No.18/2005 where Ksh.60,000/= was awarded as general damages for minor chest injuries.

2. Mumias Sugar Company Ltd v Julius Shibia [2004] eKLR where Ksh.100,000/= was awarded as general damages for multiple soft tissue injuries.

3. George Kinyanjui T/a Climax Coaches & another v Hussein Mahad Kuyale [2016] eKLR where Ksh.109,890/= was awarded as general damages for soft tissue injuries.

12. The Respondent's counsel in his submissions supported the award of general damages made by the lower court and stated that the same did not warrant interference.

13. I am guided by the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v A M. Lubia and olive Lubia (1985) 1 KAR 727**: where the Court of Appeal observed:-

“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial court are well settled. The appeal court must be satisfied either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages....”

14. Going by the injuries in the report by Dr. Wambugu and taking into account the authorities cited, I find the award of Ksh.200,000/= reasonable in the instant case. Consequently, the judgment of the lower court is hereby set aside and substituted with a judgment of Ksh.200,000/= general damages. The award of Ksh.2,700/= special damages remains. The total comes to Ksh.202,700/= plus costs and interest. The Appeal having been partially successful, each party to bear own costs of this appeal.

Dated, signed and delivered at Nairobi this 11th day of Dec., 2019

B.THURANIRA JADEN

JUDGE