



**REPUBLIC OF KENYA**

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

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

**CIVIL APPEAL NO. 68 OF 2019**

**SOSPETER KIMUTAI .....1<sup>st</sup> APPELLANT**

**PETER KARIUKI KAMAU .....2<sup>nd</sup> APPELLANT**

**VERSUS**

**ISAAC KIPLETING BOIT.....RESPONDENT**

***(Being an appeal from the judgment in CMCC No 505 of 2017***

***Naivasha delivered on 11/09/2019 by Chief Magistrate Hon. K. Bidali)***

**JUDGMENT**

**Background and issues**

1. The appellants have filed this appeal challenging the quantum of damages awarded by the lower court in respect of a road traffic accident that occurred on 29/03/2017 at Karai area. During the proceedings, liability was apportioned by consent at 90%: 10% in favour of the plaintiff / respondent herein. The award was as follows:

1) General damages	Kshs 1,000,000.00
2) Special damages	Kshs <u>9,000.00</u>
Sub total	Kshs 1,009,000.00
Less 10%	Kshs <u>100,900.00</u>
<b>Total</b>	<b>Kshs <u>908,100.00</u></b>

2. The injuries sustained by the plaintiff as stated in the report by Dr Wellington Kiamba were as follows:

- 1) Head injury with deep cut wound on the right temporal region extending to right parietal region
- 2) Contusion of right eye
- 3) Fracture dislocation of right acromio clavicular joint
- 4) Soft tissue injuries to chest
- 5) Soft tissue injuries of the right shoulder joint

3. The appellants' substantive challenge to the quantum is that the injuries in that report – which was relied upon by the trial court – go beyond those in the initial treatment notes and discharge summaries from the hospitals visited by the plaintiff.

4. According to the appellants, the general damages awarded should have been pegged at Kshs 200,000/-, and not Kshs 1,000,000/- had the initial treatment notes and discharge summaries been relied upon by the trial court.

5. In my view and having considering the parties' divergent positions the crux upon which this appeal turns is entirely on whether or not the injuries comprise essentially those in the initial treatment notes and discharge summary, rather than the doctor's later medical report.

6. Naturally, the appellants urged the court to rely essentially on:

1) P. Exhibit 1, the discharge summary from Naivasha District Hospital dated 29/3/2017 the day of the accident – which shows “*head injury (mild)*” captured on pg 13 of the ROA – following which, after management with some medicines, the plaintiff was released and referred to a hospital of his choice.

2) P. Exhibit 2 Kenyatta Hospital Discharge Summary dated 30/3/2017, the day after the accident, which shows “Soft tissue injuries, facial, right eye, chest and trunk”. In this respect, the injuries found on physical examination were described facial frontal lacerations, right eye contusion, chest and torso contusion right side

7. It is argued that despite X-rays at Naivasha District Hospital and other radiological examinations at Kenyatta Hospital, no fractures were found until two months later on 3/5/2017 when the plaintiff was x-rayed at Aga Khan Hospital Mombasa and a fracture “discovered”. The Discharge Summary dated 10/05/2017 from Aga Khan Hospital P. Exhibit 3 shows a diagnosis of dislocation AC joint treated by AC joint stabilization.

8. The Appellants placed reliance on the authorities of **Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR** to buttress the importance of treatment notes. Further reliance was placed on the authority of **Michael Adeka Khaemba & 2 others v Rassangylo Muli Kumuyu (2018)** and **High Court Meru Civil Case No.14 of 2001** to urge the court that expert opinion is not binding and only meant to assist the court. The appellant thus submitted that the Respondent suffered only soft tissue injuries which this court should take into account.

**9. The appellants argue that the Respondent did not discharge its burden of proof as it produced contradictory results by its Dr. Kiamba and the P3 signed by the medical superintendent on 18/07/2017 and 10/07/2017 respectively which showed the alleged fracture. The Appellants rely on the Court of Appeal authorities of Anthony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR where the it was held that where evidence does not support the facts pleaded, the party relying on it should fail. They also rely on Timsales Ltd v Wilson Libuywa (2008) eKLR where Maraga J. (as he then was) reiterated the importance of treatment notes.**

10. Finally, the appellants proposed that the court in assessing the injuries sustained should be guided by the following judicial authorities:

1) **Nkaruarau Lejumurt v Vegpro(K) limited t/a as Kantara Farm [2018] eKLR** where an award of Kshs.200,000/ was made, up from 160,000/- for traumatic injury to the right leg, blunt trauma to the right hand a deep cut in the upper limb, a traumatic mild head injury and multiple soft tissue injuries;

2) **Entertainer Trucks Company Ltd v George Karanja Maina [2020] eKLR** which held that the initial treatment notes were sufficient evidence of injuries, set aside the lower court award of KShs.750,000/- and substituted it for Kshs.200,000/-;

3) **John Mwendwa Kuti & 2 others v Ibrahim Kunyaga [2020] eKLR** where the court reiterating the importance of initial treatment notes, aside the award of KShs 500,000/- and substituted it for KShs 350,000/-.

