



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 32 OF 2016

(Arising from judgment of Hon. C. A. MAYAMBA (SRM)

in Githongo SRMCC No. 26 of 2015 delivered on 1st July, 2016)

(CORAM: F. GIKONYO J)

JOSPHAT MUTEMBEI.....APPELLANT

-Versus-

JAMES MWORIA.....1ST RESPONDENT

IRUKI NAFTALY.....2ND RESPONDENT

JUDGMENT

[1] The judgment appealed against was delivered by Hon. C. A. MAYAMBA (SRM) in Githongo SRMCC No. 26 of 2015 on 1st July, 2016. It relates to a road traffic accident that occurred on 10th March 2014 along Nkubu - Meru road involving the 1st Respondent, a pedestrian, and motor vehicle registration KBQ 524R. Judgment on liability was entered by consent of the parties in favour of the plaintiff and against the 1st Defendant at the ratio of 80:20. The trial court awarded the plaintiff a sum of Kshs. 900,000 in general damages and Kshs 5, 000 in special damages.

[2] The Appellant was aggrieved by the award and filed this appeal. Eight grounds of appeal preferred in Memorandum of Appeal. Looking at the grounds, and the fact that the appeal is on quantum of damages, the said grounds may be collapsed into one:

1. That the Learned Magistrate erred in law and fact in awarding excessive damages without justification.

Submissions by the Appellant

[3] The Appellant submitted that the award of Kshs. 900,000 as general damages for pain and suffering was inordinately high considering the nature of injuries. He reiterated entirely his submissions from the trial court. He affirms that an award of Kshs. 350,000 is reasonable as general damages. Some of the authorities he relied on are **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR**, **Amritlal S. Shah Wholesalers Ltd & another v Joshua Ekeno [2012] eKLR**, **Zachariah Mwangi Njeru v Joseph Wachira Kanoga [2014]eKLR** and **Harun Muyoma Boge v Daniel Otieno Agulo**

Submissions by the 1st Respondent

[4] The 1st Respondent submitted that the conventional principle of law in claims for general damages for personal injury claims courts have to strive to maintain uniformity by ensuring that similar or comparable injuries attract similar or comparable awards in damages. By being awarded Kshs.900,000/- when the Appellant had proposed Kshs. 350,000/- was guided by the decline in value of the shilling and that the same award should remain undisturbed. He relies on the case of **Charles Mwanja & Another v Batty Hassan [2008] eKLR**. On the issue of special damages he submitted that they produced a receipt for preparing the medical report. On the issue of loss of past earnings and future earnings the trial court did not award anything. It was dismissed of which they agree with. Consequently, they submit that this appeal lacks merit and the same be dismissed with costs to him.

Analysis, findings and the decision

[5] This court has carefully considered the record of appeal and submissions presented. This Appeal is on quantum only as liability was apportioned by consent at 80; 20 in favour of the Appellant. I recognize that assessment of damages is at the discretion of the trial court. And, the appellate court should be slow to interfere with the exercise of that discretion except where it is shown that the trial court, in assessing the damages acted on wrong principle or took into account irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high or low that it must be wholly erroneous estimate of damages. See the decision of the Court of Appeal in the case of **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICES, GATHONGO KANINI vs. A.M. LUBIA AND OLIVE LUBIA**, where it was held inter alia that:-

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

See also the case of **BHUTT vs. KHAN (1982 – 88) 1 KAR 1**

[6] I also take counsel in what **Lord Morris** stated in **H. WEST & SON LTD vs. SHEPHARD [1964] AC 326** at page 353 that:

“The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

[7] What does the evidence say? According to the medical report produced in court, the 1st Respondent sustained the following injuries of which parties do not dispute:

- 1) Multiple bruises on the right lower limb
- 2) Fracture of the right tibia
- 3) fracture of the right fibula

The doctor opined that the 1st Respondent sustained serious injuries that required 18 days of inpatient management and an extensive convalescent period as an outpatient. Due to the degree of injuries he has permanent disability awarded at 10%.

[8] In light of the injuries suffered by the 1st Respondent, I find the following cases to bear close semblance on injuries sustained as well as the awards made:

1. In **Ahmed Mohammed vs Abdulhafidh M. Banragah Mombasa HCCC No. 319 RD of 2001** the plaintiff sustained a fracture of the left femur subtrochanteric and compound fracture of the left tibia and fibula was awarded Kshs. 750,000/-.
2. In **Solomon W. Njoroge v Anne W. Mwangi Nairobi HCCC No 4935 of 1991** the plaintiff sustained fracture of the right hip, compound fracture of the right tibia and fibula, soft tissue injuries on the face and left elbow. General damages were assessed at Kshs 500,000/-.
3. In **Soren Peterson & Another vs Charles Muhavi Singa Eldoret Civil Appeal No.149 of 2003** delivered on 3rd September, 2008. The court was of the view that injuries sustained were compound fracture of the tibia and fibula. The other injuries were soft tissue injuries but were extensive. On appeal court reduced the award from Kshs.500, 000/- to Kshs.400, 000/-
4. In **Zachariah Mwangi Njeru vs Joseph Wachira Kanoga Civil Appeal No.9 of 2012** judgment delivered. The Respondent sustained a fracture to the tibia and fibula and was awarded Kshs.400,000/-.
5. In **Tarbo Transporters Ltd v Absalom Dova Lumbasi [2015] eKLR** the plaintiff sustained fracture of the tibia fibula which resulted to a permanent deformity assessed at 3%. The other injuries were soft tissue. The appellate court set aside the award of Kshs. 500,000/- and substituted it for Kshs. 400,000/-

[9] From the foregoing, similar injuries have attracted an award of between Kshs. 400,000 and Kshs. 750,000. Due to the degree of injuries suffered, the 1st Respondent was assessed to have permanent disability at 10%. This fact as well as the rate of inflation, would justify an award on the upper limit, i.e. Kshs. 750,000 as fair compensation for the injuries sustained. Although no injuries are exactly the same, as in the other case, courts should try and keep damages within limits which has found expression and favour in decided cases. See the case of **Kigaraari vs. Aya [1982-88] 1 KAR 768** where it was stated as follows:-

“Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance and increased fees.”

Accordingly, the trial court did not keep to the guiding principles here and erred in principle. The award of Kshs. 900,000 is on the higher side. I set it aside and make an award of Kshs. 750,000/- in general damages. Special damages proved is Kshs. 5,000/- and I so award. I also award costs on the judgment sum and interest at court rates.

Dated, signed and delivered in open court at Meru this 7th day of May 2018.

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for Respondent

Mr. Wamache advocate for Mr.Mose for appellants

F. GIKONYO

JUDGE