



IN THE HIGH COURT OF KENYA

AT MERU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 111 OF 2017

BETWEEN

DANIEL MUCHEMI.....1ST APPELLANT

SUNBIRD SERVICES LIMITED.....2ND APPELLANT

AND

ROSEMARY KAWIRA KIAMBI.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Ocharo, SRM

dated 11th February 2015 at the Principal Magistrates Court

at Nkubu in Civil Case No. 57 of 2013)

JUDGMENT

1. The issue of liability is not in dispute in this appeal as the parties agreed to apportion the same in the ratio 80:20 against the appellant. The respondent was injured while she was travelling in the 2nd appellant's motor vehicle registration number KBK 144J when it collided with another motor vehicle registration number KBA 970M along the Meru – Nairobi road on 2nd February 2010. The respondent sustained the following injuries: deep cut on the forehead, head injury with loss of consciousness for over 2 weeks with CT scan showing frontotemporal concussion, fracture of the pelvis and of the right talus with a deformity of the right foot and arthritis of the right ankle and a cut on the left leg.

2. The trial court awarded the respondent Kshs. 1,200,000/- and Kshs. 92,318/- as general and special damages respectively. It is the award of general damages that has precipitated this appeal on the grounds set out in the memorandum of appeal dated 15th December 2017 as follows:

1. The learned magistrate erred in fact and law in finding that the plaintiff was entitled to general damages that were too high in view of the injuries suffered by the plaintiff and without considering the provisions of Cap 405 (as amended) which gives a guideline on how injuries of a particular nature ought to be compensated and the available authorities on similar injuries.

2. The learned trial magistrate erred in fact and in law in failing to consider the defendants' submissions on quantum.

3. The learned magistrate erred in fact and in law in failing to consider conventional awards for general damages in similar injuries.

3. As is evident from the memorandum of appeal, the nature and extent of the respondent's injuries was not disputed. What is in dispute is the damages to be awarded.

On this issue, the parties filed written submissions in the court below.

4. The respondent urged the court to award Kshs. 2,000,000/- based on several cases. In ***Joseph Mwanza v Eldoret Express Ltd KSM HCCC No. 160 of 2004 (UR)***, the plaintiff sustained head injury with multiple facial injuries, laceration over the right frontal scalp, gross right periorbital oedema and tenderness with enophthalmos, diplopia and ophthalmoplegia of the right eye, swelling and tenderness over the facial side bone, craniomaxillofacial fractures, compound depressed frontal bone fracture and small subdural haematoma and undisplaced

fracture of the ontid. He was awarded Kshs. 1,200,000/- in 2012. In *Sylvano Nyaga and Another v Joseph Kogi Ngotho and 3 Others* NYR HCCC No. 95 of 2002 (UR), the 1st plaintiff sustained a severe closed head injury resulting in unconsciousness for 5 days and confusion for 12 days, a closed fracture of the right ulna and radius with dislocation of the elbow joint for which he underwent two operations and a diffusely swollen brain with contusion of the cerebellum. He was awarded Kshs. 2,500,000/-. The plaintiff in *Edward Mzamili Katana v CMC Motors Group Limited and Another* MSA HCCA No. 70 of 1997 (UR) was awarded Kshs. 2,000,000/- in 2006 having sustained a head injury leading to concussion, cut wound and bruises on the scalp, fracture of the left scapula, compound fracture dislocation of the left elbow and chest injury with multiple fractures of the 5th, 6th and 7th ribs and fracture of the left upper third of the femur. The respondent also cited the case of *Ernest Mokoro Ondieki v Modern Distributors* NKU HCCC No. 78 of 2002 (UR) where the plaintiff sustained a fracture at the base of the skull, cerebral concussion, prominent scars and adhesions on the abdomen and left hand deformity with reduced functionality. He was awarded Kshs. 1,200,000/- as general damages in 2004.

5. The appellants' submissions before the trial court focused on the provisions of the *Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)* ("the *Principal Act*") and the *Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, Act No. 50 of 2013* ("the *Amendment Act*"). The appellants submitted that the trial court ought to be guided by the *Amendment Act* which determines the level of award to be made under schedules made pursuant to **section 3** thereof. Counsel for the appellants pointed out that according to paragraph 4 of the said schedule, where there is a combination of injuries, the most severe of the injuries is considered the dominant injury for purposes of compensation. The appellants contended that the dominant injury was the pelvic fracture which would attract Kshs. 300,000/- being 10% of the maximum compensation of Kshs. 3,000,000/- permitted under the *Amendment Act*. The appellants' submission is that the trial magistrate did not consider this provision and its submissions and therefore came to the wrong assessment of general damages.

