



IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 145 OF 2014

CORAM: D.S. MAJANJA J.

BETWEEN

NAOM MOMANYI.....APPELLANT

AND

G4S SECURITY SERVICES KENYA LIMITED...1ST RESPONDENT

NAPHTALI OGETI ASIAGO.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Sambu, PM

dated 16th April 2014 at the Chief Magistrates Court

at Kisii in Civil Case No.76 of 2014)

JUDGMENT

1. This is an appeal against the award of Kshs. 200,000/= as general damages for injuries sustained following a road traffic accident which took place on 14th October 2011 along Kisii – Kilgoris road. The appellant was walking along the road when the 1st respondent's vehicle, driven by the 2nd respondent, lost control and knocked the appellant. The trial magistrate found the respondents fully liable for the accident. The only issue in this appeal is the quantum of damages awarded by the trial court.

2. According to the plaint, the appellant sustained a fracture of the left-right condylar tibia, blunt injuries on the back and multiple bruises on the left arm. She was treated at Ram Hospital and Kisii Level 5 Hospital. He was examined by Dr Ezekiel Ogando Zoga on 11th December 2011. The doctor confirmed the injuries sustained by the appellant and noted that at the time of examination, the appellant had a scar on the right lateral hand which was swollen. He observed that the appellant's right leg was deformed and wasted. His conclusion was that the fracture had not healed well and would require internal fixation. He assessed permanent disability at 30%.

3. Before the trial court, counsel for the appellant submitted that a sum of Kshs. 600,000/- would be reasonable compensation. He cited the case of *Samwel Ogolla Owino v Ezekiel M. Kimani KISII HCCC No. 446 of 1991 (UR)* where the plaintiff was awarded Kshs. 350,000/- in 1993. He sustained a fracture of the patella, dislocation of the right hip, lacerations, abrasions and bruises on the temporal region of the head and soft tissue injuries to the chest. As a result of the injuries, the plaintiff sustained a reduction in strength of the right leg by about 40%.

4. The respondents proposed that an award of Kshs. 80,000/- was reasonable in the circumstances on the ground that the evidence showed that the appellant had healed without any permanent disability. They cited the case of ***E M (a minor) v Nathaniel David Shulter NRB CA Civil Appeal No. 23 of 1997 (UR)*** where the Court of Appeal upheld an award of Kshs. 80,000/- in 1997. The child sustained bruises on both hands and a fracture of the left femur which had healed completely at the time of the hearing. I also note that in the case of ***Joseph Thuita v David Kahiu Kimani and Another NRB HCCC No. 431 of 1996 (UR)*** which the respondents cited in support of the issue of liability, the plaintiff suffered a compound fracture of the tibia and fibula, injury the right upper incisor tooth and soft tissue injuries to the right arm and chest wall and was awarded Kshs. 300,000/- as general damages in 2000.

5. For an appellate court to interfere with an award of damages, it must be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see ***Butt v Khan [1981] KLR 349***).

6. Both parties filed written submissions which they supplemented by brief oral arguments by their counsel. Before this court, counsel for the appellant submitted that the award was manifestly low as the trial court did not take into account the injuries sustained by the appellant. Counsel for the respondents supported the trial magistrate on the ground that the award was impartial, well informed and based on the facts and evidence.

7. My assessment of the injuries sustained by the appellant is that these were soft tissue injuries and a fracture that the doctor confirmed had healed although the right leg was deformed and wasted. Although the trial magistrate in assessing damages stated that he was guided by the cases cited by the parties, he did not explain how he reached the award made in relation to those cases. The case cited by the appellant's counsel had more serious injuries hence it was not comparable to the appellant's case. The case cited by the respondents' counsel was of a lower amount and the reason the amount given was low was that the child had healed and suffered no disability. I also note that both counsel cited cases that were over 10 years old.

8. The duty of the court in such cases was stated by the Court of Appeal 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.

9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation (see ***Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR*** and ***Jabane v Olenja [1986] KLR 661***).

10. I have considered the cases cited vis-a- vis the injuries sustained by the appellant. I am particularly guided by the ***John Thuita's Case (Supra)*** which is apposite. I note that upon examination, Dr Zoga noted that the appellant's right leg was deformed and wasted and he awarded 30% disability. It is not apparent that the trial magistrate took account this factor. I therefore intervene and enhance the award to Kshs. 300,000/-.

11. I therefore allow the appeal. I set aside the award of Kshs. 200,000/- as general damages and substitute it with an award of Kshs. 300,000/-. The sum shall accrue interest from the date of judgment before the subordinate court. The appellant shall have costs of this appeal assessed at Kshs. 15,000/-.

DATED and DELIVERED at KISII this 13th day of June 2018.

D.S. MAJANJA

JUDGE

Mr Mogire instructed by Ombuhi K. Mogire and Company Advocates for the appellant.

Ms Ang'asa instructed by Omwenga and Company Advocates for the respondents.



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