



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO.52 OF 2008

**(Being an appeal from the Judgment and Decree of Kisii Senior Principal Magistrate's Court
SPMCC No.613 of 2005 delivered on the 24th April 2008 by Hon. C.G.Mbogo – SPM)**

MAINTENANCE LTD.....1ST APPELLANT

HARRY HANEGRAAF.....2ND APPELLANT

VERSUS

W A (A minor suing through next friend and father

S K H.....RESPONDENT

JUDGMENT

1. The Respondent was the Plaintiff at the trial court. The Respondent by her plaint dated 16th October 2001 sued the Appellants jointly and severally seeking:
 - a. **General damages for pain suffering and loss of amenities.**
 - b. **Special damages of Ksh.5,000/=**
 - c. **Costs**
 - d. **Interest on (a), (b) and (c) above at court rates.**
 - e. **Any other remedy.**

The Respondent gave evidence and called 2 witnesses, however, before the Respondent could close her case, both Appellant and Respondent entered into a consent on liability which was agreed at 90% to 10% in favour of the Respondent.

2. Having agreed on liability, both parties rested their respective cases thereby leaving the issue of quantum of damages to be determined by trial court after hearing submissions of both parties over the same.
3. In this appeal, therefore, I am not called upon to determine liability as it was, as I have stated hereinabove, agreed upon by the parties and accordingly recorded in court.
4. The trial court then assessed and awarded damages payable to the Respondent as follows:

- a. General damages - Ksh.800,000.00
- b. Special damages - Ksh. 4,000.00

TOTAL	-	<u>Ksh.804,000.00</u>
Less 10%	-	Ksh. 80,400.00
	=	<u>Ksh.723,600.00</u>

- c. Costs of the suit
- d. Interest of the suit.

5. The Appellants were aggrieved by the award of damages and appealed to this court.

6. The Judgment of this court will therefore be limited to the quantum of general damages that were awarded by the trial magistrate.

7. The grounds of appeal were set out in the Memorandum of appeal filed on 12th May 2008 as follows:

1. **The learned trial magistrate applied wrong principles in assessing quantum of damages.**
2. **The learned trial magistrate's award of damages was inordinately too high and manifestly excessive as to present an erroneous estimate for the injuries allegedly suffered.**
3. **The learned trial magistrate erred on all points of fact and law in as far as the award of damages is concerned.**
8. This being a first appeal, I am obligated to evaluate the evidence on the injuries sustained and make my own conclusions and findings.
9. The plaintiff listed the following particulars of injuries:-
 - Depressed skull fracture on the left temporal region.

The plaintiff further stated the continuing effects of the injuries and disability as: -

“increased chances of developing convulsive disorder.”

10. The Respondent, then a minor, testified on her injuries as follows:

“There was a dent on my head. It was bleeding (shows the injured part above the left ear) I was also injured on the knees.”

11. **PW2 Dr. Gedion Nyacheki Ragira**, who examined the Respondent some 2 years after the accident testified on her injuries as follows:-

“I found bruises on the left temporal area and for the remarks seen and initially taken on 24th February, 2001 showed depressed fracture of the skull on the left temporal area. There was brain concussion and soft tissue injuries.

When I examined how she complained of persistent headaches, poor vision and occasional twitching of the right upper limb I concluded that as a result of the Road Traffic Accident she lost consciousness from 1.00 p.m. to 4.00 p.m. I assessed the degree of injury as grievous harm. She had attended both neurological and surgical clinics for 5 months because of poor vision.

Loss of consciousness which is reversible shows some damage to the brain (classic concussion). The presence of depressed fracture shows considerable force (coup concussion) leading to bleeding.

There are chances of developing epileptic fits it is evidenced by the twitching of the right upper limbs. Management of epilepsy is a lifelong exercise. I assessed disability at 70%.”

12. PW2 produced the medical report he had prepared in respect to the Respondent's injuries as Exhibit No.3. The Appellants did not subject the Respondent to a 2nd medical examination by a doctor of their choice and therefore, PW2 presented the only medical opinion on record that the court could rely on.
13. Looking at the doctor's testimony, I am of the opinion that the findings are consistent with the particulars of injuries as contained in the plaint, albeit, in a more detailed form. The evidence on the extent of the Respondent's injuries forms the basis upon which the award of damages is grounded. It is thus critical, in a case such as this, to carefully evaluate the medical evidence produced before the lower court with a view to determining if the award made was commensurate to the injuries sustained.
14. I have therefore also perused the treatment notes that we produced as P. Exhibit 1 and noted that they confirm the contents of the doctor's report in respect to the Respondent's resultant disabilities following the injuries which are shown as severe headache, poor vision and convulsions. The degree of injuries, as shown on the P3 form produced during the trial was assessed as **“grievous harm.”**
15. Advocates for both parties filed their respective submissions in the lower court when the Respondent and Appellant sought awards of Ksh.1,200,000/= and Ksh.200,000/= respectively. The trial court however assessed the damages at Ksh.800,000/= less 10% liability as earlier stated in this judgment.

