REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 165 OF 2016

KENYA WILDLIFE SERVICES.....APPELLANT

VERSUS

BAKARI YAWA CHIMOYO.....RESPONDENT

J U D G M E N T

1. In urging the appeal and after parties had filed written submissions the Appellant abandoned the appeal on liability and preferred to urge only the part of quantum of damages awarded to the Respondent.

2. On 4/7/2018 the parties took the 8/10/2018 as the date to highlight the submissions filed. However come the date set only the appellant appeared but not the respondent. In this judgment, I will consider both submissions as filed.

3. In his written submissions, as highlighted orally, the appellant stated that the Respondent had at trial failed to plead with specifics his injuries and in particular failure to relate the missing tooth with the accident. Having set out the principles of award of damages to be that of compensating the plaintiff rather than enriching him the appellant's counsel cited to court the decisions in ***Ken Knit vs Ngigi [2012] eKLR and George Kinyanjui vs Hassan Musa Agoi [2016] eKLR*** in which the court awarded Kshs.450,000/= and 450,000/= respectively in cases with comparable injuries to the injuries here. He took the view that the sum of Kshs.600,000/= awarded at trial was exorbitant and too high.

4. For the Respondent submissions dated 23/2/2018 and filed on 27/2/2018 were to the effect that the damages awarded to him were reasonable and compared well with decided cases of comparable injuries. The counsel cited to court several decisions Kenyan and English, for the proposition of law that an appellate court should not freely interfere with an assessment of damages[1]

5. The appeal being confined to the question of whether the

damages were too high or reasonable this court is bound to take cognizance of the principles that assessment of damages is a difficult task, [2] is a largely a discretionary matter and that the court cannot interfere unless it be demonstrated that some irrelevant consideration went into the decision by the trial court or that relevant matters were disregarded or that the assessment is outrightly and evidently erroneous[3].

6. In coming to its assessed damages the trial court observed:-

> **"The medical report by Dr. S.K. Ndegwa dated 8th July, 2011 shows that the plaintiff sustained the following injuries:-**
>
> **i. Fracture of the lower 1/3 right fibula**
>
> **ii. Chest injuries with fracture of the 8th rib and contused bruises on the back.**
>
> **iii. Avulsion of tooth No. 22 and mobile tooth No. 21.**
>
> **iv. Bruises on both lips.**
>
> **v. Chest contusion.**
>
> **vi. Bruises upper back.**

He was admitted at Kinango hospital from 3rd June, 2009 to 17th June, 2009. The doctor stated that the plaintiff "has healed with 55 permanent disability due to the dental injuries".

The plaintiff's counsel proposed a sum of Kshs.1.000,000 as general damages. He relied on the case of *Peter Mugambi vs District Commissioner Meru North & 2 Others (2011) eKLR* where the High Court upheld an award of Kshs.600,000/= for a plaintiff who sustained a fracture base of the scalp, injury to the parietal region of the head, impaired healing and injury to the hip.

On the other hand, the defendant opined that a sum of Kshs.200,000 would suffice. He cited the case of *Kiwanjani Hardware Limited & Another vs Nicholas Mutinda Civil Appeal No. 16 of 2008* where the court upheld an award of Kshs.150,000 where the plaintiff sustained following injuries:-

a. Blunt injury to the head without loss of consciousness.

b. Blunt injury to the neck.

c. A cut to the throat.

d. Blunt injury to the left shoulder and back.

e. Blunt injury to the chest.

f. Blunt injury to the right forearm.

g. Deep penetrating wound on the left leg with cuts and bruises on the same leg.

The injuries in the cited case (Hardware) were soft tissue injuries and did not involve fractures.

On the other hand the injuries in Peter Mugambi's (supra) are comparable to those suffered by present plaintiff. I therefore find that Kshs.600,000 would adequately compensate the plaintiff and I award the same".

7. As a first appellate court, my mandate and jurisdiction is to re-

evaluate the entire evidence and come to own conclusions but well aware and warned that it is not open to me to substitute my discretion for that of the trial court.

8. I have gone through the evidence led, particularly that by the

Respondent as PW 2 and the DR PW 1 together with the medical reports produced by consent of the parties and I am of the view that in coming to the decision the trial court arrived, no error was committed in principle as far as assessment of damages is concerned. Rather the trial court took into account all it was bound to take into account and cannot thus be faulted. It is not enough that the Appellant, as defendant at trial, proposed a lower figure. It is enough that the trial court took guidance of decisions of a superior court cited to it and come to an award while exercising a judicial discretion.

9. This appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

Dated and delivered at Mombasa this 9th day of November 2018.

P.J.O. OTIENO

JUDGE

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[1] Patrick Muiti M'manene vs Kevin Mugambi Nkanja [2013] eKLR

[2] Kimatu Mbuvi vs Augustine Munyao Kioko [2006] eKLR

[3] Ken Odondi vs James Okoth Ombura [2013] eKLR; Kemfro Africa vs Lubia [1982-1988] 1 KLR 777