



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL. NO. 146 OF 2015

PETER MUVAKE.....^{1ST} APPELLANT

PETER NYAGA MURAGE.....^{2ND} APPELLANT

-VERSUS-

D M M alias D M M (a minor suing through his grandmother and next friend

VICTORIA KANINI MAINGI.....RESPONDENT

(Being an Appeal from the judgment of Honourable Mbugua (Chief Magistrate)

in Machakos Chief Magistrates Court in CMCC No 601 of 2013

delivered on 20th August, 2015)

JUDGEMENT

1. The instant dispute arose out of a road traffic accident in which the Respondent was a passenger in motor vehicle registered in names of the 1st Appellant and beneficially owned by the 2nd Appellant. The same occasioned an accident in which the Respondent was injured. She thus instituted **Machakos CMCC 601 of 2013** in which after trial she was awarded damages prompting the instant appeal.

2. The appeal is solely on quantum as consent on liability had been agreed upon, and sets out the following grounds:-

I. *The Learned Trial Magistrate erred in fact and in law and misdirected herself in finding that the Respondent was entitled to general damages of Kshs.1,000,000/= which amount is excessive.*

II. *The Learned Trial Magistrate erred in fact and in law and misdirected herself in awarding special damages of Kshs 33,950/=.*

III. *The Learned Trial Magistrate erred in law and fact and misdirected herself in failing to consider the submissions by the appellants together with the authorities relied on by the appellants.*

IV. *The Learned Trial Magistrate wholly erred in law and fact in arriving at her decision.*

3. The parties agreed to canvass the appeal by way of written submission which they filed and exchanged.

4. The Appellant submits that it is trite that the assessment of quantum of damages by the trial court was inordinately high. They relied on the case of **Boniface Waiti & Another v Michael Kariuki Kamau (2007) eKLR** that listed some principles to guide the court in awarding general damages, viz;

a. *An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered.*

b. *The award should be commensurate to the injuries suffered*

c. *Awards in decided cases are mere guides and each case should be treated on its facts and merit*

d. Where awards in decided cases are to be taken into consideration then the issue of an element of inflation has to be taken into consideration

e. Awards should not be inordinately high or too low

5. They further submitted that an award of Kshs 400,000/- general damages would be satisfactory because as per the assessment by Dr P.N. Mutuku, the respondent's injuries were a deep cut to the nasal bridge, bruises to the nose, fracture/dislocation of the right upper limb and compound fracture left tibia; and the respondent was adequately treated and had made reasonable recovery. They relied on the case of **Zechariah Mwangi Njeru v Joseph Wachira Kanoga (2014) eKLR** where an award of Kshs 800,000/- was reduced to Kshs 400,000/- for similar injuries.

6. They further urge this court to set aside the award on costs for there was no service of Demand Letter and Statutory Notice as pleaded. They relied on the case of **Kajuna Idd Noor v Rapid Kate Services Ltd and 4 Others (2013) eKLR**

7. They finally submit that the appeal be allowed on its entirety with costs to them.

8. The Respondent submitted that the Appellate court will rarely interfere with exercise of discretion by the trial court when assessing damages as was laid down by the court of appeal in **Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR 5** that 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.

9. They submitted that the Respondent on physical examination by Dr. Mutuku and a report prepared therein sustained a deep cut to the nasal bridge, bruises to the nose, fracture/dislocation of the right upper limb and compound fracture left tibia and the injuries are undisputed by the appellant's failure to call witnesses.

10. It was submitted for the respondent that the award by the trial court was justified, in that the trial court took into account a relevant factor in order to arrive at the award of Kshs 1,000,000/- as general damages for pain and suffering, which amount is not inordinately high as in the case of **Godfrey Wamalwa Wamba & Another v Kyalo Wambua (2018) eKLR**, where Kshs 700,000/- was awarded for less severe injuries.

11. On the award for special damages, it was submitted that the award ought not to be disturbed since the trial magistrate took into account the receipts that were provided having been produced in court without objection from the appellants. It was finally submitted that the appeal lacks merit and should be dismissed.

12. The role of the Appellate court is to evaluate the evidence afresh and subject to its own analysis so as to reach its own independent conclusion.

