



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO 7 OF 2017

CIVIL HOLDINGS CO. LTD.....APPELLANT

VERSUS

HELLEN ANYANGO OKEYO & SHARIF MUSA WAFULA (sued as legal

representative of the estate of) MOHAMMED WAFULA JUMA.....RESPONDENTS

(Being an appeal from the judgment of the Honorable Principal Magistrate, Hon. Caroline R.T. Ateya dated 5th day of December, 2016 in Principal Magistrate's Court Civil Suit No. 88 of 2015 at Ogembo)

JUDGMENT

1. The facts leading to this appeal are that on 23rd November 2014, **Mohammed Wafula Juma** ('*the deceased*') was injured and claimed damages from the appellant who was the owner of excavator registration mark KHMA 091F which collided with motor registration number KBZ 400X driven by the deceased. The accident occurred along Ogembo-Ikoba road. The issue of liability was settled in the ratio 70:30 against the appellant. The trial magistrate made the following award following an assessment damages:

Kshs

i. General Damages 1,000,000/-

ii. Future medical expenses 75,000/-

iii. Special damages 40,525/-

Less 30% (322,500)

793,025

2. The appeal before me is one on quantum. The appellant in his memorandum of appeal contends that the award by the trial court was excessive and warrants interference by this court and also that the trial court condemned the appellant to pay for future medical expenses without documentary evidence.

3. The appeal was canvassed by written submissions.

4. The appellant submitted that the award made by the trial court was excessive. The appellant proposed that an award of Kshs 250,000/- would be sufficient as general damages and cited the following cases: **Rachel Mihaki vs Karim Simon Mwhaki & Anor [2015] eKLR; David Kiplang'at Sang vs Richard Kipkoech Langat & another (2006) eKLR; Edwin Otieno Japaso vs Easy Coach Bus Company Limited [2016] eKLR; Mwaura Muiruri vs Suera Flowers Limited & Another [2014]; and Mwavita Jonathan vs Silvia Onunga [2017].** The appellant contends that the trial court relied on the case of **Florence Ngina Nyalando vs Daniel Munyua Njathi & Anor (2015) eKLR** where the plaintiff therein sustained distinguishable injuries compared to those suffered by the deceased.

5. The respondent supported the award by the trial court and argued that the amounts were not inordinately excessive so as to warrant this court's interference. It was submitted the deceased sustained injuries which were classified as grievous harm. According to the report by Dr. Ogando Zoga, the deceased disability assessed at 20%. Dr. Ogando Zogo concluded that the deceased would need a further surgery costing Kshs 75,000/-. The respondent relied on the case of **Francis Murangari Josiah & 7 others vs Stanely Kiuriam Mutunga [2017] eKLR** and submitted that the respondent therein sustained similar injuries. In support of the trial court's finding the respondent further cited the case of **Joseph Kimani Nzau vs Johnson Macharia [2019] eKLR** and **HCCC No. 138 of 2012 Florence Nyalando Achacha vs. Daniel Munyua**

Njathi & Another.

6. As this is an appeal on quantum of damages, this court is guided by the well-worn principle pronounced by the Court of Appeal in **Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & Another (No.2) [1987] KLR 30** that:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly.”

7. Awards in general damages vary however in considering the award the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. Further in assessing damages the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards noting that no two cases are exactly alike as the Court of Appeal observed in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** that:

“Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general 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.”

8. 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.”

9. The nature and extent of injuries sustained by the deceased were not contested. According to the deceased discharge summary from Tabaka Mission Hospital dated the 2/12/2014 the deceased had cut wound on his right ear and left distal 1/3 clavical fracture. Dr. Ezekiel Ogando Zoga in his report noted that the deceased had a deep cut wound on the right ear (pinna), blunt trauma on the chest and had sustained fracture of the left clavicle. It was his conclusion that the deceased had sustained severe soft tissue injuries and that the fracture of the clavicle weakened his left upper arm muscle power grade 3.

10. In light of the injuries, the respondent had proposed Kshs 2,000,000 as general damages. They cited the case of **Florence Ngina Nyalando Achacha v Daniel Munyua Njathi & another [2015] eKLR** where the plaintiff sustained fracture of the left clavicle, head injuries and fracture base of the skull. The CT-scan of the brain revealed sub-arachnoids haemorrhage, fluid levels in the millillary and sphenoid air sinuses. The court awarded the plaintiff general damages of Kshs 2,000,000/-.

11. The appellants on the other had proposed the award of Kshs 250,000/-while citing the case of **Said Abdullahi & another v Alice Wanjira (2016) eKLR** in which the court awarded Kshs. 300,000/- in 2016 where the plaintiff sustained a fracture of right humerusmid shaft spiral.

12. The case cited by the respondent was for much more severe injuries than the ones sustained by the deceased while that cited by the appellant do not relate to the injuries that had been sustained by the deceased. A more appropriate case would be **H. Young & Company E.A Ltd v Edward Yumatsi [2016] eKLR** where the plaintiff had sustained deep cut wound on the head, bruises on the knee, cerebral concussion, fracture of the right clavicle bone and deep cut wound on the left elbow. The court affirmed the award of Kshs 500,000/- on general damages in 2016. Considering that the injuries sustained by the plaintiff in **H. Young & Company E.A Ltd v Edward Yumatsi case (supra)** were mostly soft tissue injuries and a fracture of the right clavicle bone, an award of **Kshs. 650,000/-** as general damages would be more reflective of the current trend of awards.

13. I now turn to the issue of future medical expenses. In **Kenya Bus Services Ltd v Gituma [2004] EA 91**, the Court of Appeal expressed the view that;

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded.”

14. The respondent did not plead future medical expenses to enable the subordinate court make an award on the same.

15. It is trite law that special damages must be specifically pleaded and proved. According to the proceedings before the lower court the respondent amended particulars of special damages and the treatment expenses reflected Kshs 34,000/-. This is also reflected in Pexh 2 which details the medical expenses incurred by the respondent. The respondent was able to prove that he paid Kshs 6,500/- to Dr. Ogando Zoga on account of the medical report. The respondent was thus entitled to Kshs 40,500/- as special damages.

16. In the end, I set aside the award by the trial court and substitute it with the following awards:

General Damages Kshs 650,000.00

Special Damages Kshs 40,500.00

TOTAL Kshs 690,500 .00

Less 30%

AMOUNT DUE Kshs 483,350/=

17. The appellant shall have costs of this appeal.

Dated, signed and delivered at Kisii this 11th day of June 2020.

R.E. OUGO

JUDGE

In the presence of:

Mr. Wesonga For the Appellant

Mr. Omollo h/b for Mr. Nyangosi For the Respondent

Ms. Rael Court Clerk