



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.254 OF 2009

(Appeal arising from Judgment in Nakuru CMCC No.570 of 2006 by Hon. B. Atiang, Resident Magistrate

J M W (A minor suing through his

father and next friend D W) APPELLANT

VERSUS

JOSEPH NGANGA KUNGU 1ST RESPONDENT

GEORGE KAMAU NGARAMA

t/a MUTHAITI BOARDING SE. SCHOOL 2ND RESPONDENT

JUDGMENT

The appellant (JMW suing through his father and next friend D W) has filed this appeal against JOSEPH NGANGA KUNGU (1st Respondent) and GEORGE KAMAU NGARAMA t/a MUTHAITI BOARDING SECONDARY SCHOOL (2nd Respondent).

The appellant sued the respondent for personal injuries sustained while travelling in motor vehicle registration No.KAU 008D. The occurrence of the accident and the subsequent injuries sustained by the appellant were not disputed. The appellant sustained soft tissue injuries to the left elbow joint and he and he was awarded Kshs.7,000/= for general damages.

The appeal is basically on the quantum of damages awarded on grounds that the same is inordinately low and not comparable to awards for similar injuries.

The pleadings indicated the injuries sustained by the appellant as soft tissue injuries to the left elbow.

In his evidence at the hearing, DWM, the minor' father, said:-

“My son got injury on the hand and the joint.”

The P3 form produced indicated the injury as a bruise on the left elbow, and the report by Dr. Wellington

Kiamba dated 18/2/2006 observed soft tissue injuries of the left elbow joint which had healed with minor scars on the posterior aspect. There were no abnormalities resulting from the injury which was classified as harm.

The defence offered no evidence and upon consideration of the evidence tendered the trial magistrate held the defendants 100% liable. The appellant's counsel had suggested general damages Kshs.55,000/= while defence made no proposal. The trial magistrate held that Kshs.7000/= was adequate compensation and this is what is contested as being inordinately low.

The application was disposed of by way of written submissions. The appellant's counsel argues that the principles set out by courts in considering whether an appellate court should disturb an award of damages were stated in **BUTT V KHAN (1982-88) KAR** at pg 4, that:-

“An appellate court should not disturb an award of damages, unless it is inordinately high or low to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

This position was also stated in **KEMFRO AFRICA LTD & ANOTHER V LUBIA AND ANOTHER (No.2) 1987 KLR 30 @ pg 35** that:-

“..... In deciding whether it is justified in disturbing quantum of damages . . . it must be satisfied that either 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.”

With these principles in mind, the appellant's counsel submits that past decisions dealing with similar injuries have awarded higher figures, and the sum proposed is Kshs.100,000/-.

In opposing the appeal, the respondent's counsel submits that the nature of injuries were slight, and that the trial magistrate had the opportunity of seeing and hearing the witness, and there is nothing to show that he acted on wrong principles

I have read through the judgment by the learned magistrate, with tremendous respect to him, there was nothing stated as a basis for arriving at the sum of Kshs.7000/=. He simply stated the injuries, the figure suggested by the appellant's counsel and his view of what figure was appropriate, but with no reason whatsoever as to why he thought Kshs.7000/- was adequate compensation. I think factors to be taken into account include the circumstances likely to the injury, the extent of the injury and the trauma caused and residual effects. In this instance, from the pleadings, the minor was a passenger in the motor vehicle which lost control, veered off the road, and rolled. This is what resulted in the plaintiff sustaining injuries to the elbow. It is not clear from the judgment, what principles the trial magistrate relied on in assessing the damages, but even without that, I think that circumstances leading to the injury, and the fact that it resolved very quickly, ought to have guided the court in assessment of damages. There was no significant residual effect resulting from the injury and taking into account past decisions on the same, I think the case of **Mary Chahi Kanyi V Joseph Wanjohi Gatunu Nairobi CA No.1172 of 1989** is a useful guide. Although this is a decision delivered over 20 years ago, it is helpful to note that the injuries were far more extensively spread and the plaintiff had residual effects which affected her although the pain and injuries would settle down.

I also consider the receding value of the Kenya shilling against the current economic trends and in my

view general damages kshs.20,000/= (Twenty thousand only) is sufficient compensation. To that extent the appeal succeeds, the judgment is set aside in terms of general damages awarded and substituted with the sum of kshs.20,000/=.

Delivered and dated this 16th day of December, 2013 at Nakuru.

H.A. OMONDI

JUDGE



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