



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO 100 OF 2017**

**TIRUS MBURU CHEGE.....1<sup>ST</sup> APPELLANT**

**MBURU JOHN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**J K N (minor suing**

**through the next friend and mother**

**D W N.....1<sup>ST</sup> RESPONDENT**

**NJUGUNA BERNARD.....2<sup>ND</sup> RESPONDENT**

***(An appeal from the Ruling and orders of the Chief Magistrate's Court at Limuru (L.N. Makau (Mrs) Principal Magistrate) dated 20<sup>th</sup> May 2015 in PMCC NO 96 of 2014***

**JUDGMENT**

1. The court found the appellants to have negligently controlled motor vehicles number KBK 207D and KBA 369Q, and caused the said motor vehicles to collide and as a result the Minor (JKN) sustained severe bodily injuries. Hence, the court found the appellants responsible for the accident which occurred on 13<sup>th</sup> January 2014 along Nairobi- Naivasha Highway.

2. The Minor was lawfully travelling in motor vehicle registration KBK 207D as a fare paying passenger and as a result of the said accident, he sustained fractures of the tibia /fibula (both legs), blunt head injury(forehead), broken upper right 2<sup>nd</sup> incisor tooth, nose bleed and transient (brief) loss of consciousness. The court awarded the respondent general damages of Kshs 800,000/-; special damages of Kshs 14,020/- together with costs of the suit and interest.

3. Being aggrieved by the decision the appellants filed this appeal citing the following grounds:

*(i) That the learned magistrate erred in law and in fact in awarding general damages to the respondents amounting to Kshs. 800,000/= which is inordinately high in the circumstances.*

*(ii) That the learned magistrate erred in law in failing to find the suit fatally defective and an abuse of the court process.*

*(iii) That the court failed to consider the totality of the evidence adduced and consequently arrived at an erroneous decision.*

4. The appeal was disposed of by way of written submissions. In his submissions M/S M.N.M Advocates for the appellant submitted on quantum by relying on **Akamba Public Road Services v Abdikadir Adan Galgalo[2016] Eklr** where an award of Kshs. 800,000/= was set aside on appeal and substituted with an award for Kshs. 500,000/= for a permanent partial disability of the right tibia and fibula due to fracture, fracture site eak point, post fracture arthritis, pain and estimated permanent partial disability at three(3%) per cent.

5. Counsel further relied on **Harun Muyoma Boge v Daniel Otieno Agulo [2015] Eklr** where an award of Kshs. 300,000/= was made for blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia, fibula and soft tissue injuries.

6. Counsel also relied on **Rose Makombo Masanju v Night Flora alias Nightie Flora & another [2016]eKLR** where the court awarded Kshs. 500,000 for fracture of the left wrist, comminuted fracture, frontal bone with hemossinus, concussion with loss of consciousness for three(3) hours, two(2) deep cut wounds on the forehead and right eye nerve injury -trigeminal neuralgia. Counsel urged this court to allow

the appeal with costs to the appellants.

7. The appeal was opposed by the respondents through M/s B.W Kamunge & Co. Advocates who submitted that the trial court's awarding of damages(quantum) is an exercise of judicial discretion which is not to be interfered with unless it is shown that it was exercised on wrong principles. Counsel relied on Ratnam v Cumarasamy & Another ALL ELR(1964) Vol.3 at pg 933 where it was held:-

**“the appeal must be dismissed, because it was impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle... and to allow the appeal would be substantially to interfere with the practice of the judicial committee in regard to applications of this nature.”**

8. Counsel further submitted that the burden of proving that a single Judge in exercising his unfettered judicial discretion has exercised his discretion improperly lies on the person challenging the same. Counsel relied on Samken Limited & Anor v Mercedes Sanchez Civil Application No. NBI 21 OF 1999 where the court held:-

**“The burden of proving that a single Judge in exercising unfettered discretion conferred by rule 4 of the Court of Appeal Rules has exercised his discretion improperly lies on the person challenging the same.....”**

It was thus counsel's submission that the appellants had totally failed to discharge that duty in their submissions and to that extent the Appeal must fail.

9. Counsel also relied on Peter Mburu Echaria v Priscilla Njeri Echaria Civil Application No 204 of 1998 where the Court of Appeal where the Court of Appeal held:-

**“.....we have said on numerous occasions that the discretion conferred on a single judge under Rule 4 is exercised on behalf of the Court and on a reference from his decision, the full Court cannot interfere with that exercise unless it is shown:-**

- (i) That in the exercise of its discretion the single Judge took into account irrelevant matters:**
- (ii) That he did not take into account a relevant factor.**
- (iii) That he misapprehended the law applicable to the situation.**
- (iv) Or that the decision is plainly wrong.**

Counsel thus submitted that the appellants had failed to persuade the Honourable Court that the trial magistrate was wrong in her finding on the issue of quantum in her judgment. Counsel thus urged the court to dismiss the present appeal with costs to the 1<sup>st</sup> respondent.

10. PW1 Dr. George Kungu Mwaura a registered medical officer examined J K N (minor) who had been involved in a road traffic accident on 13th January 2014. The said Minor had sustained the following injuries:-

- (i) Fractures tibia and fibula on both legs.
- (ii) Blunt injury on the forehead.
- (iii) Broken upper right second front tooth.
- (iv) Nose bleeding
- (v) Consistent loss of consciousness.

