



**REPUBLIC OF KENYA**

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

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 75 OF 2016**

**BETWEEN**

**JITAN NAGRA ..... APPELLANT**

**AND**

**R D O minor suing through father and next friend R G O ..... RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. N. Wairimu, PM dated 14<sup>th</sup> September 2017 at the Principal Magistrates Court at Ogembo in Civil Case No. 179 of 2013)**

**JUDGMENT**

1. The child, on whose behalf these proceedings were commenced in the subordinate court, was injured in a road traffic accident that occurred along the Kisii –Kilgoris road on 19<sup>th</sup> September 2013, while he was riding as a pillion passenger on motorcycle registration number KMCN 047S which collided with motor vehicle registration number KBU 532N. The issue of liability was settled in the ratio 70:30 in favour of the respondent. The court proceeded to assess damages and awarded Kshs. 1,500,000/- as general damages, Kshs. 50,000/- as future medical expenses and Kshs. 58,650/- thus precipitating this appeal.

2. The thrust of the appellant’s memorandum of appeal dated 12<sup>th</sup> October 2016 is that the award for general damages was excessive in the circumstances bearing in mind the nature and extent of the injuries and the decisions cited. The respondent on the other hand submits that the award is reasonable and supported by the injuries sustained by the child and the authorities cited. His counsel further submits that the appellant has not established a basis to interfere with the award.

3. According to the plaint, the child sustained a compound fracture of the right distal femur and a fracture of the right 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> metacarpal bone. Dr Oganda Zoga (PW 1), examined the child on 7<sup>th</sup> October 2013 and produced the medical report. He confirmed the injuries sustained by the child were initially attended to at Kisii Level 5 Hospital and then referred to Tenwek Mission Hospital where he was admitted for one week where an operation was done and a metal plate inserted. At the time of examination, the child was complaining of severe headache, severe pains on the chest, back, right foot and he could not walk without crutches. He noted that the child was walking with crutches and he still had plaster of paris (POP). He noted that the child would require future medical treatment.

4. Before the subordinate court, the respondent submitted that an award of Kshs. 2,500,000/- would suffice as general damages. He relied on the case of *Michael Maina Gitonga v Serah Njuguna alias Sarah Wanjiku Mungai NKU HCC No. 202 of 2009 [2012]eKLR* where the plaintiff sustained multiple fracture of the pelvis, dislocation of the right hip with displacement of the right acetabulum, comminuted fractures of the right tibia and fibula on the proximal end with a fracture of the tibia plateau and soft tissue on the chest. The court awarded Kshs. 1,200,000/- in 2012. In *Mwaura Muiruri v Suera Flowers Limited and Another NKU HCCC No. 189 of 2009*, the plaintiff sustained multiple lacerations on the face, soft tissue injuries on the chest case, comminuted fractures of the right humerus upper and lower thirds of the tibia and compound double fractures of the right leg and upper 1/3 tibia fibula. He was awarded Kshs. 1,450,000/- as general damages for pain and suffering in 2014.

5. The appellant proposed Kshs. 300,000/- for pain and suffering and relied on the case of *Isaac Mwenda Micheni v Mutegi Murango NRB HCCC 335 of 2004 [2004]eKLR* where the plaintiff suffered a fracture of the left tibia and fibula together with soft tissue injuries including a wound on the scalp, cut wound on the knee and bruised right forearm and was awarded Kshs. 100,000/- in 2004.

6. In light of the aforesaid submissions, I am now called upon to decide whether the appellant has established a basis to intervene in the award of damages bearing in mind the well-established principle that for an 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*).

7. The injuries sustained by the child are not disputed. What is in issue is the level of award in light of the authorities cited by the parties. In **Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR**, I expressed the following view:

The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.

8. The cases cited by the appellant are in my view on the higher side as they do not reflect the general trend of awards for such injuries. I would in fact consider them an outlier. For example, in **Naom Momanyi v G4S Security Services Kenya Limited Meru HCCA No. 145 of 2014 [2018] eKLR**, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. He was awarded Kshs. 300,000/- in 2018 while in **Gogni Construction Company Limited v Francis Ojuok Olewe HB HCCA No. 1 of 2014 [2015] eKLR**, the claimant was awarded Kshs. 350,000/= as general damages having sustained a fracture of the left distal radius and ulna and dislocation of the left elbow and was hospitalised for 6 weeks. Even factoring inflation in these more recent awards, the award of Kshs. 1,500,000/- is obviously an excessive.

9. I find that a compound fracture of the right femur is more serious than a simple fracture coupled with further fractures of the metacarpal bones. Considering the general trend of awards in comparable cases and the need to maintain consistency, I find the award of Kshs. 1,500,000/- inordinately high. I set aside the award of general damages and substitute it with an award of **Kshs. 450,000/-** which shall be subject to the agreed contribution and shall attract interest from the date of judgment before the subordinate court.

10. I award the appellant costs of the appeal which I assess at **Kshs 40,000/=** all inclusive.

**DATED and DELIVERED at KISII this 12<sup>th</sup> day of October 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr Mose instructed by Mose, Mose and Milimo and Company Advocates for the appellant.

Mr Nyangosi instructed by Nyangosi & Company Advocates for the respondent.