The appellants urge this court to set aside the award for KShs 1,000,000/- and replace it with Kshs 200,000/-.

11. The respondent argues that although the court's role on appeal is to re-evaluate the evidence and reach its own conclusion (**Selle v Associated Boat Co (1968) EA 123**), it should not interfere with the lower court's decision and discretion unless wrong principles of law were relied upon (**Butt v Khan (1981) KLR 349**).

12. The respondent further submits that the trial court looked at all relevant facts in reaching its decision on the award, and argues that they relied on **Rose Jepkosgei Kipkoti v Barnabas Biwott [2019] eKLR** where general damages of Kshs1,800,000/- were awarded on appeal enhanced from Kshs 1,200,000/-. The respondent invited this court to rely on the case of **Gerald Nzoia Ndonga v Susan Mukoma & Anor [2019] eKLR** where an award of Kshs 1,500,000/- was confirmed.

#### **Analysis and determination**

13. Having carefully perused the evidence on record and the parties' submissions, I would point out what has been stated by other courts before me; that the assessment of damages is always a daunting task for the trial court. See **George Kirianki Laichena v Michael Mutwiri**, Civil Appeal No. 162 of 2011, where the Court of Appeal stated:

***“It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case...”***

14. The Plaintiff/Respondent testified that the fracture was detected on 03/05/17, about forty days after the accident. The respondent further stated that the plaintiff had been treated at both Naivasha District and Kenyatta National Hospitals yet the fracture was not detected.

15. As a result, when the divergent doctors' reports were placed before the court on 17<sup>th</sup> July 2019, the parties consented that reports be entered on the record for use by the trial magistrate. The divergence was pointed out clearly by the trial court. In the Defendant's medical report by Dr. Kahuthu the fracture did not show but a healed scar on the head of the shoulder was indicated, whereas the report prepared by Dr. Kiamba for the Respondent, it elucidated a fracture.

16. The learned trial magistrate having examined both medical reports from the litigants correctly found them to be divergent and stated:

*"...The reports are remarkably different; in the opinion of Dr. Kahuthu the Plaintiff was treated for head injury and soft tissue injury to the chest at KNH, he was admitted for 8 days and treated for soft tissue injuries on the face, left eye, chest and trunk. According to the Dr. the chest x-rays showed no fractures. In her recommendation she stated that the plaintiff sustained mild head injuries and soft tissues to the chest and around the eye. On the other hand, the P3 form which was filled on 10<sup>th</sup> July 2017, indicated that the plaintiff had tenderness on the right shoulder and a dislocation on the right acromio clavicular joint. The degree of injury was assessed as grievous harm. This P3 form seems to confirm the injuries as indicated by Dr. Kiamba. And I shall be guided by the reports in assessment of damages...the general principle is that comparable injuries ought to attract comparable award for damages. , doing the best I can and I will be guided by the principles and award set out on Civil Appeal No.70 of 2013 High Court at Eldoret..."*

17. On the weight a court of law should attach to expert opinion, this court in the case of **Stephen Kinini Wang'ondou v The Ark Limited [2016] eKLR** held that:

*"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less....This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.*

*Firstly, expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision."*

18. In the case of **Henry Binya Oyala V Sabera Oitira [2011] eKLR** the court held that the primary source of information on injuries sustained is by the victim, and that evidence of a medical officer is not mandatory. It was also held that a victim's own statement with regard to injuries should not be dismissed merely on ground that it was not matched by initial treatment from hospital.

19. The challenge I find in this case is that the Naivasha Hospital examination included x-rays. Yet despite these the fracture was not identified there. Then there were radiology tests done at Kenyatta Hospital. Why was the fracture again not detected there?

20. I think that once parties are aware that there exist serious discrepancies in the expert reports, it is their responsibility to avail the experts in court so that their evidence can be tested by cross examination to enable the court to reach a proper and more accurate appreciation of the true facts. Here the parties merely threw in their expert reports and closed their eyes in the hope that the court will select their report to rely upon.

21. In **Stephen Kinini Wang'ondou v The Ark (supra)** this court continued:

*"... Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.*

*Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.*

*Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.(emphasis supplied)"*

22. As far back as 1995 the Court of Appeal had stated in **Dhalay vs. Republic (1995 – 1998) EA 29** as follows:

*"Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it." (Emphasis added).*

23. In **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** the Court of Appeal, held that:

*"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert*

*opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”*

24. The divergence in the medical reports emanates from the fact that there is also a discharge summary from Aga Khan Hospital Mombasa which shows that the plaintiff underwent an operation to stabilize the joint fracture. In the lower court, it was strenuously submitted by the defendants that the defence expert’s examination did not detect the any fracture dislocation. Further there is no explanation as to why the dislocation was only detected six weeks later.

