



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Civil Appeal 320 of 2002**

**1. JOHN MASENO NGALA**

**2. GENERAL MOTORS LIMITED..... APPELLANTS**

**AND**

**DAN NYANAMBA OMARE (a minor suing through**

**ISAAC JAMES OMARE his next friend) ..... RESPONDENT**

***(Appeal from a decree of the High Court of Kenya at Nakuru (Rimita, J) dated 6<sup>th</sup> February, 2001***

**in**

**H.C.C.C No. 57 of 1997)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the superior court (Rimita, J) delivered at Nakuru on 6<sup>th</sup> February, 2001. The appeal is basically on assessment of damages since liability is not challenged.

The suit herein was commenced by way of a plaint filed by Dan Nyanamba Omare (minor suing through Isaac James Omare his next friend) as plaintiff against John Maseno Ngala (1<sup>st</sup> Defendant) and General Motors Limited (2<sup>nd</sup> Defendant). It was not in dispute that the minor was on 1<sup>st</sup> February, 1996 hit and injured by a motor vehicle registration number KAE 305S which was being driven by the 1<sup>st</sup> defendant. According to the pleadings and the evidence adduced in support of the plaintiff's case, the minor was lawfully crossing Nakuru -Eldoret Road when he was hit by the vehicle which was being driven by the 1<sup>st</sup> Defendant. This accident was witnessed by Kipkerich Rono (PW 4) who testified that on the material day at about 12.30 p.m. he was with other elders driving towards Nakuru when he saw an Isuzu pick-up registration number KAE 305S being driven at a speed. There were nursery school children who were crossing the road. The driver of the pick-up applied emergency brakes but in the process hit one of those children. Rono told the superior court that near the place of the accident, there was a road sign showing "Children Crossing". The child who was hit was the plaintiff. The child was examined by Dr. Mukasa (PW 1) who found the following injuries:-

***"(1) Severe head injury, fractures of the base of the skull with moderate brain damage.***

**(2) Severe neck trauma with damage to the roots of the left brachial plexus resulting in complete paralysis of the left shoulder and left arm muscles.”**

In the report prepared and produced in evidence by Dr. Mukasa, he was of the following opinion:-

**“I found master Nyanamba to have sustained severe injuries to the head and neck following the road traffic accident he was involved in on 1.2.96. He suffered fractures of the base of the skull (as evidenced by profuse bleeding from both ears and mouth) at the time of the accident as well as severe damage to the roots of nerves of the left shoulder and left arm in the neck.**

**The fracture base of the skull resulted in some brain damage which accounts for the mental retardation the child is currently suffering.**

**Damage to the roots of left shoulder and left arm nerves in the neck resulted in complete paralysis and sensory loss of the left shoulder and left arm muscles.**

**Whereas some improvement of the brain damage may be expected with time, master Nyanamba is not expected to recover fully and some degree of mental retardation is likely to persist for some foreseeable (sic) future. The damage to his left arm and left shoulder nerves in the neck and the resultant paralysis of his left shoulder and left arm muscles plus the sensory loss are in my opinion permanent.**

**I will classify the assessed degree of these injuries as “Grievous (sic) harm.” In my opinion, master Nyanamba suffered a permanent disability of approximately forty percent (40%) as a result of the injuries he sustained to the head and neck following the road traffic accident he was involved in on 1.2.96.”**

The defendants on their part called Dr. Malik (DW 1) who had examined the minor and Dr. Malik produced his report in evidence. In that report, Dr. Malik was of the following opinion:-

**“Duncan sustained serious injuries as a result of a road traffic accident on 1.2.96. He lost blood and suffered pain. He was admitted to a hospital for about two weeks and was unconscious for three days. He had cerebral concussion and possibly contusion and lost his speech and sense of hearing. He had cuts over the scalp, face and left arm and bled from the nose and ears. After the child’s mental status started improving, the father noticed that he could not use his left arm. He took him back to hospital and the arm was fixed with a cock-up splint on the left wrist to maintain position of the hand. It now looks as if the child suffered damage to main nerve trunk to the left arm. Even if this had been discovered immediately after the accident, nothing much could have been done to improve the outcome. The left arm has lost much of its function and although some recovery is anticipated, it may not be complete.**

**His mental capacity and intellectual performance is claimed to have been affected and he has therefore been advised to attend a special school presumably a school for the mentally handicapped. However, at the time of examination, his demeanor, memory and response to questions was normal. No evidence of aggressiveness, restless or hyperactive behaviour was noted. He looks and sounds mentally normal. Fortunately he has not had any convulsions as is sometimes the case in severe head injury cases.**

**The prognosis regarding improvement in his mental capacity and function in the left arm is guarded.”**

Both Dr. Mukasa and Dr. Malik were consultant surgeons.

The school report cards for the minor were produced in evidence and these report cards showed that the minor was a bright child in school who held positions 2, 5 and 7 out of 52 before the accident but after the accident, he came down to position 52 out of 52.

