



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 121 OF 2019**

**BETWEEN**

**DERRICK MWENDA NGAINE.....1<sup>ST</sup> APPELLANT**

**CATHOLIC DIOCESE OF MERU, OUR LADY OF HELP CHRISTIANS.....2<sup>ND</sup> APPELLANT**

**AND**

**DENNIS MWENDA.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Tigania SRMCC NO.33 of 2017 by Hon. P.M.Wechuli (SRM) delivered on 03<sup>rd</sup> September, 2019)*

**JUDGMENT**

1. **Dennis Mwenda (Respondent)** sued **Derrick Mwenda Ngaine** and **Catholic Diocese of Meru, Our Lady of Help Christians (1<sup>st</sup> and 2<sup>nd</sup> Appellants)** in the lower court claiming damages for personal injuries and subsequent loss of earnings he suffered when he was knocked down by 2<sup>nd</sup> Appellant's M/V KAN 333Q which was driven negligently by the 1<sup>st</sup> Respondent on 02.06.16.
2. The Appellants filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on 3<sup>rd</sup> September, 2019, the learned trial Magistrate found the Appellants jointly and severally liable at 100% and awarded the Respondent Kshs. 900,000/- in general damages, Kshs. 265,859/- in special damages, costs and interest.

**The Appeal**

4. The Appellants being dissatisfied with the lower court's decision on quantum preferred this appeal by way of the Memorandum of Appeal filed on 30<sup>th</sup> September, 2019 setting out 4 grounds but mainly that the awarded general damages are excessive.

**SUBMISSIONS BY THE PARTIES**

5. On 27<sup>th</sup> July, 2020, this court directed that the appeal be canvassed by way of written submission which the parties dutifully filed.

**Appellants' submissions**

6. Appellants hold the view that the general damages awarded to the Respondent are not comparable to awards in similar cases. It was submitted that the court failed to have regard to all the evidence relating to the injuries sustained by the Respondent and to appreciate the authorities cited by the Appellants. Appellants contend that the sum of Kshs. 900,000/- was inordinately high and further that an award of Kshs. 300,000/- would be reasonable compensation. Appellants placed reliance the following authorities: -

1. **Maselus Eric Atieno v United Services Limited [2017] eKLR** where the court on appeal sustained an award of Kshs. 250,000/- for simple fracture and multiple soft tissue injuries
2. **Harun Muyoma Boge v Daniel Otieno Agulo [2015] eKLR** where the court awarded Kshs. 300,000/- for blunt chest injuries, cut wound right wrist, deep cut wound on the right foot, fracture right tibia and fibula and soft tissue injuries

3. **Isaac Mwenda Micheni v Mutegi Murango [2004] eKLR** where a sum of Kshs. 100,000/- was awarded for wound on scalp, fracture of left tibia and fibula, cut wound on knee and bruised right forearm

4. **Jitan Nagra v Abidnego Nyandusi Oigo [2018] eKLR** where Kshs. 450,000/- was awarded for lacerations on the occipital area, deep cut wound on the back, right knee and lateral lane, bruises at the back extending to the right side of the lumbar region, blunt trauma to the chest, bruises on the left elbow, compound fracture of the right tibia/fibula, segmental distal fracture of the right femur.

### Respondent's submissions

7. The respondent submitted that the award for damages was comparable to awards in similar cases and that there was no justification for this court to interfere with the discretion of the learned trial magistrate. To this end, respondent relied on the following authorities: -

1. **Stephen Mutisya Muumbi V Peter Mutuku Katuli [2008] eKLR** where Kshs. 570,000/- was awarded for fracture of the left tibia which caused post-injury complications such as inability to stand for a long time, deformity of the left leg, inability to walk long distances and tenderness at the fracture site and soft tissue injuries

2. **Robert Gitau Kanyiri V Charles R. Kahiga & 2 Others [2010] eKLR** where Kshs. 1,000,000/- was awarded for fractures of the right radius, fracture of the right ulna, fracture of the left humerus with subsequent infection, fracture of the right femur with subsequent infection and mal-union, blunt head injury and multiple soft tissue injuries

3. **Samuel Mwangi Kamau -vs- Joseph M. Kimemia (2004) eKLR** where a sum of Kshs. 1,000,000/- was awarded for Head injury with paralysis of the left upper limb due to intra cranial haemorrhage and depressed fracture of the left temporal bone resulting in 50% permanent incapacitation, Fracture of the right tibia and fibula which had malunited resulting in a permanent deformity. According to his prognosis the Plaintiff would be unable to walk for long distances, Laceration and bruises on the forehead and right hand which had healed but left prominent scars.

4. **Ndathi Mwangi & 2 others v Benson Lumumba Ndivo [2018] eKLR** where 1,250,000/- was awarded for Fracture of the ulna, Compound fracture of the femur in the middle one third, Compound displaced fracture of the left tibia and fibula, Soft tissue injuries and Laceration on the right leg

### Analysis and Determination

8. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

9. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise. Such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. Where the trial court has violated legal principles, the appellate court will interfere with the exercise of discretion by the trial court. The discretion, in assessing the amount of general damages payable will be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. These principles were set out by the Court of Appeal for Eastern Africa, the predecessor of the Court of Appeal of Kenya, and were subsequently approved and adopted by the Court of Appeal in several cases among them; **Kanga v Manyoka [1961] EA 705**, **Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto [1979] E. A. 414**, **Butt v Khan [1981] KLR 349**, **Kemfro Africa t/a Meru Express & Another v. A. M. Lubia & Another [1982 – 88] 1 KAR 72** and **Mariga v Musila [1984] KLR 257**.

10. In **Harun Muyoma Boge v Daniel Otieno Agulo MGR HCCA No. 7 of 2015 [2015] eKLR**, D.S Majanja J. expressed himself thus: -

**“The assessment of general damages is not an exact science and the court in doing the best it can, takes into account the nature and extent of injuries in relation to awards made by the court in similar cases. It ensures that the body politic is not injured by making excessively high awards and that the claimant is fairly compensated for his or her injuries.”**

11. The Respondent suffered fracture of both tibia and fibula with a 7% permanent incapacity. The trial court awarded Kshs. 900,000/= as general damages for pain and suffering.

12. It is beyond argumentation that no two accidents will ever result in exactly the same injuries or the same set of injuries. Accordingly, it is the duty of the court, on the basis of its best appreciation of the various authorities cited and using its closest approximation of the compensable value of the injuries in the case before it relative to those cited in authorities, and given the passage of time, to pronounce itself on the appropriate compensation.

13. The case that compares to the present case is **Jitan Nagra v Abidnego Nyandusi Oigo (supra)** but even in that case the Plaintiff did not suffer any permanent incapacity.

14. Having taken everything into account, the general damages awarded to the Respondent were high. I therefore set aside the lower court judgment to this extent and award Kshs 600,000/- general damages for pain suffering

15. Costs shall be in the cause.

**DATED AT MERU THIS 15<sup>th</sup> DAY OF April 2021**

**T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Appellants - Ms. Rigaga for J.K.Kibicho & Co. Advocates**

**For Respondent - N/A for M.G.Kaume & Co. Advocates**