



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 63 OF 2017**

FRANCIS NDUNGU WAMBUI.....1<sup>ST</sup> APPELLANT

DANIEL IRUNGU WAMBUI.....2<sup>ND</sup> APPELLANT

ISAAC MUTHERERO.....3<sup>RD</sup> APPELLANT

**VERSUS**

PURITY WANGUI GICHOBO.....RESPONDENT

**J U D G M E N T**

**A. Introduction**

1. This is an appeal that arises from the judgment of Principal Magistrate Embu in Embu CMCC No. 271 of 2016. The respondent instituted a suit for general damages against the appellants for injuries sustained in a motor vehicle accident. The issue of liability was settled in favour of the respondent against the appellants at the ratio of 75:25, the court proceeded to assess and award the respondent general damages Kshs. 450,000/= less 25% amounting to Kshs. 342,750/= and special damages of Kshs. 5,250/=.

2. The appellants were dissatisfied with the trial court's judgement and filed a memorandum of appeal dated 14<sup>th</sup> November 2017 on eight grounds that can be summarised as follows;

- a) That the learned magistrate misdirected himself in awarding excessive damages on quantum.
- b) That special damages were not proved per se.

3. The parties disposed of the appeal by way of written submissions.

**B. Appellant's Submissions**

4. It was submitted that the injuries sustained by the respondent were soft tissue in nature that healed well and as such an award of Kshs. 80,000/= is reasonable as general damages. Reliance was placed on the cases of **Machakos HCCA No. 68 of 2013 Alex Ogutu v PNMN** where the plaintiff sustained a cut wound on the left 1<sup>st</sup> finger and cut wound on the left 2<sup>nd</sup> finger and the Court of Appeal set aside an award of Kshs. 250,000/= and substituted it with an award of Kshs. 80,000/=.

5. in the case of **Nakuru HCCA No. 162 of 2011 Simon Kimani Kuria v Transpares (K) Ltd**, the plaintiff sustained soft tissue injuries to the face, blunt injury to the right eye and soft tissue injury to both hands and the Court of Appeal set aside an award of Kshs. 150,000/= and substituted it with an award of Kshs. 90,000/=, and the case of **Kisumu HCCA No. 52 of 2012 Dickson Ndungu Krembe & Anor v Anna Anyango Chaka** where the plaintiff sustained chest injuries, neck injury, injury to the lower limbs, injuries of the shoulders and facial lacerations where the Court of Appeal set aside an award of Kshs. 200,000/= and substituted with an award of Kshs. 90,000/=.

6. It was also submitted that the award of Kshs. 5,250/= as special damages was allowed without proof of the same and should be disallowed.

**C. Respondent's Submission**

7. It was submitted that an award of Kshs. 450,000/= in general damages for pain and suffering and loss of amenities was very fair. The

respondent relied on the case of **Blowplast Ltd v Julius Ondari Mose [2018] eKLR** where the respondent sustained similar injuries and was awarded Kshs. 600,000/= and the case of **Spin Knit Limited v Johnstone Otara [2006] eKLR** where the respondent suffered a degloving injury to his right hand as a result of the industrial accident and the court upheld an award of Kshs. 300,000/= as general damages.

8. The respondent further submitted that she had duly proved the special damages due to her through the provision of receipts and as such it was duly awarded.

#### **D. Analysis & Determination**

9. As the first appellate court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

10. I have carefully perused the grounds of appeal, record of appeal and the parties' submissions. Liability was settled by consent in this case. The issues for determination in my view are: -

a) whether the learned magistrate erred in awarding excessive damages.

b) Whether special damages were proved.

11. The respondent was submitted to two medical examinations which taken together reveal that the respondent suffered a laceration to the left foot as well as a degloving injury to the base of the thumb which healed well leaving scars which in my considered view were soft tissue in nature with no permanent disability.

12. As this is an appeal against an award of damages, the general principle applicable is that the appellate court should be slow to interfere with the discretion of the trial court to award damages except where the trial court acted on wrong principles of the law, that is to say, it took into account an irrelevant factor or failed to take into account a relevant factor, or due to the above reasons or other reason, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (see **Butt v Khan [1982-88] 1 KAR 1** and **Mariga v Musila [1982-88] 1 KAR 507**)

13. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike (see **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR**).

14. I would also add what the Court of Appeal stated in **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998] eKLR** that:

*“The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.”*

15. In reaching an appropriate award, the court ought to consider the factors of inflation among others. The court should avoid astronomical awards but strive to ensure that the final award makes sense and fairly compensates the claimant (see **Kigaraari v Aya [1982-88] 1 KAR 768**, **Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR** and **Jabane v Olenja [1986] KLR 661**).

16. The respondent according to the report of Dr. Mulwa suffered a deep laceration on the medial side of the left foot and a degloving injury on the left thumb. He relied on the case of **Spin Knit Limited** where the court upheld an award of Kshs. 300/= for a degloving injury in 2006. I have looked at the authorities relied on by the appellant and note that they were not comparable in way of injuries.

17. I have perused the judgment of the trial magistrate and it does not indicate the authorities he relied on as he awarded Kshs. 450/. The respondent is not suffer any permanent disability.

18. In the circumstances, I find the award arrived at by the trial magistrate of Kshs. 450,000/= was manifestly excessive and I hereby set aside the said award of Kshs. 450,000/= and substitute it with an award of Kshs. 250,000/=. I wish to point out that I have also considered the effect of inflation on the value of the Kenyan Shilling.

19. Regarding the special damages, I have perused the record of appeal and note that the respondent duly proved the same.

20. Accordingly, having considered the record of appeal, the written submissions in the case law, I am persuaded that this is a suitable case for this court to exercise its discretion and interfere with the trial court's finding for the reason that the quantum awarded was manifestly excessive considering all the relevant factors.

21. As for special damages, I have perused the record and find that the legible receipts produced in court are Kshs. 5,200/=. I therefore set aside the amount of Kshs. 5,550/= awarded for special damages by the magistrate and substitute it with an award of Kshs. 5,200/=.

22. The total award is Kshs. 255,200/= less 25% amounts to Kshs. 191,400/= payable to the respondent by the appellant.
23. Each party will pay its own costs of the suit.
24. The appeal is allowed.
25. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthama for Respondent**

**Ms. Kiai for Omagwa for Appellants**