



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 381 OF 2017

ANTONY PETER WAINAINA.....APPELLANT

VERSUS

JUMBA PATRICK OGANDA.....1ST RESPONDENT

CHESONI YATOR.....2ND RESPONDENT

ANDREW THURANIRA.....3RD RESPONDENT

JAMES KING'ORI MBOROKI.....4TH RESPONDENT

(Being an appeal against the Judgment of Hon.L. W. KABARIA (Ms.) Senior Resident Magistrate delivered on 30th June 2017 in Milimani CMCC No. 5356 of 2013)

JUDGMENT

The appellant was involved in a road traffic accident on 9th September, 2010. He was travelling in motor vehicle registration number KAV 195B which collided with motor vehicle registration number KAX 664P. The appellant sought damages for injuries sustained during the accident and the trial court awarded him Kshs.980,920 as special damages, Kshs.1,500,000 general damages for pain and suffering and Kshs.150,000 for future medical expenses. According to the appellant, the findings of the trial court are contrary to the evidence on record and preferred this appeal on the following grounds:-

1. The learned magistrate erred by failing to award Shs.378,799/- special damages.
2. The learned magistrate erred by declining to award the special damages paid by Dodhia Packaging.
3. The learned magistrate failed to apply the correct legal principles about payment of all loss suffered by a tortfeasor even if paid by third parties.
4. The learned magistrate erred by awarding general damages for pain, suffering and loss of amenities of life which sum:-
 - a. Was too low.
 - b. Did not take account of the nature and extent of the injuries.
 - c. Did not accord with the applicable legal principles and precedents which guide a court in assessing damages for personal injuries.

Mr. Kaburu, Counsel for the appellant submitted that the trial court's finding on both special and general damages is erroneous. As far as special damages is concerned, the appellant made a claim for Kshs.1,359,719. The trial court rejected a claim for Kshs.378,799 simply because part of it was paid by a third party who is the appellant's employer. Counsel relies on the cases of **RELI CHAKA NDORO -V- MAREE AHMED (2017) eKLR**, **JACKSON ONYANGO ALOO -V- JUMA AGGREY IDAHO & 2 OTHERS (2019) eKLR** where the courts held that the tortfeasor has to settle all special damages even if payment is not made by the accident victim.

On the issue of general damages, it is submitted that the appellant suffered multiple and life threatening injuries. He suffered a total of six

(6) fractures and internal injuries. Counsel relies on the case of **REGINA MWIKALI WILSON –V- STEPHEN M. GICHUHI & ANOTHER (2015) eKLR** where Justice A. Mabeya awarded Kshs.2.5million for communitated fracture of the right radius bone, fracture of the 3rd, 4th, 5th and 6th ribs, fracture of the femur involving the neck shaft and supra condulor region, fracture of the left tibia and fibula bones of the same leg and fracture of the femur of the right leg.

Counsel for the appellant also referred to the case of **MICHAEL NJAGI KARIMI –V- GIDEON NDUNGU NDURIBU & ANOTHER (2013) eKLR** where Justice H. Waweru awarded Kshs.2,000,000 for fractures of the left femur, two fractures of right lower leg, fracture right upper hand and two fractures of right lower arm. Counsel for the appellant urged the court to enhance the award to Kshs.4,000,000.

Mr. Mugun appeared for the respondent. It is submitted that there is an established legal principle of non-interference with a trial court's discretion in award of general damages. Counsel referred to Mcgregory's book on Damages (2003), 17th Edition, Paragraph 35-043 where it is stated as follows:-

“The concept of full compensation... cannot operate here. It is not possible to give full compensation as no amount in money can fully compensate for a serious physical injury; indeed, with all physical injuries one is not, when arriving at a compensatory figure, comparing like with like. The best the law can do is put a monetary value upon the deprivation which the person has suffered...”

This is a first appeal, the court is required to evaluate the evidence and record of the trial court afresh before drawing its own conclusion. Three witnesses testified for the appellant's case while the respondents closed their case without calling any evidence. **PW1 P.C. FAIRFAX MASINDE SINDANE** was attached to Buruburu Police Station on traffic duties. The accident occurred along the Outering road near Total Petrol Station. He did not investigate the case. The appellant was the accident victim. Motor vehicle registration number KAV 195b, Nissan pickup was blamed for the accident.

PW2 DR. WASHINGTON WOKABI examined the appellant and prepared a medical report. It is his evidence that the appellant sustained the following injuries:

- Injury to the abdominal chest
- Rapture of the diaphragm
- Perforation of the gut
- Fracture of the right femur
- Fracture of the left humerus bone
- Fracture of two right ribs
- Fracture of the 10th thorasic vertebrae.

The fracture of the right femur was operated on and fixed with a K-nail. A metal plate was fixed on the left humerus bone. The fracture of the 10th thorasic vertebrae was stabilized using a metal plate. The fractures united very well and the appellant did not have major complaints.

