



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OMOLO, O’KUBASU & GITHINJI JJ A)**

**CIVIL APPEAL NO 344 OF 2001**

**BETWEEN**

**ARROW CAR LIMITED.....APPELLANT**

**AND**

**ELIJAH SHAMALLA BIMOMO.....RESPONDENT**

**DISHON MMBALI .....RESPONDENT**

**JACOB MALECH .....RESPONDENT**

(Appeal against judgment of the High Court of Kenya at Kisumu (Birech C/A) dated 24th August, 2000 in HCCC No 48 of 1998)

**JUDGEMENT OF THE COURT**

This as an appeal from the judgement of the superior court (Mr P K K Birech –Commissioner of Assize) delivered on 24th August, 2000. The appeal is basically on assessment of damages since the grounds of appeal relating to liability were abandoned. These were the first two grounds of the memorandum of appeal. With the abandonment of those grounds this appeal proceeded on the following grounds:-

“1. ....

2. ....

3. That the learned Commissioner of Assize misdirected himself in not reminding himself of the crystallized principles of law at the time of awarding general damages.

4. The learned Commissioner of Assize erred in law in awarding general damages to the 3 respondents, which were so inordinately high as to represent an entirely erroneous estimate.

5. The learned Commissioner of Assize proceeded on wrong principles and misapprehended the evidence before him in a material respect to arrive at the quantum that he arrived at.

6. That the learned Commissioner of Assize did not give any or any sufficient consideration to the duty he owed not to upset the body politic.

7. That there was no evidence to sustain an award for future plastic surgery; alternatively, if there

was such evidence, the learned Commissioner of Assize should have arrived at a finding of fact before awarding damages under such head.”

On 25th April, 1997 three respondents in this appeal, Elijah Shamalla Bimomo, Dishon Mmbali and Jacob Maleche were passengers traveling in Peugeot Station Wagon registration number KWA 541 from Nairobi to Kisumu. On reaching Kimende along the new Limuru /Naivasha road at about 2.45 pm the said vehicle had a head on collision with a Suzuki motor vehicle registration number KAB 431 V and as a result of the said accident the respondents and other passengers sustained varying injuries necessitating their being admitted at AIC Kijabe Medical Center.

The first respondent, Elijah Shamalla Bimomo (hereinafter referred to as Shamalla) found that he had been injured on both legs, had internal injuries and pain in the neck and was taken to AIC Kijabe Medical Centre where he was treated and discharged. He proceeded on his journey to Kisumu where he was working as the Officer Commanding Kisumu Police Division. He later attended Aga Khan Hospital, Kakamega Highway Nursing Home and other hospitals including Nyeri Provincial Hospital for further medical attention.

In his evidence during the trial Shamalla produced various receipts in respect of bus fare and payments in various hospitals in a bid to prove special damages. Shamalla was finally examined by Dr Juma and Dr Raburu and the two medical reports were produced in evidence. According to these medical reports Shamalla suffered the following injuries:-

- “(a) Sprain to neck with severe pain ;
- (b) Soft tissue injury at the neck
- (c) Sprain to the left ankle joint with soft tissue swelling of the joint;
- (d) Soft tissue injury to the right ankle joints;
- (e) Lacerated cut wound with soft tissue loss to the ankle region.”

At the time of the examination by the two doctors Shamalla was complaining of recurrent pain and swelling to the left ankle joint and pain in the neck after writing for long hours. There was a visible healed scar with mild swelling compared to the right side.

In conclusion the medical reports indicated that injuries suffered by Shamalla were soft tissue injuries.

The learned Commissioner having considered all this evidence together with decided cases cited to him came to the conclusion that an award of Shs 350, 000/= would be appropriate being general damages for pain and suffering and loss of amenities. As regards special damages the learned Commissioner was of the view that Shs 9,207/= had been proved and he awarded this amount to Shamalla.

Dishon Mmbali (hereinafter referred to as Mmbali) the 2nd respondent herein told the superior court that after the accident he was admitted to Kijabe Medical Centre for twelve days. He received injuries including a ruptured diaphragm , spleen and a cut wound on the forehead, multiple bruises on the face and the hands and broken teeth. When he was discharged from Kijabe Medical Centre he was thereafter treated at Kakamega Provincial General Hospital where he was issued with Exhibit 23 by Dr Alusiola.

