



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 68 OF 2020

KIMATHI MUTURI DONALD.....APPELLANT

VERSUS

KEVIN OCHIENG ASESU.....RESPONDENT

(Being an Appeal from the judgement of the Chief's Magistrate's Court by Honourable I. Oreng (SRM) delivered on 18th of October 2019 in CMCC 5220 of 2018)

JUDGMENT

The Respondent filed the suit before the Chief Magistrate's Court at Nairobi seeking damages arising from a road traffic accident which occurred on the 19th of June 2017 along Argwings Kodhek Road. Parties agreed on liability which was adopted by the court on 11th of July 2019 whereby the Appellant was held 80% liable while the Respondent took 20% liability. The Trial Court was only required to deal with the question of quantum. The Trial Court awarded Kshs.1,500,000 for general damages, Kshs.259,275 for special damages, Kshs.630,000 for future medical expenses and costs of the suit and interest at court rates.

The Appellant was not satisfied with the amount awarded as damages by the trial court and preferred this appeal on the following grounds: -

- 1. THAT** the learned Magistrate erred in law and in fact awarding damages to the Respondent amounting to Kshs.2,089,275 with costs and interests thereon.
- 2. THAT** the quantum of damages is excessive and erroneous estimate of the damages that may be awarded to the Respondent with due regard to the circumstances of the case before subordinate court and the weight of precedents in similar circumstances.
- 3. THAT** the learned Magistrate misdirected herself by failing to consider the submissions by the Appellant while arriving at the judgment.

The Appellant's Submissions

The Appellant submits that the award for general damages was inordinately high. The trial court did not consider the written submissions on behalf of the Appellant. The Appellant states that the award of Kshs.1,500,000 is high and should be assess downwards. In the Appellant's submissions to the trial court, they proposed an award of Kshs. 500,000 for the injuries sustained. The Respondent suffered fracture of the upper right tibia, fracture of the head of the right fibula and fracture of the floor of the socket of the left hip joint (acetabulum).

According to the Appellant, the issue for determination is the appropriate level of compensation bearing in mind that in assessing damages, comparable injuries should as far as possible be compensated by comparable awards. The Appellant is guided by the Court of Appeal's case **SIMON TAVETA V MERCY MUTITU NJERU [2014] eKLR** where it was observed:

“... the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

The Appellant further relied on the cases of **WEST (H) & SON LTD V SHEPHERD [1964] AC. 326, 345**, and **MOHAMED MAHMOUD JABANE v HIGHSTONE BUTTY TONGOI OLENJA (KLR 661)** where the point that comparable injuries should attract comparable awards was emphasised.

Regarding quantum, the appellant referred to the case of **CIVICON LIMITED V RICHARD NJOMO OMWANCHA & 2 OTHERS**

[2019] eKLR where the 2nd Respondent suffered a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint. She was awarded Kshs.450,000 general damages. Also, the Appellant relied on **AKAMBA PUBLIC ROAD SERVICES V ABDIKADIR ADAN GALGALO [2016] eKLR** where the award of Kshs.800,000 by the trial court was substituted with an award of Kshs.500,000 on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle. Counsel for the Appellant urged the Court to award the Respondent Kshs 500,000 as general damages.

The Respondent's Submissions

The Respondent opposed the appeal. It is the Respondent's submission that Kshs.500,000 is too low. The Respondent submit that it is not disputed that he suffered the following injuries: fracture of the upper right tibia which was operated and fixed with a metal implant, and fracture of the floor of the socket of the hip (acetabulum). These fractures limited the Respondent to the use of crutches for movement and couldn't sit down for long.

It was submitted that as per Dr. Wokabi's medical report, the above injuries are major and at optimal rehabilitation, the Respondent is expected to have 20% permanent incapacitation. The seriousness of the injuries necessitates a hip replacement costing Kshs.500,000 and removal of the implants at a cost of Kshs.130,000. Additionally, there is pain as a result of the injuries and surgery and signs of developing arthritis as a result. The Respondent further claims to suffer another injury, particularly, fracture of the head fibular as per Coptic Hospital's discharge summary which is also pleaded in the plaint.

The Respondent relied on the cases of **ALPHONCE MULI NZUKI V BRIAN CHARLES OCHUODHO [2014] eKLR** in which the Respondent was awarded Kshs.800,000 for commuted fracture of the right tibia and fibula as well as degloving injury medial aspect of right leg and foot not a hip fracture as outlined in the Respondent's Submissions and **SBI INTERNATIONAL HOLDINGS (AG) KENYA V WILLIAM AMBUGA ONGERI [2018] eKLR** that awarded the Respondent Kshs.800,000 for chronic dislocation of the left hip and a fracture of the femoral head, as well as bruises on the right thigh not a hip fracture as outlined in the Respondent's submissions.

