



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 20 of 2008

QUENTINE WAMBUA APPELLANT

VERSUS

V.W.N. (Minor suing thro' Father and next Friend)

NDUNDA WAMBUA KITUU RESPONDENT

J U D G M E N T

This is an appeal from the decision in **Machakos Chief Magistrate’s Civil Suit No. 162 of 2004** in which liability was agreed upon by consent. The Defendant who is now the appellant agreed to shoulder 90% liability.

In the judgment on assessment of quantum of damages, the learned trial magistrate on 17th December 2008 stated as follows:-

“All considered I award Kshs.160,000 .00 as being general damages for pain and suffering. Out of this the defendant is to bear 90% while the 3rd party shoulder 10%. In the circumstances I enter judgment for the plaintiff against the defendant in the sum of Kshs.144,000.00 while the 3rd party is to pay Kshs.16,000.00 being 10% contribution.

Special damages proved amount to Kshs.4,850.00. Same shall now be subjected to 10% contribution. The defendant is to shoulder the same. The upshot of the foregoing is that there shall be judgment for the plaintiff against the defendant as follows:-

General damages	– Kshs.144,000.00
Added specials	- Kshs. 4,850.00
Total award	- Kshs. 148,850.00

“The plaintiff shall also have costs of the suit plus interest.”

From the above award, the appellant (who was the defendant in the trial court) has appealed to this court through M/s Manthi Masika & Company Advocates on the following two grounds:-

- 1. The learned Resident Magistrate erred in law and fact by making an award on general damages which was manifestly excessive given the injuries sustained by the plaintiff and the relevant case law produced by the defendant.**

2. The learned Resident Magistrate applied wrong principles of law in assessing damages hence arriving at a (sic) manifestly excessive damages.

Both the appellant's counsel M/s Manthi Masika & Company and the respondent's counsel M/s Annie W Thoronjo & Company filed written submissions in the appeal. The appellant's counsel Mr Masika made brief submissions in court that the award of general damages should have been Kshs.60,000/=. M/s Thoronjo for the respondent submitted that the above amount is too low today.

I have perused the written submissions on both sides. I have also considered the oral submissions and authorities cited.

This is a first appeal. As stated correctly by counsel for the appellant, the mandate of the court in such an appeal was clearly stated in the case of **Butt –vs Khan (1977) 1 KLR 1**, where the court stated:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

I have perused the record of proceedings in the subordinate court. The only issue for determination was the quantum of damages. Only one witness testified. He was **V.W.N. (PW1)**. The doctor's report appears to have been produced by the said witness by consent. The injuries sustained by the victim of the road traffic accident were described in the medical report of **Dr. P.M. Wambugu** as:-

- **Cut wound left knee joint region.**
- **Blunt trauma left scalp region associated with haematoma.**
- **Blunt trauma left shoulder joint region.**

In written submissions in the lower court, counsel for the plaintiff relied on two cases and asked for an award of Kshs.300,000/=. The first case was **Jane Njoki Muraya –vs- Alice Kimani - HCCC 2886 of 2005** decided on 27th February 2001. The injuries suffered were injuries to the left shoulder, injuries the left anterior chest wall and injuries to the left hip joint. The award was for Kshs.150,000/=. The second case was **Jacinta Akinyi –vs Philip Kipteret Siele HCCC 4676 of 1990** decided on 31/10/91 with an award of Kshs.150,000/=. The injuries were described as multiple severe soft tissue injuries.

In the subordinate court, counsel for the appellant, who was the defendant, asked for an award of Kshs.60,000. Cases cited in written submissions were two. The first was the case of **James Ndungu Wainaina –vs- James Mwega Guchu HCCC 1647 of 1998** whose date of decision was not given in which the award was for general damages of Kshs.50,000/= for cut wounds on the face, knee and pains on the head and chest. The second was the case of **Jane Wanjiru –vs- Duncan Mwaura – HCCC 3854 of 1986** whose date of decision was also not indicated. The award for general damages was Kshs.120,000/= for cut wounds of the face, behind the left ear and right knee and pains on the head and chest.

The appellant's counsel has now come to this court on appeal relying on totally different cases that were not cited before the learned magistrate. He has cited the case of **Sokoro Saw Mills Ltd –vs- Grace nduta Ndungu (2010) e KLR**, **Ziporah Wambui Wambaira –vs- Gichuru Kiogora (2004) e KLR**, **Tayalo –vs- Annah Mary Kinaru (1982 – 88) KAR 90** and **Stanley Maore –vs Geoffrey Mwenda (2004) e KLR** on the quantum of damages.

In my view, this is a wrong and unjustified approach by

counsel. Counsel did not place these authorities before the trial court, and should therefore not use them to criticize the decision of the learned magistrate. In my view, what counsel is doing is to bring to this

court parameters for consideration which he did not place before the magistrate.

As stated earlier, this court can only interfere with an award of general damages where it is so inordinately high or low as to cause injustice, or where the trial court applied wrong principles or where it misapprehended the facts placed and arrived at an inordinately high or low figure. With the facts before the trial court and the case authorities placed before it, I find nothing to suggest that the award can be said to be inordinately high or low. The magistrate put the award of general damages mid way between what was asked for by the plaintiff and what was asked for by the defendant. It must be appreciated that the cases relied upon by both sides were determined sometime back and the magistrate had to take into account factors such as inflation and fall in the purchasing power when making the award.

Having considered the grounds of appeal, the submissions and re-evaluated the evidence on record, I find that the appeal has no merits. I find no basis for disturbing the award of general damages made by the subordinate court. The appeal is therefore for dismissal.

For the above reasons, I dismiss the appeal, with costs to the respondent.

Dated and delivered at Machakos this **8th** day of **October** 2012.

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George Dulu
Judge

In the presence of:

N/A for Appellant

Mr S.A. Makau for Respondent

Court clerk - Nyalo