Mmbali was examined by Dr Juma whose medical report showed that Mmbali had suffered the following injuries:-

- “(a) Wound on the head which was stitched;
- (b) Laparotomy for: -

- (i) Splenectomy following the rupture of the spleen;
  - (ii) Repair of the diaphragm, which was tom.
- (c) Cardio Respiratory Embarrassment as the intestines were in the thoracic cavity;
- (d) Was unconscious for six days.”

The other injuries included multiple cuts on the face which were stitched; cut on the left nostril, avulsion of the teeth, bruising of the left arm and gluteal anterior region and bruising of the dorsum of both feet. His complaints at the time he was examined by Dr Juma were memory lapse, massive scar on the right side of the head, occasional dysperia, abdominal pain and frequent malaria.

Dr Raburu’s medical report (Exhibit D2) agreed with the findings of Dr Juma and added that Mmbali had suffered 20% disability.

The learned Commissioner considered the medical evidence relating to Mmbali’s injuries and taking into account the awards in cases cited to him came to the conclusion that an appropriate figure would be Shs 950,000/= as general damages for pain and suffering and for loss of amenities. Mmbali was also awarded Shs 1,600/= as proved special damages.

Dr Jacob Stephano Maleche (hereinafter referred to as Dr Maleche) the 3rd respondent testified before the superior court that after the accident he was taken to Kijabe Medical Centre where he was treated and discharged that same day. After that he attended Kakamega Provincial General Hospital. He was injured on the forehead, had a cut which needed stitching, a sprain in the neck, bruises on both arms, injuries on knee joints and ankle joints.

Dr Maleche was examined by Dr Juma whose medical report showed that Dr Maleche suffered the following injuries:-

- “(a) Cut wound on the face which was done stitching;
- (b) Bruising of the arm which was cleaned with antiseptic;
- (c) Bruises of the right anterior knee which was cleaned;
- (d) Blunt injury to the head.”

Dr Raburu’s medical report was produced as Exhibit D3. The report agreed in all material particulars with that of Dr Juma but added that there was some itchiness at the scar on the forehead. In order to correct the scar would require the sum of Shs 50,000/= for the plastic surgeon to do the work. According to Dr Raburu he assessed the disability of Dr Maleche as 10%. In awarding damages in respect of Dr Maleche the learned Commissioner stated:-

“Dr Maleche suffered what can be termed as soft tissue injuries. For pain and suffering and loss of amenities, I would award Dr Maleche the sum of Shs 350, 000/= as general damages and the sum of Shs 50,000/= being the sum required for plastic surgery.”

In addition to the foregoing the learned Commissioner awarded Dr Maleche Shs 1,600/= as proved special damages.

In the end the learned Commissioner entered judgement in favour of the respondents as follows:-

|              |         |                               |               |
|--------------|---------|-------------------------------|---------------|
| “(1)         | Elijah  | Shamalla                      | Bimomo:-      |
| General      | Damages | for pain                      | and suffering |
| for loss     | of      | amenities                     | Shs           |
| Special      | damages |                               | 350,000.00    |
| <b>TOTAL</b> |         | <b><u>Shs 359, 207.00</u></b> | 9,207.00      |

(2) Dishon Mmbali:-

|              |            |               |      |     |           |     |                              |
|--------------|------------|---------------|------|-----|-----------|-----|------------------------------|
| General loss | damages of | for amenities | pain | and | suffering | and | for                          |
| Special      | damages    |               |      |     | Shs       |     | 950,000.00                   |
| <b>TOTAL</b> |            |               |      |     | Shs       |     | <b>1,600.00</b>              |
|              |            |               |      |     |           |     | <b><u>Shs 951,600.00</u></b> |

  

|   |                              |                                     |      |     |                    |               |                              |
|---|------------------------------|-------------------------------------|------|-----|--------------------|---------------|------------------------------|
| (3) General for Cost Special <b>TOTAL</b> | Dr Damages of future damages | Jacob for amenities plastic surgery | pain | and | Stephano suffering | Maleche:- and |                              |
|   |                              |                                     |      |     | Shs                |               | 350,000.00                   |
|   |                              |                                     |      |     | Shs                |               | 50,000.00                    |
|   |                              |                                     |      |     | Shs                |               | 1,600.00                     |
|   |                              |                                     |      |     |                    |               | <b><u>Shs 401,600.00</u></b> |

The respondents were awarded costs of the suit plus interest from the date of the judgement.

