



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**(CORAM: R. MWONGO, J.)**

**CIVIL APPEAL NO. 19 OF 2018**

**MOIZ MOTORS LIMITED.....1<sup>ST</sup> APPELLANT**

**KUWEKA TRADING COMPANY.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HARUN NGETHE WANJIRU.....RESPONDENT**

*(Being an Appeal from the Judgment of Hon E. Kimilu, PM delivered on 27<sup>th</sup> February, 2018 in Naivasha CMCC No 373 of 2014)*

**JUDGMENT**

**Background**

1. This appeal challenges the decision of the trial court on its appreciation of the injuries and assessment of the quantum of damages awarded. The trial court found the injuries suffered by the respondent as a result of the accident on 23<sup>rd</sup> May, 2014, to be as follows:

- a) Depressed frontal bone fracture of the skull.
- b) Severe tissue injuries in the face.
- c) Soft tissue injury of the chest.
- d) Soft tissue injury of both knees
- e) Soft tissue injury of both hip joints.
- f) Severe soft tissue injury of the toes of the right leg.

These are the injuries particularized in the pleadings.

2. The trial court entered liability at 70:30% in favour of the plaintiff, and made an award as follows:

General damages      Kshs 700,000.00

Special damages      Kshs 2,650.00

**Sub Total              Kshs 702,650.00**

Less 30% Contribution Kshs 210,795.00

**Total award           Kshs 491,855.00**

Costs and interest were also awarded.

3. The appellant submits that the Respondent exaggerated the nature and extent of injuries in order to mislead the trial court to award inflated damages. The appellant argues that the “*main bone of contention*” is whether the Plaintiff “*suffered a depressed fracture of the skull*” and what award would be a fair award for such an eventuality. They also submit that there were disparities in the medical evidence which led the trial court to award excessive damages.

4. In respect of the award of damages, this court’s role is to re-evaluate the evidence of the injuries sustained and to come to its own conclusions noting that the court did not have the advantage of hearing the witness and seeing their demeanour.

### **Medical Evidence of Injuries**

5. It is not disputed that the plaintiff/respondent was walking along the road on 23<sup>rd</sup> March, 2014 when he was hit by the plaintiff’s vehicle from behind, and lost consciousness. He was hospitalized for three days. His Discharge summary (P. Exhibit 1 (a)) from Naivasha District Hospital diagnosed that he had:

#### **“STI (Soft Tissue Injuries) and Moderate Head Injury”**

The investigations done on him were Skull X-Ray, Chest X-ray and Pelvic X-ray. The results of the investigations were not indicated in the Discharge Summary.

6. The P3 Form filled in at the same hospital eight (8) days later on 1<sup>st</sup> April, 2014, indicates the plaintiff’s injuries as follows:

- Multiple facial lacerations; Depressed skull frontal bone.
- Soft tissue injury right upper chest.
- Multiple bruises both hands dorsal aspect.
- Multiple bruises both hips.
- Swollen toes right leg.
- Bruises both knees.

This report shows a wider scope of injuries than those indicated in the Discharge Summary, as the Discharge Summary was just that, and did not particularise the injuries, even the type and location of the soft tissue injuries.

7. Dr. Omuoyoma’s report dated 26<sup>th</sup> May, 2015, a year later, shows that the plaintiff suffered the injuries pleaded. He relied on the Discharge summary, the P3 Form and the plaintiff’s information. On examining the plaintiff, Dr. Omuoyoma found he had:

- Multiple scars on the face, and the skull x-ray showed depressed fracture of the frontal bone; On chest palpation he found tenderness on the right side, and the Chest X-ray did not show any fracture, haemothorax or pneumothorax; On the lower limbs he found multiple healed bruises on both hip joints and knee joints.

8. The only medical expert called to testify was Dr. Omuoyoma. In oral testimony he classified the degree of injury as “*grievous harm*” but in his report he classed it as “*harm*”. He said he relied on the plaintiff’s Patient File from Naivasha Hospital and the P3 form, in addition to examining the patient.

