

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 89 OF 2017

JOHN KIPKEMBOI.....1ST APPELLANT

THELMAX CONTRACTORS LTD.....2ND APPELLANT

VERSUS

BRAMWEL VUKINU..... RESPONDENT

(An appeal arising from the judgment and decree of the Hon. Jacinta A Owiti, Principal Magistrate (PM), in Vihiga PMCCC No. 8 of 2016 of 18th July 2017)

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellants, for general and special damages, arising from a motor traffic accident involving motorcycle, on which he was a pillion passenger, and a motor vehicle owned and controlled by the appellants. The appellants entered appearance and filed a defence, in which they denied liability and attributed negligence on the respondent or on the rider of the motorcycle on which he was a passenger.

2. The issue of liability was settled by consent between the appellants and the respondent at the ratio of 85:15. Judgment on quantum was pronounced on 18th July 2017. General damages were awarded at Kshs. 3, 000, 000.00, and specials at Kshs. 4,385.00, plus costs and interest. After the application of the liability ratio, the quantum came down to Kshs. 3, 004, 385.00.

3. The appellants were aggrieved by the award and lodged this appeal. Their principal case is that given the nature and extent of the injuries that the respondent suffered the award by the trial court was manifestly high. They argue that the trial court did not appreciate the injuries sustained were minor soft tissue injuries.

4. It is pleaded in the plaint that the respondent had sustained a fracture of left mid-shaft tibia, amputation of the left leg toe, cut wound on the left leg at the knee and injury to the right leg. The injuries reflected in the plaint were extracted from medical records that are on the trial court's file. The injuries reflected in the said records are not very clear. The medical report by Dr. LW Okombo, dated 14th March 2014, refers to injuries to the left leg with cut wound, on the left knee and on the left toe. The x-rays indicated a fixation, there is amputation of the left big toe, a scar on left knee and tenderness around those areas. He had fully recovered at the time the doctor saw him. The leg was deformed and he experienced difficulty walking. He still needed further attention from an orthopedic surgeon and the scars needed reconstructive surgery.

5. There is a second medical report by Dr. PW Oketch, instructed by the appellants, dated 13th April 2014. It reflects the injuries sustained by the respondent as a deep open wound on the lateral aspect of the left knee and injury to the left big toe with resultant loss of the distal phalanx. He was said to have healed with scars, deformed knee and amputated big toe on the left foot.

6. At the trial court, the respondent sought general damages at Kshs. 3, 500, 000.00 and Kshs. 250, 000.00 for loss of amenities, given that his life was never going to be the same again. There was a claim for future medical expenses, placed at Kshs. 200, 000.00 and for special damages assessed at 100, 000.00. He placed before the court two High Court decisions, *Joseph Musee Mua vs. Julius Mbogo Mugi & 3 others* (2013) eKLR and *Mwaura Muiruri vs. Suera Flowers Limited & another* (2014) eKLR, where awards of Kshs. 1, 300, 000.00 and 1, 450, 000.00 for general damages, together with loss of amenities and future medical expenses were made. I have noted that the injuries in the cases cited were a lot more serious, and that the said decisions were made in 2013 and 2014, as opposed to 2017 when the instant matter was determined.

7. The appellants on the other urged the trial court to award Kshs. 150, 000.00, and cited *Odinga Jacktone Ouma vs. Moureen Achieng Odera* [2016] eKLR, where Kshs. 180, 000.00 was awarded for general damages. I have noted that the injuries in that case were multiple and to the soft tissue. On appeal, the appellants have cited *Kennedy Oseur vs. Musa Lucho & 2 others* [2009] eKLR. I do not find that decision relevant. It is ten years old.

8. The injuries that the respondent sustained were not clearly articulated in the medical records presented before the trial court. The respondent had pleaded a fracture. He should have led evidence to demonstrate that he had indeed sustained one. The medical report and the x-ray document do not categorically state that he had sustained such a fracture. It would appear that the respondent interpreted the screws referred to in the x-ray report to suggest that there was a fracture of the shaft of the tibia, but there is no document on record unequivocally stating that he had a fracture on the tibia.

9. I have also considered other recent decisions on amputation of the big toe and cut wound on the leg. It is not clear whether there was a fracture, and what its nature was, but I am persuaded that there was one. I shall work with a fracture of the left tibia.

10. For amputation of the left big toe, the courts in *Peter Kioko & another vs. Hellen Muthee Muema* [2018] eKLR and *National Cereals & Produce Board vs. Protas Wafula Wanyama* [2018] eKLR awarded Kshs. 200, 000.00. For the tibia fractures the courts in *Coast Bus (Msa) Ltd vs. Joseph Odhiambo Makambora* [2017] eKLR, *Akeno Valley Hospital and Maternity vs. Napoleon Mecha Ogati* [2019] eKLR and *Mwanahamisi Omar Mzee also known as Fatuma Mohamed Ali Omar vs. Chengo Kahindi Biryia & another* [2018] eKLR, awarded figures in the region of Kshs. 300, 000.00 to Kshs. 400, 000.00.

11. In view of the more recent decisions on similar injuries, I am persuaded that the award by the trial court was on the higher side. The court should have awarded damages only for amputation toe but not for the fracture. I shall accordingly reduce the award on general damages to Kshs. 200, 000.00, subject to contribution. The appeal shall be allowed to that extent. Each party shall bear their own costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF January 2020

W. MUSYOKA

JUDGE