25. The defence expert stated as follows regarding the dislocation:

*“...The diagnosis of fracture dislocation of the acromioclavicular joint is made on 10/5/2017, which is approximately 6 weeks after the accident. This is a severe injury to be missed by two hospitals and especially KNH where he was admitted; as such the fracture dislocation is not from the RTA of 29/03/2017”*

26. I have sought to find out whether a reasonable connection was made between the injury identified in Aga Khan Hospital Mombasa and the accident that took place in Kinungi. The respondent relied on the P3 form dated 10<sup>th</sup> July 2017: in the history part of the form the doctor stated:

*“He was treated at NRSH, later referred to KNH and subsequent follow up at AgaKhan Hospital.”*

In section B of the P3 Form the doctor examined the upper limbs and stated:

*“....Had dislocation right acromioclavicular joint ORIF of dislocation done Scar noted on the right shoulder”*

27. The doctor filling in the P3 Form on 10<sup>th</sup> July, 2017 therefore appears to have relied on the findings and treatment information from Aga Khan Hospital Mombasa. However, there is no document availed that shows the plaintiff was referred to Aga Khan Hospital as a *result* of the accident, nor does the Aga Khan Discharge Summary connect the dislocation to the accident that occurred two months earlier.

28. In addition, in the medical report of Dr Kiamba, also written in July 2017, does not indicate his reliance on any x-rays or scans of the plaintiff. Instead, he indicates that the only documents he relied upon for his report were:

*“1. P3 form filled on 10/7/2017*

*2. Discharge Summary from Aga Khan Hospital Mombasa date of admission 10/5/17 date of discharge 11/5/17*

*3. Discharge Summary from Kenyatta Nation (sic) Hospital 30/3/2017 date of discharge 7/4/2016 (sic)*

*4. Discharge summary from Naivasha District Hospital*

*5. Abstract from police on road accident filled on 10/7/2017”*

29. This is quite unlike the medical report of Dr Kahuthu which shows she relied on:

*“ - Claimant’s history: Self*

*-Treatment records dated 29/03/2017 Naivasha District Hospital, 07/04/2017 Kenyatta National Hospital 11/05/2017 Aga Khan Ho (sic)*

*- Medical Report dated 18/07/2017 Dr Kiamba*

*- X-ray /Scan report dated Initial X –ray presented 27/11/2017 9 Jamu .... Imaging)*

*- Clinical examinations 27/11/2017” (Emphasis added)*

30. Further, in her report at paragraph 2, she refers to the x-rays seen, and I treat her report as rather more thorough than that of Dr. Kiamba.

31. According to the P3 Form, the doctor found the degree of injury to be “*grievous harm*”. Surprisingly, the Police Abstract P. Exhibit 5, filled in on the same date also indicates that the plaintiff suffered “*grievous harm*”. How the police officer receiving the report of the accident deduced the level of harm is not indicated.

32. All in all, I am unable to find proof of any rational connection between the dislocation treated in July 2017 and the accident that occurred in March 2017. Accordingly, I find that the dislocation, having not been included in the earlier contemporaneous accident examinations cannot, without further explanation, justifiably be included as part of the accident injuries of 10/5/2017

33. For these reasons, I exclude the fracture from consideration in the quantum assessment. This leaves the injuries suffered by the respondent as follows: 1) Head injury with deep cut wound on the right temporal region extending to right parietal region; 2) Contusion of right eye; 3) Contusion torso right side and Soft tissue injuries to chest 5) Soft tissue injuries of the right shoulder joint.

34. Taking these injuries into account and applying the principles that compensation ought to be for the injuries found to have been suffered, I find that the award was manifestly excessive and I would, and hereby, set it aside.

35. I earlier considered the authorities cited by the appellant: the **Nkuraru case**, the **Entertainer Trucks case** and **John Mwendwa Kuti case**. The range of awards there for these types of injury is between 200,000/- and 350,000/-.

36. Taking into account all the matters and the injuries indicated herein I would award Kshs 350,000/-for general damages subject to 10% liability. The award is therefore 350,000 – 35,000= 315,000/-Special damages were not challenged and remain at Kshs 9,000/-.

37. Interests at court rates.

38. Each party shall bear their own costs of the appeal

#### **Administrative directions**

39. 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.

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

41. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 24TH DAY OF SEPTEMBER, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Thairu holding brief for Kabute for the Appellants
2. Owuor for the Respondent
3. Court Assistant - Quinter Ogutu