9. In his brief cross-examination Dr. Omuoyoma said the Discharge Summary did not indicate a fracture, although the P3 Form did. This, according to the appellant’s submission “*is the main bone of contention [.....] whether indeed the Plaintiff/Respondent suffered a Depressed Fracture of the skull and what award would be fair and just*”.

10. I think the question in the main bone of contention is answered from the evidence. It is true that the Discharge Summary did not indicate any fracture. It did however indicate the X-rays done without particularizing the results. This cannot mean that there were no results or that there were no injuries found by the investigations. In his evidence-in-chief Dr. Omuoyoma stated that he relied on patient file from Naivasha Hospital, and that the “*Skull X-ray confirmed depressed fracture of frontal bone.*” In cross examination he confirmed:

**“I saw [the] x-ray films but not a report”.**

Having seen the x-ray, it is reasonable to expect that Dr. Omuoyoma was able to read and interpret it, but he was not questioned on this aspect. The fracture was also indicated in the P3 Form filled at the hospital by a different officer who was not called to testify. I see no basis to find that the Discharge Summary was inconsistent with the P3, or to reject the existence of a fracture using the standard of on balance of

probabilities.

11. I have considered the authorities cited by the appellant namely: **Standard Chartered Bank Limited v Intercom Services Limited & 4 Others [2004] 2 KLR 183** where the Court of Appeal said that it was the duty of the court:

**“.....to analyse the contradictions and inconsistencies in the evidence of witnesses.”**

I have also considered **Ndoro v Ndolo [1995] LLR 390 (AK)** where the Court of Appeal stated that reports ought to be subjected to careful consideration and that it has:

**“.....been repeatedly held that the evidence of experts must be considered along with all other available evidence.....**

**A court cannot simply say, ‘Because this is the evidence of an expert, I believe it.’**

12. I have considered the medical evidence as a whole. Clearly the Discharge Summary shows there were x-ray investigations. It did not indicate the outcome of the investigations. It was a summary report. Dr. Omuyoma testified that he saw the x-rays. He stated clearly that the one for the head showed a fracture. The P3 Form showed the same, even though the doctor who filled it was not called, I think on balance the evidence of Dr. Omuyoma’s evidence is credible and there is no basis to discount it.

13. The appellant urges the court to find that the only injuries suffered were those shown in the Discharge Summary, namely: *“Soft tissue injuries and Moderate head injury”*; and proposes an award of KShs 50,000 - 100,000/=.

14. The plaintiff was hospitalized for three days. That is significant information. In the lower court, the trial magistrate took into account the case of **Julius Chelule & Another v Nathan Kinyanjui [2013] eKLR** where an award for depressed fracture of the skull was reduced from KShs 600,000/= to 500,000/= on appeal. In more recent cases where fracture of the skull is involved, awards have been made as follows:

- **Telkom Orange Kenya Limited v I S O minor suing through his next friend and mother J N [2018] eKLR** - where there was depressed fracture of skull, loss of consciousness, scars of the left tempo-parietal area and bruises of left leg; the award was KShs 500,000/=

- **Maintenance Ltd & another v W A (A minor suing through next friend and father S K H [2015] eKLR** - for fracture at base of the skull, comminuted complex mandibular fracture, loss of incisor tooth, right eye vertical dystopia; an award of KShs 1,000,000/=.

- **GA (Minor suing thro’ her father and next friend BZ) v Paul Muthiku [2020] eKLR** - for multiple fractures of frontal left orbital roof; right temporal bones; bleeding in the skull airspace cut on the head; cut on the chin the general damages award was increased from KShs 300,000/= to 500,000/=.

15. I think in this case a comparative award for the injuries sustained would be KShs 500,000/=. I so award.

16. Accordingly the appeal succeeds on the head of general damages and the lower court’s award for general damages is reduced from KShs 700,000/= to KShs 500,000/=. The other aspects of the lower court’s judgment are upheld.

17. Costs to Appellants.

#### **Administrative directions**

18. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

19. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

20. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 25TH DAY OF FEBRUARY, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Mr. Geno for the Appellants

2. Mr. Oganga for the Respondent

3. Court Clerk – Quinter Ogutu