11. He told the trial court that the Minor received treatment at PCEA Kikuyu hospital and by the time he examined him, healing was incomplete as evidenced by the pain he experienced on exertion, his prognosis was fair but no disabilities were foreseen. He termed the injuries sustained by the Minor as grievous harm with soft tissue injuries. He produced the report (PEXB.1b), receipt (PEXB.1b) of Kshs.3,000 and attendance fee (PEXB.1c) of Kshs.7,000.

12. The issue of liability had already been determined in a sister file by the lower court at 100% against the appellants.

13. The learned trial magistrate considered all this evidence and awarded general damages and special damages in favour of the respondents follows: -

- a) Liability 100% against the appellants.**
- b) General damages Kshs. 800,000**

c) Special damage Kshs. 14,020

**Kshs. 814,020**

The respondent was also awarded costs and interests of the suit.

14. This being a first appeal I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to see or hear the witnesses and I must give an allowance for that. See Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: (Okubasu, Githinji & Waki JJA).

I should also bear in mind that it is not open to this court to review the findings of the trial court just because it would have found differently had it been hearing the matter for the first time.

15. I have considered the pleadings, evidence on record, grounds of appeal, and authorities by both counsel. The appellant raised six(3) grounds of appeal. I have however considered them and the issue I find falling for determination is:

**(i) Whether the quantum that was awarded was manifestly high as to warrant disturbance by this court.**

16. It is an established principle of law that that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR and Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5).

17. In the present appeal, the trial magistrate awarded general damages at Kshs 800,000/= and special damages at Kshs. 14,020/=. The appellants were categorical in their submissions that the damages awarded to the respondent were excessive and the trial court had absolutely no justification to award the sum of Kshs. 800,000/= as general damages for pain and suffering. Instead the appellants urged this court to award a sum of Kshs. 300,000/=.

18. In Rose Makombo Masanju v Night Flora alias Nightie Flora & another [2016] eKLR Kamau J observed:-

**“It must be understood that money can never really compensate a person who has sustained any injuries. No amount of money can remove the pain that a person goes through matter how small an injury may appear to be. It would in fact be difficult to say with certainty a particular amount of money would be commensurate with the injuries that a person has sustained. It is merely an assessment of what a court would find to be reasonable in the circumstances to assuage a person who has suffered an injury.”**

19. I agree with this observation by my sister and wish to add that an assessment cannot be without limits. A court must have presence of mind to ascertain to itself the sum of general damages that courts and especially appellate courts would ordinarily award in respect of a particular injury. A court must therefore be guided by precedents which it then applies to the circumstances of each case.

20. Indeed, in the case of Kigaraari vs Aya(1982-88) 1 KAR 768, 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.”**

21. In the case of Agnes Wakaria Njoka v Josphat Wambugu Gakungi [2015] eKLR, the plaintiff therein sustained two (2) deep cut wounds on her hand, fracture of the skull, deep compound fracture on the right forearm and loss of left hand at wrist which was cut off. In 2015, Limo J awarded a sum of Kshs 650,000/= for general damages, pain and suffering and loss of amenities.

22. In the case of Zachary Kariithi v Jashon Otieno Ochola [2016] eKLR, the plaintiff therein sustained compound fractures of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> ribs of the right side and injuries to the forehead, hip joint, big left toe, waist and pains in the chest. In 2016, Majanja J awarded a sum of Kshs 1,500,000/= general damages, pain and suffering and loss of amenities.

23. In the case of Margaret T. Nyaga vs Victoria Wambua Kioko [2004] Eklr the plaintiff therein had sustained a ruptured urinary bladder, fracture of the fibula and superficial injuries to the right axle, left hand and both knees. In that case the trial court therein had awarded a sum of Kshs 450,000/= which on appeal was reduced to Kshs 300,000/= as the appellate court had found the sum of Kshs 450,000/= to have been excessive.

24. In the case of Florence Njoki Mwangi vs Chege Mbitiru [2014] eKLR, on appeal, Wakiaga J allowed a sum of Kshs 700,000/= general damages where a plaintiff had sustained fractures of femurs bilaterally, two degloving injuries of the right knee and the right ankle and concluded that she would need money to remove k-nails and screws.

25. This court has perused the Plaintiff and noted that the Minor sustained the following injuries: -

- Fractures tibia and fibula on both legs.
- Blunt injury on the forehead.
- Broken upper right second front tooth.
- Nose bleeding
- Consistent loss of consciousness.

26. The Medical Report prepared by PW1 confirmed indeed that the minor J sustained the above injuries. Evidently, the injuries the appellant sustained could not be termed to have been minor. They were serious in that he sustained fractures on both legs with no disability. Bearing in mind the recent awards and the injuries that the minor sustained, it is this court's view that the award of the sum of Kshs 800,000/= was manifestly high warranting interference by this court.

27. In the assessment of this court, it is my considered opinion that an award of Kshs 500,000/= as general damages, pain and suffering and loss of amenities would be fair and reasonable to compensate the minor for the injuries that he sustained as PW 1 had opined that he never suffered any permanent disability as a result of the said injuries.

28. For the reasons foregoing, the upshot of this court's judgment is that the Appellant's Appeal is successful and is allowed.

(i) The Judgment for the sum of Kshs 800,000/= general damages, for pain and suffering and loss of amenities is hereby set aside and substituted with a judgment in the sum of Kshs 500,000/= as general damages for pain, suffering and loss of amenities.

(ii) The Judgment on special damages for Kshs 14,020 is upheld.

(iii) The Respondent shall bear the costs for both the appeal and the lower court case.

**Signed and dated this 3<sup>rd</sup> day of October at Nairobi.**

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**HEDWIG I. ONG'UDI**

**JUDGE**