13. In the case of **Lukanya Ranching and Farming Coop. Society Ltd v Kavoloto (1979) EA**, the learned Judge recapped the grounds that the Appellate court will interfere with exercise of discretion by the trial court when assessing damages laid down by the court of appeal in that 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.

14. The Appellants aver that the Learned Magistrate's award was **extremely high**. They ask the court to review the evidence and facts on record and the foregoing submissions, the law and case law cited herein to allow their appeal and set aside the award of **Kshs.1,000,000.00/= as general damages and substitute the same with an award of around Kshs.400,000/=**.

15. Further, they urge the court to reject the claim for costs as unsustainable.

16. The Respondent's grandmother (Victoria Kanini Maingi), was Pw1 and testified on behalf of her grandson. She testified that on 1.5.2011, he was involved in a road traffic accident and was injured. He had fractured his left leg and right hand and no other injury.

17. Pw1 further stated that her grandson was treated at Machakos Level 5 Hospital and admitted for 21 days. She tendered the Medical Report, the treatment notes, the Police Abstract, Receipts, Demand letter and Statutory Notice as documentary evidence.

18. Pw3 was Dr Kimuyu Judith who testified on behalf of Dr Mutuku on a medical examination that was conducted on D M on 14.11.2011 who had a history of involvement in a road traffic accident on 1.5.2011. She testified that D was examined six months after the accident and the injuries were classified as grievous harm. On cross-examination she testified that the degree of incapacity was not indicated and tendered the P3 form. The plaintiff's case was closed.

19. The Appellants did not call any witness and closed their case.

20. I have analyzed the evidence that was adduced before the trial court. The issues for determination are:-

1) Whether the case for disturbing award herein has been made

2) If yes, how much is the Respondent entitled to?

3) What is the order as to costs?

21. The Respondent's grandmother testified that on 1.5.2011, her grandson was involved in a road traffic accident and was injured.

22. On quantum, the Respondent's grandmother testified that her grandson had a fractured left leg and right hand and no other injury. He was treated at Machakos General Hospital and hospitalized for 21 days. The parties entered a consent on liability in the ratio of 80:20 in favour of the Respondent.

23. According to the undated medical report that was prepared by Dr. P.N Mutuku, he made a deduction that the D suffered grievous harm following a road traffic accident. He was adequately treated and had made reasonable recovery. There was no indication of permanent disability.

24. I have had the benefit of going through the written submissions that were filed by the counsels for both parties and the authorities that were supplied therein.

25. The trial court relied on what was opined by Doctor Mutuku in arriving at the final award of general damages. However taking into account the medical report relied on, the award of Kshs. 1,000,000 was inordinately high in the circumstances and I hereby set aside the same and substitute it with an award of **Kshs.500,000/=** as **general damages** for pain and suffering. This is so because according to Dr. Mutuku's medical report D did not suffer a permanent disability. The appellant has offered Kshs 400,000/- and I am guided by the case that the appellants have quoted of **Zechariah Mwangi Njeru v Joseph Wachira Kanoga (2014) eKLR** where an award of Kshs 800,000/- was reduced to Kshs 400,000/- for similar injuries. The said case was decided in 2014. Hence in view of inflation and passage of time, the award of Kshs 500,000/- is sufficient and reasonable in the circumstances.

26. The trial court awarded Kshs 33,950/- as Special Damages but the receipts produced total to Kshs 34,600. However the respondent pleaded Kshs 37,560. The award of Special Damages of the trial court of Kshs 33,950/- is substituted with an award of Kshs 34,600/- as same was specifically proved by production of receipts.

27. In the result the appeal succeeds. The award of Kshs.1,000,000/= by the trial court is hereby set aside and substituted with the sum of **Kshs.427,680/=** made up as follows:-

a) General damages Kshs. 500,000/=

b) Special damages.....Kshs. 34,600/=

Total..... Kshs. 534,600/=

c) Less 20% contribution.....Kshs.106,920/=

NetKshs. 427,680/=

As the appeal has succeeded the Appellant is awarded half the costs of the appeal while the Respondent shall have full costs in the lower court.

Orders accordingly.

Dated and Delivered at Machakos this 30th day of May, 2019.

D.K. KEMEI

JUDGE