



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.21 OF 2019

LEE MAYANI KINYANJUL.....1ST APPELLANT

PETER MWANGI WANJIRU.....2ND APPELLANT

VERSUS

CHARLES MWANGI MUGI.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT /DECREE OF HON.F. MUNYI

(PM) DELIVERED ON 25TH JANUARY 2019 IN NAKURU CMCC NO.916 OF 2013).

JUDGEMENT

1. The respondent was involved in a road traffic accident on **7th December 2010** along Nakuru -Nairobi road where his motorcycle registration number **KMCF 910F** was hit by motor vehicle registration number **KAA 866J** driven by the **2nd** appellant and owned by the **1st** plaintiff and as a consequence he sustained a commuted fracture of right femur.
2. The parties at the lower court entered into a consent where the appellant shouldered 80% against 20% liability by the respondent. The court proceeded to deliver its judgement on quantum and awarded the respondent Kshs, 1,500,000 in general damages Kshs 28,250 as special damages. The said amount was subjected to the above percentage.
3. The appellant being dissatisfied with the above judgement filed this appealed against the same arguing that it was excessive in the circumstances. The parties were directed to file their written submissions which they have done.
4. The appellant submitted that the award of Kshs. 1,500,000 was excessive and he went on to rely on several authorities to prop his claim. This include the cases of **DENSHIRE MUTETI WAMBUA V. KPLC LTD (2013) eKLR CIVIL APPEAL NO.60 OF 2004** where in a more serious injuries including fracture of the femur the Court of Appeal awarded a sum of Kshs1,500,000 as damages.
5. The same followed in the other three authorities which according to the appellant the injuries were more severe than those of the respondent herein. He said that the injuries consisted of fractures which were multiple in nature as opposed to those of the respondent.
6. The appellant submitted that the award of Kshs. 700,000 would have been appropriate in the circumstances. He relied *inter alia* on the case of **SALOME MANTAI & ANOTHER VS. LUCIA WANJIRU MWANGI (2016) eKLR KAJIADO HCCA NO.39 OF 2015**.
7. On his part the respondent supported the award stating that it was commensurate in the circumstances. He relied on the same cases which he had at the trial court namely **CHARLES MATHEGE WAHOME VS MARK MBOYA LIKANGA & ANOTHER (2011) eKLR** and **MAQSOOD BEGUM SROYA VRESES. SUNMATT LIMITED (2017) eKLR**.
8. In the above authorities the courts awarded the claimants the sum of Kshs.1500,000 as general damages.
9. Having gone through the proceedings and the submissions it is apparent that the only point of departure is on the award. This courts duty at this juncture was well explained in the case of **SELLE VR. ASSOCIATED MOTOR BOAT COMPANY LTD (1968) EA AT 123**. The court stated that;

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

10. The court has perused the injuries sustained by the respondent. It is not disputed that he sustained fracture to his femur. The two medical reports by **DR KIAMBA** and **DR MALIK** are in agreement on the nature and the extent of the injuries. Obviously the respondent went through very painful healing process. It appears that at some point the wound became septic and fresh treatment had to be undertaken.

11. Both doctors differ on the extent of disability. DR KIAMBA for instance opines that he suffered a disability of 40% while DR MALIK is at 20%. Clearly being two different persons, it is sometimes certain that there could be disparity. This court finds that whichever way the percentages go the respondent suffered serious disability in the leg which became shorten.

12. What then should be the appropriate quantum? Did the trial court failed to consider the evidence and authorities raised by the appellant?

13. I have perused all the authorities relied by the parties. Clearly the authorities by the appellant indicates that the claimants suffered other multiple injuries than the appellant herein. The trial courts in those matters must have taken into consideration the other injuries.

14. On the other hand, the other authorities relied on by the appellant save that the awards are almost half of those relied on by the respondent clearly have other serious multiple injuries. The award of Kshs. 700,000 seems to run through all of them.

15. The court in **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE V.A M LUBIA & ANOTHER (1987) KLR 27** laid down the principles to be considered whether to interfere with an award. The court stated that;

“..... the principles to be observed by an appellate court in deciding whether it is justified in distributing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 wholly erroneous estimate of the damage.....”

16. This court does find that when compared to the cited authorities by the parties the injuries suffered by the respondent were not as multiple as those cited both by the appellant and the respondent. In my view a middle ground between the two would be appropriate. The court is also aware of the 20% contribution by the respondent and the cost of future medical expenses which the medical report opines.

17. Taking the above factors into consideration as well as the element of inflation I find that an award of Kshs. 1,000,000 would have been appropriate in the circumstances. This should be able to cover at least part of the future medical treatment.

18. Consequently, the appeal is hereby allowed as follows;

a) The trial courts award is hereby set aside and substituted with an award of general damages of Kshs. 1,000,000. The award on special damages remains the same. The above shall be subject to the contributory negligence of 20% as earlier consented to by the parties.

b) The award herein shall attract interest at courts rates from the date of the lower court judgement till payment in full.

c) The appellant shall have 20% of the costs herein as well as in the lower court.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF APRIL 2021.

H. K. CHEMITEI

JUDGE