The learned Judge of the superior court considered the evidence placed before him together with the authorities cited in support of the submissions by counsel appearing for the parties and finally came to the following conclusion in his judgment:-

***“I consider a global sum of 2,000,000/= would be adequate compensation in this case. General damages are pleaded at only Shs.1,100/=. This is only what I can award.***

***Consequently, there will be judgment for the plaintiff against the defendants jointly and severally for the sum of Shs.2,001,100/=. Plus costs and interest at court rates.***

***If the decretal sum is paid, an application for apportionment and investment must be made so that the interests of the minor plaintiff are protected.”***

It is from the foregoing that this appeal arises. The Memorandum of Appeal filed in this Court on 14<sup>th</sup> November, 2002 was as follows:-

**“MEMORANDUM OF APPEAL**

***JOHN MASENO NGALA and GENERAL MOTORS LIMITED, the above-named Appellants appeal to the Court of Appeal against such part of the said decision as decides that:-***

***1. nature and extent of injury suffered by the Plaintiff Minor in particular on the issue of whether the Plaintiff Minor suffered brain damage resulting in mental retardation and***

***2. the quantum of damages awarded which the Appellants find to be excessive on grounds namely:-***

***1. The Judge erred in law and in fact in misdirecting himself in appraising the evidence on the nature and extent of injuries suffered by the Plaintiff Minor and in particular:-***

***(i) erred in fact and in law by failing to give a concise statement of the case relating to the injuries, the points of determination and failed to make a finding re the injuries suffered by the Plaintiff Minor,***

***(ii) the Judge erred and misdirected himself on the issue of the doctor’s award to the Plaintiff Minor of permanent disability of 40%.***

***(iii) the Judge erred in disregarding and failing to differentiate between the injuries viz-a-viz injury to the arm and brain damage,***

***(iv) the Judge erred in law and in fact in disallowing Professor Adam’s report which was marked MFI.3. and***

***(v) the Judge erred in disregarding Dr. Malik’s finding that the Plaintiff Minor had not suffered brain damage.***

***2. The Judge erred in failing to give reasons for awarding general damages in the sum of Shs.2,000,000/= and the damages awarded by the Judge are excessive and unrealistic.”***

When this appeal came up for hearing before us, Mr. Mahida, the learned counsel for the appellants, made it clear that the appellants were not challenging liability. Mr. Mahida’s submissions were in respect of damages. He conceded that there was some degree of retardation but he was of the view that this could not be 40%. He referred to the medical reports and pointed out that the authorities relied upon by the respondent’s counsel were in respect of extreme brain damage. It was Mr. Mahida’s contention that the learned Judge of the superior court was in error when he based his assessment on 40% brain damage. Mr. Mahida invited us to reduce the figure of Ksh.2,000,000/= as in his view, this was too high. He suggested

that a figure not exceeding 1 million shillings would be appropriate in the circumstances of this case.

Mr. Nyachoti, the learned counsel for the respondent, reminded us that this appeal was against assessment of damages only as liability had not been denied. He pointed out that the child was still retarded and that there was no significant change noted.

This being a first appeal and basically on assessment of damages only, we still have to re-evaluate the evidence, assess it and make our own conclusions remembering that we have neither seen nor heard the witnesses and hence due allowance must be made for this – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD. [1968] E.A 123 at p. 126** and **WILLIAMSON DIAMONDS LTD V. BROWN [1970] E.A. 1.**

In this appeal, we are being urged to interfere with the assessment of general damages awarded by the superior court. In **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE, GATHONGO KANINI V. A.M. LUBIA AND OLIVE LUBIA (1982 – 88) 1 KAR 727 at p. 730** Kneller, J.A said:

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of 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. See Ilango v. Manyoka [1961] E.A. 705, 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd. v. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles.”***

The above stated principles continue to be applied by this Court. We have endeavoured to set out the brief background to this appeal. The appeal arises out of a traffic road accident in which the respondent minor was hit by a vehicle belonging to the 2<sup>nd</sup> appellant and being driven by the 1<sup>st</sup> appellant. We have set out in this judgment what injuries Dr. Mukasa and Dr. Malik found to have been sustained as a result of this accident. We have indeed reproduced the opinion by the two doctors. It is our view that in assessment of damages, the general method 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. It would appear that the learned Judge had the correct approach as he embarked on the exercise of assessment of general damages in this case.

The case of **OCHIENG V. AYIEKO [1985] KLR 494** is an example of a case in which the plaintiff was a young boy aged about 10 years when he was knocked by the defendant’s car as a result of which the young boy suffered severe brain damage and compound injury of the left thigh. In giving judgment in favour of the young boy, the superior court at that time (1985) stated that for pain, suffering and loss of amenities, the plaintiff was entitled to general damages in the sum of Ksh.700,000/= as reduced by the degree of contributory negligence of 10%. That award was made over twenty years ago. That must be taken into account as we consider the figure of Shs.2 million awarded by the superior court in this appeal.

In **RAHIMA TAYAB AND ANOTHER V. ANNA MARY KINARU (1987 – 88) 1 KAR 90** Potter, J.A gave the following advice:-

***“I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd v. Shepherd [1964] A.C. 326 at pg. 345:-***

***“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Further-more, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”***

**The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in Lim Poh Choo v Camden and Islington Area Health Authority [1979] 1 All ER 332 at 339:**

***“In considering damages in personal injury cases, it is often said: “The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration.” That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay. It is worth recording the wise words of Parke B over a century ago:***

***“Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life.... You are not to consider the value of existence as if you were bargaining with an annuity office.... I advise you to take a reasonable view of the case and give what you consider fair compensation.””***

**Later in his judgment, at 341, Lord Denning had this to say about extravagant awards:-**

***“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.””***

We have said enough by way of setting out what we consider to be the most practical method of dealing with assessment of damages especially in personal injury cases as it relates to brain damage to young children.

Coming back to the facts of this case, can it be said that the learned Judge took into account an irrelevant factor, or left out of account a relevant one, or that the amount awarded was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage? We were urged by Mr. Mahida that we should reduce the amount awarded. But in view of the decided cases and what we have already stated, we detect no fault in the approach adopted by the learned Judge. We have no reason to interfere with the award made by the superior court.

For the foregoing reasons, we order that this appeal be and is hereby dismissed with costs to the respondent.

**Dated and delivered at Nakuru this 10<sup>th</sup> day of November, 2006.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**S.E.O BOSIRE**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**