PW3 is the appellant. He was a passenger in the pickup. The other vehicle, a lorry used the wrong turn and caused a head-on collision. He suffered a broken leg and hand; raptured diaphragm, his intestines were exposed and part of it had to be removed. He did undergo surgery. The accident occurred between 1.00a.m. to 2.00a.m. He was conscious after the accident but later on went into a coma. He mobilized funds from friends and relatives so as to pay the medical bills. They also took a loan from Family Bank. He did not lose his job and salary as a result of the accident.

The principles for awarding general damages arising from accidents are well known. Award of damages entails the exercise of discretion by the trial court. An appellate court should not review awards by a lower court for the sole reason that it would have awarded a different sum. In the case of **HENRY HIDAYA KANGA –VS-MANYEMA MANYUKA (1961) E.A. 705 AT 713**, the then Court of Appeal for East Africa held:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

The first issue raised by the appellant relates to a claim of Kshs.378,799 as special damages. The appellant testified that the medical expenses were paid in full. The National Hospital Insurance Fund paid Kshs.20,000. The trial court in its judgment stated as follows:-

“I see two receipts shown paid by Messrs Dodhia Packaging. There was no basis laid for the reimbursement of the amounts to the plaintiff. I decline to award that amount.”

The trial court did not find that the sum of Kshs.378,799 was not paid as medical expenses. The decision to deduct it is based on the finding that there was no basis laid as to how third parties paid part of the medical expenses. In the case of **LELI CHAKA NDORO –V- MAREE AHMED & S.M. LARDHIB (2017) eKLR** I made reference to the case of **GEORGE WHITE –V- JUBITZ CORPORATION, (2009)** Supreme Court of the State of Oregon, USA where the court stated:-

“The salutary policy underlying the collateral source rule is simply that if an injured party received some compensation from a source wholly independent of the tortfeasor, such compensation should not be deducted from what he might otherwise recover from the tortfeasor.”

“The common-law collateral source rule does not concern itself with whether a plaintiff actually obtains a “double recovery.” The rule permits a plaintiff to recover damages from a tortfeasor and concomitant sums from a third party and to do so without regard to whether the plaintiff has purchased, earned, or must repay those third-party benefits.”

The appellant testified that he was an employee and did not lose his salary as a result of the accident. It does not matter whether he used to work for Dodhia Packaging or not. The fact that Dodhia Packaging Company paid part of the medical bill does not entitle the respondent to benefit from the appellant’s arrangements with third parties. The appellant is entitled to recover the special damages incurred in form of medical expenses. I do find that the grounds of appeal on the deducted sum of Kshs.378,799 as general damages is merited and the same is hereby allowed.

The next issue involves the award of general damages. Counsel for the respondent contend that assessment of damages in personal injury case is guided by established principles namely:-

- 1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.**
- 2. The award should be commensurable with the injuries sustained.**
- 3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.**
- 4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.**
- 5. The awards should not be inordinately low or high.**

Counsel for the respondent in their submissions dated 8th January 2017 before the trial court did not make any reference to any proposed quantum on general damages. According to counsel, the appellant had not proved that the respondents were liable.

Counsel for the appellant is of the considered view that an award of Kshs.4,000,000 will suffice. The case of **REGINA MWIKALI WILSON** (supra) does provide comparable injuries. However, in that case the claimant had fractures of both femurs. In the current case the appellant had a fracture of the diaphragm.

In the case of **EDWARD NJOROGE GICHOMO –V- PATRICK SIMIYU WEKESA & MYTRADE LTD, (2004) eKLR** the claimant suffered fractures of the upper parts of both arms, rupture of diaphragm, fracture on right femur, lost two upper front teeth, injury to the right knee and injury to the right ankle. He was fitted with plates on the arms and the femur was operated. Justice Dulu awarded Kshs.1,600,000 as general damages in 2004.

I also do find that the case of **EDWARD NJOROGE GICHOMO** (supra) does provide for comparable injuries. The plaintiff in that case had a fracture of the diaphragm and femur Kshs.1.6million was awarded in 2004.

Considering the injuries sustained by the appellant, I do find that the award by the trial court is quite low. The appellant has a metal plate fixed on his spine and will have to live with it. There were other implants on the femur and humerus bone. The claim for Kshs.4million is equally on the higher side. I do find that an award of Kshs.2.5million as general damages is sufficient compensation for the injuries suffered.

In the end, the appeal is merited and is hereby allowed. The appellant is awarded an extra sum of Kshs.378,799 as special damages. The award of Kshs.1.5million as general damages by the trial court is set aside and replaced with an award of Kshs.2.5million. The award of Kshs.150,000 for future medical expenses and special damages of Kshs.980,920 as awarded by the trial court shall form part of the award. For the avoidance of doubt judgment is entered for appellant against the respondents as follows:-

a. Liability	- 100%
b. General damages for pain and	
Suffering	- Kshs. 2,500,000
c. Future medical expenses	- Kshs. 150,000
d. Special damages	-Kshs. 1,359,719
Total	- <u>Kshs. 4,009,719</u>

The appellant shall have costs and interest of the suit before the trial court. Parties shall meet their own costs of this appeal.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MAY, 2021

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S. CHITEMBWE

JUDGE