



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 16 OF 2018

BETWEEN

ZACHARY NJANJA MUGO.....1ST APPELLANT

BOLPAK TRADING COMPANY LIMITED.....2ND APPELLANT

VERSUS

KIMEMIA GEOFFREY MAKUMI.....RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court at Thika Onsarigo, RM of 2014

dated 23rd November, 2016 in Thika CMCC No. 470 of 2013)

JUDGMENT

1. **KIMEMIAH GEOFFREY MAKUMI**, the respondent obtained judgment in his favour before the Thika Chief Magistrate's Court which has been appealed by **ZACHARY NJANJA MUGO** and **BOLPACK TRADING COMPANY LIMITED**, the appellants.
2. The respondent sought judgment before the Thika Chief Magistrate's Court for general damages for pain and suffering and special damages of Kshs.60,975. The trial court by its judgment awarded the respondent Kshs.800,000 for general damages, Kshs.458,256 for loss of earnings and earnings capacity, Kshs.350,000 for future medical care and Kshs.60,975 for special damages.
3. The appellants were aggrieved by the awards in general damages for loss of earning and for future medical care. In other words, the appellants have appealed against the quantum and not liability.
4. The respondent's case before the trial court was that on 11th October, 2012, whilst directing traffic in his capacity as an employee of a company that was constructing/repairing the Thika Superhighway, he was hit by a motor vehicle registration No. KBU 493L. That vehicle was registered in the name of the 2nd appellant and was being driven by 1st appellant.
5. Respondent called as a witness, **Dr. N.H. Bhanji** who also produced his medical report. The report indicated the respondent suffered the following injuries:-
 - a) Head injury (cerebral concussion)
 - b) Compound fracture of the left lower leg.
 - c) Fracture dislocation of the left ankle joint.
 - d) Soft tissue injury to the left side of the body.
6. Respondent was taken to Thika Level 5 hospital where X-Ray was done and he was admitted. On the following day, he was taken to theatre where the fracture was manipulated and his left leg was immobilized in plaster of paris cast. On 15th October, 2012 he was transferred to PCEA Kikuyu Hospital. On admission, he was operated whereby the fracture was stabilised by means of external fixator and the plaster of paris cast was removed. He was discharge from hospital on 30th October, 2012 on crutches. He however continued attending clinic for dressing. The external fixator was removed three and half months after application. Respondent however continued to attend out-

patient hospital for reviews.

7. *Doctor Bhanji* reviewed the respondent on 4th June, 2013 and concluded that the respondent sustained severe injuries to the head, to the left ankle joint and soft tissue injuries. The doctor's future prognosis was that the respondent, due to his injury to his head, was predisposed to developing epileptic fits in the future. He assessed the risk of developing fits at 5%. He also found that the respondent was likely to develop symptoms of post concessional syndrome. The doctor noted the respondent had restricted movement to his left ankle joint and that there was bony deformity of 12% at the fracture site. In the doctor's view, the respondent would need future surgical correction of the deformity whose costs he estimated to be Kshs.350,000/= plus costs for physiotherapy. The doctor concluded his report by stating:-

“Considering the above points, it is unlikely that Geoffrey Kimemiah Makumi will never recover completely from the injuries sustained while at his place of work on 11th October, 2021.”

8. In the contrary to the very detailed report of *Doctor Bhanji*, the appellant produced a medical report of *Doctor Tom Mogire* which was very scanty. That report under the heading, “Current condition” stated:-

“Limping in left leg.”

9. Doctor Mogire did however note, on examining the respondent that he had scaring and swelling on the left leg and also concluded that he sustained concussion.

10. This Court, as the first appellate court has a duty to do as stated in the case **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) E.A. 123** as follows:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMMED SAIF V ALI MOHAMED SHOLAN (1955). 22 E.A.C.A. 270).”

11. In considering this appeal on quantum, I must bear in mind that the award of general damages, though it must be consistent with other court awards, such award is however at the trial court's discretion. This is amplified in the case **CATHOLIC DIOCES OF KISUMU VS. SOPHIA ACHIENG TETE Civil Appeal No. 284 of 2001 (2004) eKLR 55**, thus:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

12. The appellant's reliance in this appeal of cases that are far older than this case does not assist me. I have in mind the cases **ELIZABETH MULUKI VS. TAWFIQ BUS SERVICES (2003) eKLR, S.D.V. TRANSAMI K. LTD VS. SCHOLASTIC NYAMBURA (2012) eKLR** and **FLORENCE NJOKI MWANGI VS. PETER CHEGE MBITIRU (2014) eKLR**. That notwithstanding the only authority close in range to this case relied upon by the appellant is, **KENYATTA UNIVERSITY VS. ISAAC KARUMBA NYUTHE (2014) eKLR**. The injuries reflected in that authority are however not comparable to the ones suffered by the respondent. In that authority, the injuries were, fracture of the right femur, soft tissue injuries to the head and bruises of the right knee.

13. My consideration of the trial court's award in general damages, I shall rely on the case **FRED OGADA AZERE & ANOTHER VS. EZEKIEL KIARIE NGANGA (2019) eKLR**. This was an appeal from the subordinate court's decision of 22nd July, 2015. The injuries in that authority included, amongst other commuted fracture of right acetabulum, mild head injuries and lacerations of the right knee and leg. The High Court in that case awarded Kshs.1,350,000/= in general damages.

14. In my view, although the trial court did not support its award with authorities its award in general damages cannot be faulted.

15. I do, however, find the appellants' appeal against the award of loss of earnings merited. The respondent did not prove that he was indeed receiving a salary nor did he prove that his earning capacity had been affected by the accident.

16. On further medical care, the appellants' submission was that this award was inordinately high. What is however noteworthy is that appellants did not cross examine Doctor Bhanji on this item yet it was that doctor who stated in his report that the respondent would in future need corrective surgery. I therefore reject that submission on that award.

CONCLUSION

17. The appellants' appeal is only allowed limited to the award of loss of earning. The judgment of this Court therefore is as follows:

a) The trial court's award of loss of earning of Kshs.458,256/= is hereby set aside. The other awards of the trial court are upheld.

b) The respondent is awarded half the costs of this appeal.

18. Orders accordingly.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 25TH DAY OF NOVEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

COURT ASSISTANT: MAURICE/KINYUA

FOR THE APPELLANTS: MS. CHIRCHIR HOLDING BRIEF FOR THAIRU

FOR THE RESPONDENTS: MR. MWANGI

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE