



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gicheru, Akiwumi & Tunoi JJ A)

CIVIL APPEAL NO 197 OF 1994

BETWEEN

SAMUEL OSORO NYAMWARO.....APPELLANT

PETER NGANGA MUIGAI.....APPELLANT

DANIEL WABORI MWANGIAPPELLANT

AND

BONIFACE KAMAU.....RESPONDENT

WAIGANJO KIGOTHORESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Mr Justice D M Rimita) dated 22nd September, 1994 in HCCC No 85 of 1986)

JUDGMENT

The appellants seek in this appeal the enhancement of the general damages awarded them by the learned judge of the High Court for the injuries suffered as a result of a motor accident caused through the negligence of the respondents on 18th July, 1994. Liability was admitted and the medical reports on the appellants accepted in evidence by consent. The learned judge then ordered that written submissions should be filed within 14 days, that is by 1st August, 1994. As it happened, submissions for the appellants were filed late on 22nd April, 1994. It is not clear when that for the appellants, are part of the record of appeal. The learned judge, however, did not give his judgment on 22nd August, 1994, as he had hoped, but did so a month later on 22nd September, 1994, after the appellants submissions had already been filed. In the introduction to his judgment, the learned judge said that he had taken the medical reports into consideration. He, however, refused to take into account the submissions filed on behalf of the appellants which must have been in his file at the time of giving judgment, contenting himself with the specious excuse at the beginning of his judgment that:-

“No written submissions have been filed as agreed.”

As regards the medical reports it cannot be said from his very scanty judgment, that the learned judge even gave any worthwhile consideration to them. This can be illustrated by the following extract from this judgment which represents all that he had to say affecting the first appellant who was the third plaintiff in the suit:-

“Medical reports were admitted by consent. No written submissions have been filed as agreed. Consequently I will assess damages as follows:-

3rd plaintiff – Samuel Nyamworo Osoro

The third plaintiff had the following injuries:-

- (a) fractured left hand
- (b) injury on the left hip joint
- (c) injury on the knee
- (d) injury on the left ear
- (e) injury on the back bone

According to Dr Masiira the injuries have healed well except for the fracture which had a mal-union causing deformity.

I have considered the two medical reports on this plaintiff.

I would award this plaintiff a sum of Kshs 75,000/= as general damages.”

A similar cavalier treatment was applied by the learned judge in his judgment in determining the general damages that he awarded to the second and third appellants. It is not at all surprising therefore, that the appellants have appealed against the quantum of general damages awarded by the learned judge on the ground that they were manifestly low. Though served, the respondents were not represented at this appeal. We have considered much more fully than the learned judge did, the medical reports that were in evidence before him, he ignored important and unchallenged factors such as, the fact that the appellant had suffered severe head injuries, had been unconscious for one day, hospitalized for seven days and had a permanently deformed, painful and stiff left elbow joint arising out of a gross mal-union of the comminuted fracture of the upper one third of the left radius, all of which had caused this appellant between 30-40% permanent disability. One really wonders if the learned judge had seriously considered at all, the medical reports on the first appellant, for if he had done so, leaving aside the submissions made on behalf of that appellant which contained relevant decisions as to damages awarded for similar injuries, he surely, he would not have awarded as he did, the inordinately low sum of Kshs 75,000/= as general damages to the first appellant. This sum we have no doubt, having considered the unchallenged medical reports and the authorities contained in the submissions filed on behalf of the appellant. Must be enhanced and based on these very same reports and authorities, we assess at Kshs 250,000/= and hereby substitute it for the sum of Kshs 75,000/= awarded by the learned judge as general damages for the first appellant.

The observations which we have just made with respect to the appeal of the first appellant and the circumstances surrounding the award of general damages by the learned judge to him, apply with equal force to the appeal of the second and third appellants and the circumstances surrounding the award of general damages by the learned judge to them.

Having considered the unchallenged medical reports on the second and third appellants and the authorities contained in the submissions filed on their behalf, we are of the view that the general damages of Kshs 20,000/= and Kshs 15,000/= respectively awarded by the learned judge are inordinately low. We shall, based on our consideration of the medical reports and the authorities, substitute Kshs 45,000/= as general damages for the sum of Kshs 20,000/= and Kshs 25,000/= for the sum of Kshs 15,000/=.

We have had no hesitation in arriving at the conclusion that the general damages awarded to the appellants are in each case, manifestly low which is a ground on which we can interfere with the general damages awarded by the superior court and in the result, the appeal succeeds and the enhanced general

damages as specified herein above, replace those awarded by the learned judge. The appellants will have the costs of their appeal.

Dated and delivered at Nakuru this 29th day of September 1995 .

J.E GICHERU

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JUDGE OF APPEAL

A.M AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR