



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 70 OF 2017

BETWEEN

TELKOM ORANGE KENYA LIMITED.....APPELLANT

AND

I S O minor suing through his next friend and mother J N.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C. R. T. Ateya, RM

dated 21st August 2017 at the Magistrates Court at Ogembo

in Civil Case No. 146 of 2011)

JUDGMENT

1. The child subject of this appeal was walking along the Kisii-Kilgoris road on 2nd March 2011 when at Magena market, he was hit by the appellants' motor vehicle registration number KAT 776X and injured as result. The issue of liability was resolved by a consent apportioning liability at 85:15 in favour of the respondent. The trial court awarded Kshs. 950,000/- as general damages which has precipitated this appeal.
2. A reading of the memorandum of appeal dated 11th September 2017 shows that the appellant reiterated the principles upon which this court may intervene in reviewing an award of damages on appeal. It was held in *Butt v Khan [1981] KLR 349* 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. Counsel for the appellant argued that the award was inordinately high bearing in mind the nature of injuries and the authorities cited and as such it represented an entirely erroneous estimate of damages.
3. Counsel for the respondent urged the court to uphold the award of the trial court as the appellant had not established any basis for the appellate court to interfere with the award. He urged that the award of general damages was reasonable given the serious injuries sustained by the child.
4. The injuries sustained by the child were particularised in the plaint as follows; head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg. The main evidence by on the child's injuries was given by Dr Ogonda Zoga (PW 2) who produced the report and P3 form prepared by Dr Maurice Raute who had examined the child and confirmed that the child sustained the injuries that I have outlined above. At the time of examining the child, Dr Raute noted that the child was complaining of chronic headaches especially on the left side requiring treatment by use of analgesics. The child also had occasional blurring of vision with occipital headache. He concluded that the child sustained serious head injuries which put him at risk of developing seizures as a long term complication together with disfiguration resulting from the scalp and leg scars.
5. In order to guide the trial magistrate parties relied on written submissions which they adopted in this appeal. The respondent suggested Kshs. 1,400,000/- as general damages. She cited *Maintenance Limited and Another v WA (a minor suing through father next friend SKH) ELD HCCA No. 52 of 2008 [2015]eKLR* where the court upheld an award of Kshs. 800,000/- in 2015 where child sustained a depressed fracture of the skull on the left temporal area, brain concussion and soft tissue injuries and loss of consciousness for 3 hours. In the case of *Isaac Waweru Mundia v Kiilu Kakie Ndeti t/a Wikwatyo Services MKS HCCC No. 312 of 2009 [2012]eKLR* where the court awarded of Kshs. 1, 000,000/- as general damages in 2012. The plaintiff suffered a fracture at the base of the skull, comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of the left lower incisor tooth, right eye vertical dystopia and diplopia on

the left gaze with marked ptosis of the upper eyelids, resultant facial asymmetry caused by the injuries, wounds and abrasions on the lip, chin and both lower limbs and loss of blood, physical and psychological pain.

6. The appellant submitted that Kshs. 400,000/- was reasonable in the circumstances based on ***Sila Tiren and Another v Simon Ombati Odhiambo ELD HCCA No. 142 of 2011 [2014]eKLR*** where the claimant sustained a brain concussion, the scalp was swollen and tender with a wound on the pectoral region, he was bleeding from the left ear and nostril indicating that he had sustained a fracture of the base of the skull and a fracture of the mastoid involvement.

7. General damages are damages at large and 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.

8. 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.

9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see ***Kigaraari v Aya [1982-88] 1 KAR 768 Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR*** and ***Jabane v Olenja [1986] KLR 661***).

10. The trial magistrate considered the injuries and the authorities cited by the parties and came to the conclusion that the injuries sustained by the plaintiff in the ***Maintenance Limited Case (Supra)*** were similar to those the child sustained in this case. I cannot fault the trial magistrate for increasing the amount awarded in that case to Kshs. 950,000/-. Having reviewed the cases cited by the parties, I find the cases cited by the respondent reflected more serious injuries. For example, in the ***Maintenance Limited Case (Supra)***, the doctor who testified assessed the degree of disability at 70%. In this case, the doctor did not assess disability but only stated that there was a risk of developing seizures as a long term complication. Apart from the head injuries, the other injuries sustained by the plaintiff in the ***Isaac Waweru Case (Supra)*** were more serious than those in the present case. In the ***Sila Tiren Case (Supra)***, the appellant sustained some fractures of the head but the court accepted the doctor's report which stated that while the injuries were severe they had all healed save for the headaches.

11. Having considered the decisions cited, I find that the trial magistrate erred in not considering the nature and extent of the injuries in light of the decision relied on to reach the award of Kshs. 950,00/-. The child sustained primarily a head injury and the doctor who testified only noted that there was a risk in the future. The child did not suffer any permanent disability. Consequently, I set aside the judgment of the trial court and substitute it with an award of Kshs. 500,000/- as general damages.

12. Before I conclude this judgment, I would like to comment on the procedure used to produce the medical report and P3 form prepared by Dr Raute. The documents were produced by PW 2 who testified that he knew Dr Raute and was familiar with his signature. This was in purported compliance with **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which allows a person other than the one who prepared a report such as a medical report to produce it provided the presumption of authenticity is met. The section provides as follows:

77. (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof. [Emphasis mine]

13. A plain reading of **section 77** aforesaid is clear that it only applies to criminal cases. In civil cases, the normal rules of admissibility of documents apply. In this case though, the issue is moot since the medical report and P3 form were produced without any objection on the appellant's side.

14. I allow the appeal, set aside the award of general damages by the subordinate court and substitute with an award of Kshs. 500,000/- as general damages. The award shall be subject to agreed contribution and shall accrue interest from the date of judgment before the subordinate court.

15. The respondent shall pay costs of the appeal which I assess at **Kshs. 35,000/-** all inclusive.

DATED and DELIVERED at KISII this 3rd day of DECEMBER 2018.

D.S. MAJANJA

JUDGE

Mr Wagonda instructed by L. G. Menezes and Company Advocates for the appellant.

Ms Gogi instructed by Khan and Associated and Advocates for the respondent.