The Respondent also relies on the authorities cited by the Trial Court in support of the award: **GODFREY WAMALWA WAMBA & ANOTHER V KYALO WAMBUA [2018] eKLR** where the Respondent suffered compound fracture of the right distal tibia/ fibula, cut wound on the scalp, cut wound on the chest and cut on the lower lip. and was awarded Kshs.700,000 and **JOSEPH MUSEE MUA V JULIUS MBOGO MUGI & 3 OTHERS [2013] eKLR** where the Plaintiff was awarded Kshs.1,300,000 for injuries to the left leg, head, and face; fractures on the left leg tibia and fibula; two broken upper jaw teeth; a chest injury; right shoulder injury and bruises on the left elbow.

According to Counsel for the Respondent, authorities relied upon by the appellant comprise of a limb fracture and no hip fracture with no serious resulting incapacitation.

Analysis and Determination

This being a first appeal, it is the duty of this Court to re-evaluate the evidence and record of the trial court before drawing its own conclusion. No witnesses testified. There was a consent recorded and adopted by the Trial Court on 1st August 2019 where written submissions would be filed on quantum and the Plaintiff's (Respondent) documents to be admitted without calling the makers.

The Plaintiff's documents as per the Plaintiff List of Documents at the Trial Court dated 24th May 2018 included a Prescription from Maria Immaculata Hospital, a Treatment note from German Medical Centre, a prescription from Kenyatta National Hospital, radiological request/report form from Kenyatta National Hospital, Patient report collection form from Kenyatta National Hospital, an Xray Report from Coptic Hospital, a Discharge Summary from Coptic Hospital, interim bills from Coptic Hospital, a Discharge Report from Coptic Hospital, bundle of treatment receipts, P3 Form, Police abstract, Dr. Wokabi medical report and receipt, Motor vehicle copy of records and receipt and a Demand letter dated 1st February 2018.

The injuries sustained by the Respondent are not disputed. The issues for determination are whether the trial court properly considered the Appellant's submissions and whether the award of general damages to the Respondent was inordinately high and calls for the intervention of this Court.

In assessing the award of general damages, the usual approach is that an appellate court will not interfere with an award of damages by the trial court unless the appellant can prove that the trial court applied the wrong principles or misapprehended the evidence and so arrived at a figure that was so inordinately high or low as to represent an erroneous estimate. This approach was adopted in **BUTT V KHAN (1981) KLR 349 ; KEMFRO AFRICA LIMITED T/A "MERU EXPRESS SERVICES (1976)" & ANOTHER V LUBIA & ANOTHER (NO 2) [1985] eKLR**.

The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **SOUTHERN ENGINEERING COMPANY LTD. VS. MUSINGI MUTIA [1985] KLR 730** where it was held that:

"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question."

The above stand was illustrated by Kneller, JA in **MOHAMED MAHMOUD JABANE V HIGHSTONE BUTTY TONGOI OLENJA [1986] eKLR** where it was stated: -

“The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.

- 1. Each case depends on its own facts;**
- 2. awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);**
- 3. comparable injuries should attract comparable awards.**
- 4. inflation should be taken into account; and**
- 5. unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.”**

From the above quoted cases, the principles that were formulated when awarding damages is that some degree of uniformity must be sought depending on the facts and the best guide would be to consider recent awards on comparable injuries.

From the Respondent’s List of Documents, the Respondent Received treatment at Maria Immaculata Hospital and Kenyatta National Hospital on 19th June 2017. He was then admitted at Coptic Hospital on the same day for further treatment where he was discharged on 30th June 2017. He underwent surgery on the 22nd June 2017.

As per Dr Wokabi’s Medical Report, the Respondent/Plaintiff sustained the following major injuries: **a fracture of the upper right tibia and a fracture of the floor of the socket of the left hip joint (acetabulum)**. The fracture of the tibia was surgically fixed with a metal implant and the fracture of the socket of the left hip was treated conservatively (non-surgically). He was mobilized and discharged with crutches. As a result of these 2 major injuries and the surgery, he suffered a lot of pain. At optimal rehabilitation, the disability will be 20% for both legs. His prospects of developing arthritis were higher due to the fracture of the acetabulum which the process has already started as confirmed by the X-ray.

In his judgment, the learned Trial Magistrate outlined the proposals on quantum made on behalf of the parties plus the authorities cited in support thereof. Counsel for the Respondent proposed an award of Ksh.1,300,000 as general damages in their submissions before the Trial Court. He relied on two authorities: **ALPHONCE MULI NZUKI V BRIAN CHARLES OCHUODHO [2014] eKLR** in which the Plaintiff was awarded Kshs.800,000 for compound commuted fracture of the right tibia and fibula as well as degloving injury medial aspect of right leg and foot; and **SBI INTERNATIONAL HOLDINGS (AG) KENYA V WILLIAM AMBUGA ONGERI [2018] eKLR** that awarded the Plaintiff Kshs.800,000 for chronic dislocation of the left hip, fracture of the femoral head, and bruises on the right thigh. On the other hand, the Appellant proposed an award of Kshs.500,000. He relied on two authorities: **CIVICON LIMITED V RICHARD NJOMO OMWANCHA & 2 OTHERS [2019] eKLR** where the court awarded Kshs.450,000 for a deep cut wound on the left ear lobe, a tender left lateral chest wall, swollen and tender left arm, bruises on the left hand, swollen and tender left elbow, bruises on the left elbow, cut wound on the left foreleg, fracture of the left tibia and fibula and dislocation on the left hip joint; and **AKAMBA PUBLIC ROAD SERVICES V ABDIKADIR ADAN GALGALO [2016] eKLR** where the award of Kshs.800,000 by the trial court was substituted with an award of Kshs.500,000 on appeal for injuries particularized as fracture to the right tibia leg bone malleolus, right fibular bone and blunt injury to the right ankle.