6. I agree with the appellants' submissions that the trial magistrate erred when she failed to consider and or deal with the issue raised by the appellants *namely* whether the quantum of damages be determined in accordance with the provisions of **section 3** of the *Amendment Act*. It therefore falls upon this court, as the first appellant court to consider this issue.

7. In order to deal with the issue raised by the appellant, it is important to recall the purpose of *Principal Act*. It is to indemnify motor vehicle owners against claims by injured third parties following road traffic accidents. **Section 10(1)** of the *Principal Act* encompasses the duty of the insurer to satisfy judgment against persons insured and it provides as follows:

10(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

8. Section 3(a) of the *Amendment Act* added an amendment to **section 10** of the *Principal Act* as follows;

3. Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act is amended (a) by inserting the following subsections immediately after subsection (1)- Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule (Emphasis mine)

9. The tenor and effect of the aforesaid amendment was to cap damages payable to the third party by the insurer based on the schedule titled, "*Structured Compensation Liability Schedule*." These provisions of the *Amendment Act* were challenged in *Law Society of Kenya v Attorney General* NRB Petition No. 148 of 2014[2016]eKLR. Onguto J., considered the constitutionality of the *Amendment Act* and held, *inter alia*, that the **sections 3(a)** and **(b)** of the *Amendment Act* were unconstitutional, null and void. This decision was affirmed by the Court of Appeal in *Justus Mutiga and 2 Others v Law Society of Kenya* NRB CA Civil Appeal No. 141 of 2016 [2018]eKLR. As regards the Schedule relied on by the appellants, the Court of Appeal stated as follows;

[32] In view of the foregoing, we are satisfied the impugned schedule has no place in the *Principal Act* as the same cannot be applied to any judgment without rendering the same null and void. We therefore agree with the learned Judge that Sections 3(a) of the Insurance (Motor Vehicle Third Party Risks (Amendment) Act, 2013 is null and void and so is **section 6** which sought to introduce the impugned schedule.

10. I note however that the judgment before the trial court was delivered before the declaration of unconstitutionality in *Law Society of Kenya v Attorney General* (Supra). This, in my view, would not change the outcome as the *Amendment Act* does not tie the hands of the trial magistrate in determining damages in a suit by a claimant against a tortfeasor. The *Principal Act* deals with liability of the Insurance Company to settle claims against the insured arising from judgments against the insured. The respondent's suit is not a claim for indemnity and falls outside the scope of the *Principal Act*. I therefore reject the appellants' submission that an award of Kshs. 300,000/- is reasonable and appropriate.

11. The guiding principle for consideration of this appeal is that for the appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* [1981] KLR 349).

12. The award of general damages is not a precise or scientific exercise. Since general damages are damages at large, the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in *Stanley Maore v Geoffrey Mwenda* NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that:

Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again 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.

13. I would also add what the Court of Appeal stated in *Mbaka Nguru and Another v James George Rakwar* NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR that:

The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.

14. The appellant has complained that the trial magistrate erred in failing to consider conventional awards for damages in similar cases. In assessing damages, the trial court relies on similar decided cases from superior court submitted by the parties. It is thus the duty of advocates to cite to the court appropriate cases to guide the court on the award to make. In this case, counsel for the respondent cited several cases which I have referred to elsewhere in the judgment while the appellants did not cite any cases. The trial magistrate considered all the cases cited by the respondent and since none were cited by the respondent, she came to the conclusion that the award of Kshs. 1,200,000/- was reasonable in the circumstances. Since the appellants did not cite any cases to guide the trial court, they can hardly complain if the trial magistrate considered the cases cited by the appellants. It is now too late in the day to rely cases that were not cited before the trial magistrate to test whether the trial magistrate erred. The appellants have not shown how the trial magistrate erred in light of the principles of *Butt v Khan (Supra)*.

15. I dismiss the appeal and award the respondent **Kshs. 50,000/-** all-inclusive as costs of this appeal.

DATED and DELIVERED at MERU this 16th day of October 2018.

D.S. MAJANJA

JUDGE

Ms Wamburu instructed by Kairu and McCourt Advocates for the appellant

Mr Ariithi instructed by Kiogora Ariithi and Company Advocates for the respondent.