



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 35 OF 2017

ANDREW KIMANI MWAURA.....1ST APPELLANT

SAMUEL THUO.....2ND APPELLANT

-VS-

NYAGUTE MORAA VERAH ALIAS FERAH MORAA.....RESPONDENT

JUDGMENT

1. This is an appeal challenging the quantum of damages awarded by the trial court, following a road traffic accident. The appellants were found 100% liable. They formally abandoned the issue of liability on appeal. An award was made by the trial court as follows:

General damages	3,200,000.00
Special damages	<u>20,499.00</u>
Total	<u>3,020,499.00</u>

Special damages are not challenged on the appeal.

2. The injuries pleaded were:

- (i) Degloving scalp lacerations left side of face.
- (ii) Multiple rib fracture.
- (iii) Right haemothorax.
- (iv) Right clavicle fracture.
- (v) Fracture both iliac bones and pubic ramii, right sacrum.
- (vi) Fracture of 5th lumbar spine

3. It is contended by the appellants that the injuries pleaded were not consistent with those in the discharge summary dated 29th August, 2015 from AIC Kijabe Hospital, namely, Right haemothorax, pelvic fracture and scalp laceration. Further, that these were inconsistent with the first discharge summary dated 5th August, 2015 from Naivasha District Hospital which indicated the injuries as: Degloving scalp laceration; multiple rib fractures, pelvic fractures and clavicular fractures.

4. To complicate matters, the medical report by Dr. Karanja relied on by the trial court, indicated that the respondent sustained significant trauma out of the multiple fractures and wounds and the doctor examining her said she had high chances of developing osteoarthritis of the chest cavity and pelvic region later in life.

5. The Respondent makes three substantive arguments. First, that the appellate court should not disturb an award for damages unless it inordinately high or low. Secondly, that damages are at the discretion of the court (See **Kemfro Africa Limited t/a Meru Express Services**

(1976) & another v A. M. Lubia & Another [1985] eKLR; Thirdly, that the High Court in Embu had awarded damages at Kshs 3,000,000/= in Sabina Nyakenya Mwanga v Patrick Kigoro & Another HCCA No. 9 of 2012 where the injuries were similar.

6. I have perused the authorities availed and considered the parties representations. The only question for determination is, what is the true nature of the injuries sustained and what is the appropriate award for them.

7. I have also carefully perused the Record of Appeal. I note that several of the exhibits referred to in the appeal by the appellants are not contained in the record of appeal. The lower court file was also not available at the time of writing judgment herein so that I have not been able to peruse the following documents referred to by the appellants:

1. The Discharge summary dated 29th August, 2015 from AIC Kijabe Hospital P. Exhibit 2.

2. The medical Report by Dr. Karanja dated 11th November, 2015 P. Exhibit 7,

8. Accordingly, I can only rely on the documents in the Record of Appeal, concerning the injuries namely; Discharge summary from Naivasha District Hospital dated 3rd August, 2015 (Page 9 of Record of Appeal); Witness statement of the Plaintiff/Respondent (Page 11 Record of Appeal) and Dr. Jenipher Kahuthu's medical report dated 25th June, 2016 (Pages 16 - 17 Record of Appeal).

9. The Discharge Summary dated 3rd August, 2015 shows the diagnosis as:

- 1) Degloving scalp laceration,
- 2) Multiple Rib fracture,
- 3) Pelvic fracture (Open Book),
- 4) Clavicular fracture.

It also shows that a pelvic x-ray and skull x-ray were done. The results of the x-rays were however, not shown to have been released and at that date.

10. The Medical Report dated 25th June, 2016 by Dr. Jenipher Kahuthu (Page 16 - 17 in the Record of Appeal) confirms the following injuries:

- Degloving injuries on left side of face extending to scalp.
- Healed surgical scars on both thighs (15 centimetres).
- Healed surgical scar on right side of chest.
- Initial x-ray: rib fractures from 2nd - 10th Rib.

Pelvis bilateral superior and inferior rami fracture of pubic bones.

- Chest x-ray confirms the fractures.

11. Based on the documents availed in the Record of Appeal, I see nothing that persuades me to sustain a challenge of the trial court's decision.

12. In an appeal, it is the appellant's responsibility to discharge the burden of proving any matter sought to be relied upon by it. In the absence of such proof, the appellate court cannot find for the appellant.

13. Accordingly the appellants' appeal is hereby dismissed.

Administrative directions

14. 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.

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

16. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 19TH DAY OF MAY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Kabuteh for the Appellants
2. No representation for the Respondent
3. Court Assistant - Quinter Ogutu