The Trial Magistrate was guided by two authorities: **JOSEPH MUSEE MUA V JULIUS MBOGO MUGI & 3 OTHERS [2013] eKLR** where the Plaintiff was awarded Kshs.1,300,000 for injuries to the left leg, head, and face, fractures on the left leg tibia and fibula, two broken upper jaw teeth, a chest injury, right shoulder injury and bruises on the left elbow; and **GODFREY WAMALWA WAMBA & ANOTHER V KYALO WAMBUA [2018] eKLR** in which the Plaintiff suffered injuries particularized as compound fracture of the right distal tibia/ fibula and cut wound on the scalp, chest and lower lip and was awarded Kshs.700,000.

Analysing the Parties’ authorities, the Appellant’s authorities do point to a dislocation of the hip joint and fracture of the tibia and fibula but not fracture of the acetabulum. Also, the Respondent’s authorities do point to dislocation of the hip and fracture of the tibia and fibula but not fracture of the acetabulum. Further, the Respondent’s authorities do not point to effect of the injuries sustained. In the Akamba Public Road Services Case (Supra) permanent partial disability was assessed at three (3%) per cent and the soft tissue injuries would leave no residual disability. Also, it was not clear to the court whether it could authoritatively come to the said assessment of three (3%) per cent considering the examining doctor was not an orthopaedic surgeon but the family physician/specialist venerologist. On the other hand, in the Civicon Limited Case (Supra) the fracture was treated by POP and though permanent disability was assessed at 30% then, another doctor who examined her a few months later did not make such an assessment. As per Dr Wokabi’s Report, the fracture of the acetabulum is one of the major injuries.

In this case, the Respondent sustained fracture of the tibia, fibular and acetabulum. Dr Wokabi’s report point to pain, affected mobility, 20% disability on both legs at optimal rehabilitation and prospects of developing arthritis due to the injuries sustained.

In the case of **COLD CAR HIRE TOURS LIMITED VS. ELIZABETH WAMBUI MATHERI [2015] eKLR**, the Respondent suffered a comminuted fracture of the right acetabulum and a dislocation of the right hip joint resulting in total hip replacement, the trial court award of Kshs. 1,400,000/= as general damages was upheld by the High Court on appeal.

In **KENNEDY OOKO OUMA DACHI V JOSEPH MAINA KAMAU & ANOTHER [2018] eKLR**, the court substituted the award of Kshs. 1,000,000 with Kshs. 1,400,000 for a fracture to the acetabulum. Noting the seriousness of a hip fracture, the learned judge stated:

“A fracture to the tibia or femur for instance, is very different from a hip fracture, especially in terms of long-term consequences to the victim’s health, and especially mobility. Besides, the awards in the authorities cited by the Respondents are too low. In my view, the trial magistrate ought to have considered more specifically the consequences that the fracture to the acetabulum predisposed the Appellant to, more so because he had obviously been persuaded that one consequence was the requirement for a total hip replacement, as a result of osteo-arthritis.”

Further, in the case of **GEOFFREY MARAKA KIMCHONG V FRECHIAH HUGIRU [2020] eKLR**, the respondent suffered a cut wound on the cheek which was tender, blunt trauma to the pelvis which was tender and a fracture of the right acetabulum. The Appellate Court found an award of Kshs. 1,000,000 to be fair and reasonable considering that there was no specific indication in the Medical Reports that the Appellant would require hip replacement.

Before the trial court, counsel for the appellant sought an award of Kshs. 1,300,000. Considering the above authorities, Parties’ authorities and their respective proposals on quantum I do find that the award of the Trial Court is quite high and needs interference. Accordingly, this Court is of the considered view that an award of Kshs.1,200,000/= in general damages is sufficient compensation for the injuries sustained by the Respondent. This is also bearing in mind that an award of future medical expenses was awarded. The award of Kshs. 1,500,000/= on general damages is hereby set aside and replaced with an award of Kshs. 1,200,000/= on general damages subject to the 80:20 apportionment on liability. The total award shall be as follows:

1. General damages- Kshs. 1,200,000/- subject to the 20% contribution:

General damages: Kshs. 1,200,000

Less 20% contribution: Kshs. 240,000

Total: Kshs. 960,000

2. Special damages Kshs. 259,275

3. Future medical expenses Kshs. 630,000

Total award Kshs. 1,849, 275

The appeal partly succeeds. Judgment is entered for the respondent against the appellant for a sum of Kshs.1,849,275. The respondent shall have costs and interest awarded by the trial court. Each party to bear their own costs of the Appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021

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S. J CHITEMBWE

JUDGE