Submissions on appeal:

16. In the instant appeal, both parties agreed to canvass their arguments by way of written submissions. I have perused the written submissions of both sides and noted that the Appellants' submissions in support of appeal filed on 3rd August 2015 are mainly centred on the ground that the award of the lower court was too high and manifestly excessive as to represent an erroneous estimate for the injuries allegedly suffered.
17. The Appellant maintained that the magistrate applied wrong principles in assessing quantum of damages.
18. According to the Appellant, the principles to be applied in assessing quantum of damages were stated in the case of **Kipkebe Ltd vs Moses Kauni Masaki, Kisii High Court Civil Appeal No.127 of 2004** when it was observed as follows:-

“It is trite law that an award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards of similar injuries and such other relevant factors.”

19. The Appellants' submissions can be summarized as follows:

- a. *That the trial magistrate assessment of damages was not based on the injuries sustained by the Respondent.*
- b. *That the magistrate did not adhere to the principles applicable in assessment of damages, that is; took into account an irrelevant factor and disregarded a relevant factor, fairness, reasonableness, moderation and stare decisis.*

c. *That the award was inordinately high and was not supported by any judicial award on similar injuries.*

20. The Appellants concluded their submissions by proposing that an award of Ksh.361,800/=, which is half the award contained in the judgment appealed against, would be adequate compensation for the Respondent.

21. The Respondent's submissions filed on 24th July 2015 supported the lower court award which she opined, should not be disturbed as it was reasonable and appropriate considering that the Respondent had prayed for Kshs.1,200,000/= general damages in her submissions before the judgment.

22. The Respondent further submitted that numerous court decisions have held that an appeal court should not interfere with the findings of the trial court on assessment of damages unless it is based on no evidence or misapprehension of evidence or the judge acting on wrong principles.

23. According to the Respondent, the trial court considered the evidence presented and gave an appropriate award commensurate with the injuries sustained by the Respondent and the inflationary trends prevailing at the time of the judgment. The Respondent urged this court to uphold the lower court's decision.

24. The trial court gave an award of Ksh.800,000/= on injuries that were classified as causing the Respondent "**grievous harm.**" The medical report, P3 form and treatment notes produced as exhibits reveal that the nature of the injuries were such that they could have long term effects on the health of the minor respondent with the possibility of developing epilepsy in future.

25. In fact, the doctor who testified before the lower court stated that the degree of disability at 70%. Clearly, to my mind, the injuries were likely to have far reaching long term consequences on the health of the Respondent.

26. The doctor's testimony on the nature of the Respondents' injuries and their effects on her health was not impeached on cross-examination or by another separate report showing a different scenario. In effect, this court and indeed the lower court had only one medical report/opinion to go by.

27. I find the Appellants' contention that the Respondent's wounds had fully healed to be only telling half of the story because indeed even though the physical wounds could have fully healed, the overall resultant effect of the injuries were such that, according to the doctor already causing the Respondent debilitating health problems such as severe headaches, poor vision and convulsions. There is no doubt in my mind that the trial magistrate took into account the resultant effects of the injuries in making her award of general damages when he observed:

"Having considered the circumstances of this case and having noted that the Plaintiff has chances of developing epileptic fits, the sum of Ksh.800,000/= would be adequate compensation."

28. The principles for assessment of damages were set out by the Court of Appeal for East Africa, and subsequently adopted by our Court of Appeal in the following cases:

1. **Kanga vs Manyoka [1961] EA 705, 709, 7013.**
2. **Lukenya Ranching and Farming Co-op. Society Ltd vs Kavoloto [1979] EA 414, 418, 419.**
3. **Kemfro Africa t/a Meru Express & Anor. vs A.M.Lubia & Anor [1982]-88] I KAR 727.**
4. **C.A. No.66 of 1982 Zablou Mangu vs Morris W. Musila (unreported)**

From the above authorities, Appellate Court will interfere with the exercise of discretion by the trial court when assessing damages if the trial court;

- a. *Took into account an irrelevant fact or,*
- b. *Left out of account a relevant fact or,*
- c. *The award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.*

29. I find that the trial magistrate's exercise of discretion was in tandem with the principles stated hereinabove and was therefore exercised judicially. The trial magistrate based his assessment on the Respondent's injuries their resultant effects on the Respondent's health, the awards proposed and the judicial authorities cited by both parties. The magistrate even went further to take into account the factor of inflation on the judicial awards cited by the Appellant which he observed were 37 years and 30 years old respectively.

30. I have looked at the authorities quoted by the Appellant in support of this appeal and noted that for similar injuries to the instant case, the awards made are not way off the mark from the award made by the trial magistrate in this instant case.

31. This court finds no reason to interfere with the award made by the trial court for general damages. For those reasons, this appeal is hereby dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 9th day of November, 2015

H. W. OKWANY

JUDGE

In the presence of:

- M/S Bosire for M/S Kibichiy for the Appellants
- M/S Sagwe for Bunde for the Respondent
- Mr. Ogega: Court clerk