



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 13 OF 2013

(An appeal from the Judgment of the Senior Resident Magistrate, Embu in CMCC No. 72 of 2011 dated 21/2/2013)

DICKSON KARIUKI NYAGA.....1ST APPELLANT

MARTIN IRERI NAMU.....2ND APPELLANT

VERSUS

EMMA MBANDI NYAGA.....RESPONDENT

RULING

The appellants were dissatisfied with the judgment of Embu Senior Resident Magistrate in Embu CMCC No. 72 of 2011 where the respondents were awarded Kshs.600,000/= general damages for loss of amenities less 10% to contribution. The respondents claim as set out in his plaint dated 25/5/2011 was for general and special damages arising from injuries sustained in a road traffic accident which occurred on 30/8/2010 along Embu-Tharaka road. It involved the appellants vehicle registration number KBB 113B in which the respondent was travelling as a fare paying passenger.

In a statement of defence filed on 17/6/2011 the appellants denied the claim. However, the parties recorded consent judgment on liability at the ratio of 90% in favour of the defendant therefore submissions were filed by the parties together with supporting authorities on assessment of damage. Two medical reports one by Dr. Njiru and the other By Dr. Theuri were availed to the court.

Both reports showed that the respondent sustained a fracture of the right fibula and multiple soft tissue injuries. The report of Dr. Njiru stated that the soft tissue injuries were; multiple scalp wound, multiple laceration on the lower limbs, right shoulder, wrist joint and back. The doctor formed the opinion that the respondent was likely to develop osteoarthritis and osteomyelitis in the future. The appellants report prepared by Dr. Theuri opined that the soft tissue injuries had healed and were not likely to cause any complications. The trial magistrate made a global award of Shs.600,000/= for loss of amenities.

The appellant in his memorandum of appeal filed on 20/3/2013 contended that the magistrate failed to consider their submissions and the authorities thereby awarding excessive damages in total disregard of the principles which guide courts in assessment of damages.

The duty of the first appellate court was stated in the case of **ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES VS JOH PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR** where the Court of Appeal held inter alia that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

This appeal before me is against the quantum of damages. It is therefore important to examine the principles guiding an appellate court in whether it is entitled to disturb an award of damages. In the case of **ARROW CAR LIMITED VS BIMOMO & 2 OTHERS [2004] 2 KLR 101** the court of Appeal citing the case of **KEMFRO AFRICA LTD VS GATHOGO KANINI VS V.A.M.M. LUBIA & ANOTHER** held

- 1. In deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, an appellate court must be satisfied that the judge in assessing the damages took into account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.*
- 2. In assessment of damages the general methods of 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.*

In pursuance with the laid down principles this court will look into whether the trial magistrate took into account irrelevant factors or omitted to consider relevant fact and whether the assessment of damages was inordinately high as alleged by the appellant.

The respondent had pleaded in his submissions before the magistrate for an award of Shs.700,000/= citing a number of authorities. He relied on the case of **JOHN NYARANGI RAGUSU VS CAR & GENERAL AUTOMOBILE LTD & ANOTHER Nairobi HCCC No.2531 of 1996** where the plaintiff sustained fracture of the left radius and ulna, fracture of the right femur, fracture of the right tibia and fibula and fracture of the left tibia and fibula. The court awarded general damages of Kshs.600,000/= in the year 2001.

In the case of **GEORGE MATHENGE MUTHINGO VS M.D. PATEL Nairobi HCCC No. 2216 of 1993** where the plaintiff sustained compound fracture of radius and ulna, fracture of right thumb, fracture of right tibia and fibula, loss of left incisor tooth, strain in the right knee, ankle joint and big toe and multiple soft tissue injuries. Damages were assessed at Kshs.600,000/= in the year 2000.

The appellants on the other relied on hand relying on the case of **WAMBAIRA & 17 OTHERS VS KIOGA 2 OTHERS [2004] eKLR** where the court held that money cannot renew a physical frame and that all the court can do is to give reasonable compensation. The court in that case also observed that there must be uniformity in that comparable injuries should be compensated by comparable awards. This was meant to influence the court in giving a reasonable award and to consider uniformity in assessing damages. For the quantum of damages, the appellant relied on two authorities. In the case of **HASSAN NOOR MOHMOUD VS TAE YOUNG ANN [2001] eKLR** the court awarded Kshs.20,000/= for a fracture of the left tibia and dislocation.

In the **WAMBAIRA CASE (SUPRA)** the court of Appeal confirmed an award of KShs.100,000/= for a fracture and stated the award was not inordinately high.

On careful perusal of the magistrates judgment, it is clear that none of the authorities cited by any of the parties was considered. Neither was there any comparative analysis on the injuries sustained by the respondent and those in the authorities relied on by the parties in the assessment of damages. The failure by the court to consider the authorities which were relevant factors in the assessment was wrong and may have led to assessment of damages without any legal or factual basis. The authorities relied on by the respondent reflected more serious injuries which are not comparable to those sustained by the respondent.

On the other hand the authorities relied on by the appellant had less serious injuries in comparison to those sustained by the respondent.

For these reasons, I wish to rely on an independent authority whose facts are similar to this case. In the case of **JOHNSON MOSE NYAUNDI (Minor suing through Next Friend and Father) WILFRED WADIMBE NYAUNDI VS PETROLEUM & INDUSTRIAL SERVICE LTD, HCCA No. 183 OF 2010 at Kisumu** the appellant was awarded Kshs.350,000/= for loss of amenities by the magistrate for fracture of the right tibia and fibula and multiple soft tissue injuries. He was dissatisfied with the judgment and appealed against it on grounds that the award was inordinately low considering the serious nature of the injuries. The High Court on 7th May 2014 confirmed the award on grounds that it was commensurate to the injuries suffered.

Considering that the plaintiff suffered a fracture of the right fibula which healed without any complications plus soft tissue injuries in this case, an award of Shs.600,000/= in 2013 was inordinately high. The **NYAUNDI (SUPRA)** case is a more recent case and the appellants suffered two fractures of tibia and fibula as opposed to one fracture in this case.

It is trite law that comparable injuries should receive similar awards. However, peculiar circumstances of each case must be taken into consideration.

The award of Shs.600,000/= is hereby set aside and substituted with one of Shs.400,000/=. The agreed contribution ratio of 90:10 shall remain applicable. The amount payable to the respondent is Kshs.360,000/= plus costs and interests from the time of the first judgment.

Taking into consideration the circumstances in this appeal, I hereby order that each party meets his own costs of this appeal.

The appellant will bear the costs of the court below.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MARCH, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kiragu for Mogere for Applicant

Ms. Muriuki for Respondent

F. MUCHEMI

JUDGE