It is from the foregoing that this appeal arises.

Mr Menezes for the appellant started his submission by referring to the principles that guide this Court when dealing with awards for general and special damages. It was his contention that the learned Commissioner misdirected himself in evaluation of evidence and as a result arrived at a wrong decision. Mr Menezes referred us to the pleadings and pointed out that some of the injuries considered in the judgement had not been pleaded. He gave examples of ruptured spleen of the 2nd respondent. Mr Menezes dealt with the awards in respect of each respondent and it was his submission that the awards ought to be reduced drastically since the learned Commissioner adopted an erroneous approach.

Mr K'Owinoh for the respondents urged us to dismiss the appeal as, in his view, the learned Commissioner had the correct approach. As regards 2nd respondent Mr K'Owinoh conceded that there was no pleading in respect of the spleen and diaphragm but went on to point out that before the trial commenced there were issues drawn by the parties. When framing the issues there was no dispute as regards the injuries suffered. Mr K'Owinoh further submitted that the medical reports, which the learned Commissioner relied on were produced by consent of the parties. Finally Mr K'Owinoh concluded his submission by saying that although the awards may appear high, nevertheless, they are not inordinately high to warrant interference by this Court.

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 conclusion, remembering that we have not seen nor heard the witnesses and making due allowance for this (see *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 at p 126 and *Williamson Diamonds Ltd v Brown* [1970] EA 1).

In this appeal we are being urged to interfere with the awards made by the superior court. In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A M Lubia and Olive Lubia* (1982-88) 1K AR 727 at p730 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] EA 705 709, 713; *Lukenya Ranching and Farming Co-operatives Society Ltd v Kavoloto* [1970] EA, 414, 418, 419. This Court follows the same principles.”

The above stated principles continue to be applied by this Court. We have endeavored to set out the brief background to this appeal. It rose out of a traffic road accident in which two vehicles collided head on. The respondents were among fare paying passengers in the Peugeot station wagon registration number KWG 541 commonly known as “Wepesi.” The respondents sustained injuries and medical reports were produced in which Dr Juma and Dr Raburu gave their professional opinion on the degree of injuries

sustained by each respondent.

Having evaluated the pleadings, the evidence adduced and the conclusions reached by the learned Commissioner, we observe that he took into account a number of injuries which had not been pleaded. For example, according to the amended plaint the first respondent's injuries were:-

- “(a) Deep cut wound on the scalp.
- (b) Confusion on the neck.
- (c) Confusion on the right side of the chest.
- (d) Deep cut wounds on the left leg.
- (f) Dislocation of the left ankle joint.”

We have set out in this judgement what injuries Dr Juma and Dr Raburu found to have been sustained by 1st respondent. Again while the doctors termed the injuries sustained as soft tissue injuries the learned Commissioner considered the injuries sustained to be quite serious especially in the case of 2nd respondent. As regards 2nd respondent in the amended plaint particulars referred to loss of consciousness for 3 days, multiple cuts and bruises on the face, injury on the right eye and severe pain on the right. And as regards 3rd respondent the injuries were deep cut wounds on the forehead, sprained neck, dislocation of the left ankle joint and bruises of both limbs.

The general conclusion by the medical evidence was that 1st and 3rd respondents suffered soft tissue injuries. As regards 2nd respondent his injuries were slightly serious but the issue of ruptured spleen and other serious injuries had not been pleaded.

In view of the foregoing we are satisfied that the learned Commissioner was influenced by these injuries and hence took into account what he should not have considered. This, therefore, justifies our interfering with the awards. But even a more important aspect which has led us to interfere is that the learned Commissioner appears to have misapprehended the general principles in assessment of damages in personal injury cases. 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. We have considered cases cited in the superior court and it would appear that the learned Commissioner based his assessment on cases in which the injuries were very serious. Here we are dealing with soft tissue injuries. We are of the view that had the learned Commissioner considered cases of similar injuries, he would have awarded much lower awards than what he awarded.

In *Rahima Tayah and another v Anna Mary Kinaru* (1987-88) 1 K A R 90 Potter J A gave the following advice:-

I would commend to trial judges the following passage from the speech of Lord Morris of Borthy-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 endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, 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 Posh Choo v Camdem and Islington Area Health Authority* [1979] 1 All E R

332 at 339:

In considering damages in personal injury cases, it is often said: “The defendants are wrong doers, 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 taxpayers 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 are 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 judgement, 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 in personal injury cases.

What about the injuries sustained by the respondents in this appeal? We have indicated that taking into account the fact that comparable injuries should be compensated by comparable awards and as the 1st and 3rd respondents herein suffered what the doctors describes as soft tissue injuries the awards of Shs 350,000/- for such injuries as made by the superior court are, in our view, inordinately high as to warrant our interference. We have considered damages in respect of 2nd respondent and although he came up with more serious injuries than what was pleaded sight should not be lost of the fact that at the commencement of the hearing of the suit in the superior court there were issues framed by the parties. So that there was no element of the appellant being taken by surprise. Again the medical reports were put in by consent. While a party is bound by his own pleadings what the parties agree by consent to go on record cannot be ignored.

We must now consider what we think ought to have been awarded in respect to each respondent. Taking into account other decided cases on soft tissue injuries we think that the first respondent's injuries should have attracted an award of Shs 150,000.00/- as general damages for pain and suffering and loss of amenities. We, therefore, award him that sum. As regards 3rd respondent, Dr Maleche, we are of the view that as his injuries were very similar to those suffered by Shamalla, the 1st respondent ought to have been awarded Shs 150,000.00/= as general damages for pain and suffering and loss of amenities. The 2nd respondent's case is a little different. He sustained slightly more serious injuries than the other two. Though he did not plead pis injuries we have held that that failure did not surprise the appellant. We have already discussed the framing of issues and the medical reports being admitted by consent and we think that we should give some consideration to the 2nd respondent's injuries. Doing the best we can in the circumstances we think that a figure of Shs 500,000/- would be reasonable as general damages for pain and suffering and loss of amenities. Since cost of future plastic surgery had not been specifically pleaded

we disallow it.

As regards awards in respect of special damages, we are satisfied that these were specifically proved and the superior court was entitled to award them. Hence these (special damages) will not be interfered with.

In view of the foregoing this appeal is allowed and the judgement of the superior court is set a side and in its place we enter the following awards:

1. ELIJAH SHAMALLA BIMOMO

|  |               |                               |      |          |           |
|--|---------------|-------------------------------|------|----------|-----------|
| General<br>and loss<br>Special damages | damages<br>of | for<br>amenities              | pain | and      | Suffering |
|  |               | Shs 9, 207.00                 |      | Shs 150, | 000.00    |
| <b>TOTAL</b>                           |               | <b><u>Shs 159, 207.00</u></b> |      |          |           |

(2) DISHON MMBALI

|  |               |                               |      |          |           |
|--|---------------|-------------------------------|------|----------|-----------|
| General<br>and loss<br>Special damages | damages<br>of | for<br>amenities              | pain | and      | Suffering |
|  |               | Shs 1, 600.00                 |      | Shs 500, | 000.00    |
| <b>TOTAL</b>                           |               | <b><u>Shs 501, 600.00</u></b> |      |          |           |

(3) DR JACOBO STEPHANO MALECHE

|  |               |                               |      |          |           |
|--|---------------|-------------------------------|------|----------|-----------|
| General<br>and loss<br>Special damages | damages<br>of | for<br>amenities              | pain | and      | Suffering |
|  |               | Shs 1, 600.00                 |      | Shs 150, | 000.00    |
| <b>TOTAL</b>                           |               | <b><u>Shs 151, 600.00</u></b> |      |          |           |

We give half the costs of this appeal to the appellant.

**Dated and delivered at Kisumu this 9<sup>th</sup> day of July , 2004**

**C.OMOLO**

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**JUDGE OF APPEAL**

**O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E.M GITHINJI**

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**JUDGE OF APPEAL**