



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 33 OF 2016**

**PETERSON MUTHIKE MUGO.....APPELLANT**

**VERSUS**

**G.K. KAMURI & SONS LTD.....RESPONDENT**

**(Being An Appeal Against the Judgment of Hon. D. Nyaboke Resident Magistrate Wang'uru**

**Dated 23<sup>rd</sup> Day of May, 2016 in Wang'uru PMCC No. 67 of 2015 Consolidated with  
Wang'uru**

**PMCC No. 65 and 66 of 2015)**

**JUDGMENT**

This appeal arises from the Judgment of the Principal magistrate's court Wang'uru Civil case number 67 of 2015. The plaintiff had filed a plaint claiming special damages of 8,780/= general damages for pain and suffering and loss of amenities, cost of the suit, interest on a, b and c above.

The appellant had sustained injuries while he was lawfully riding his motorcycle registration number KMCW 072 B Haojin along Kagio Kiamichiri - Kadongu murram road when he was knocked by a motorvehicle KAK 871 Z Isuzu FVR.

The appellant sustained injuries as a result of the accident which involved:-

1. Communicated fracture of the tibia and fibulia bones
2. Blunt injury to the left shoulder with limited range of motion
3. Cut wound below the right knee area.

His claim was therein was for general damages for pain and suffering, loss and amenities and for special damages.

The trial magistrate entered judgment and awarded the respondent 95% liability. He proceeded to award the appellant general damages of 250,000/= and special damages of Kshs; 13,560/=.

The appellant was aggrieved by the award of damages, and filed this appeal which raised the following grounds;

1. The trial magistrate erred in law and fact in awarding general damages for pain and suffering and loss of amenities in the sum of Kshs: 250,000/= which sum was excessively low in view of the injuries sustained.
2. The trial magistrate erred in law and fact in failing to trace, locate and consider the plaintiff's submissions despite the plaintiff having filed them on time and confirmed to the court during the mention to confirm filing of written submissions.

The appellant prays that the award of general damages for pain and suffering and loss of amenities by the trial magistrate to be

set aside and this court do make a fresh award thereof.

The appeal was disposed of by way of written submissions, he submits that in her judgment the trial magistrate did not consider the appellants submissions on quantum indicating that none were filed. She consequently conceded to wholly rely on the respondents submission and awarded a sum of Kshs; 250,000/=.

The appellant submits that the prevailing award for pain and suffering and loss of amenities in respect to loss of fracture and tibia and fibula shaft in the region of Kshs; 800,000/= he relies on the following authorities;

**“ Civil appeal no. 1 of 2017 formerly Machakos High Court Civil case No. 26 of 2014 – Justice C. K. Kariuki dismissed the appeal which was challenging the an award of Kshs; 800,000/=.”** H.C No. 95 of 2014 T.W. Cerere set aside an award of Kshs; 200,000 and continued to enhance it to Kshs; 600,000/=. He has submitted that the award of Kshs; 200,000/= was inordinately low and he is urging the court to set aside and award the appellant general damages for pain and suffering and loss of amenities in the sum of Kshs; 900,000/= with interest at court rates from the date of judgment from the lower court.

**For the respondent;** In relation to the injuries sustained by the plaintiff, he stated that he had fully recovered from the injuries and walks properly without the aid of a walking stick. He has relied on the case of **Kenfro Africa Limited T/a Meru Express service Gathogo Kanini -versus . A. M. Lubia & Olive Lubia (1985) 1 KAR page 727.** Where the principles to be considered when deciding whether to disturb the quantum of damages awarded by a trial judge were held by a former court of appeal of Eastern Africa it must be satisfied that either that the Judge in accessing the damages took into account an irrelevant factor or left out into account a relevant one, or short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

I have considered the application, the award of general damages is an exercise of discretion by the trial court, and the appellate court will not normally interfere with the exercise of discretion unless the award is inordinately high or so inordinately low to be wholly erroneous estimate of the damages.

It will also consider whether while making the award of damages the trial magistrate took into account an irrelevant factor or left out a relevant one.

The appellant is contending that the trial magistrate did not consider the submissions and damages.

I have considered the authorities cited in the persuasive decisions which the appellant has annexed to this submission.

The decision cited show that the High court has awarded general damages of Kshs; 600,000/= to Kshs; 800,000/= for injuries similar to those sustained by the plaintiff.

**In Alfonza Wothaya Warutu & Caroline Bancy Wawira -vrs- Joseph Muema.** In the case respondent was awarded Kshs; 800,000/= as general damaged together with proven special damages to the sum of Kshs; 3,500/=.

The appellant was aggrieved by the Judgment and appealed to the High Court the Judge held; ***“that I have looked at several authorities which In my view provide better guidance in the instant case. That is: Safco Stores Limited –vs- David Mwangi Kimotho ( Machakos High court no. 12. 2005) where the plaintiff had sustained fracture left tibia and left tibia and fracture below the elbow deep cut wound and left forehead and consequently suffered 20% disability, and the Appeal court upheld the award of Kshs; 800,000/= in general damages.”*** He also considered Beatrice Wairimu Wandurua -vrs- Didorman Limited (2009) eKLR where the appellant sustained serious injuries to her legs which resulted to compound fractures for the left tibia and dislocation of the left ankle joint and the Court appeal awarded Kshs; 550,000/= and he came to the conclusion that he had no reason to disturb the award made by the learned trial magistrate.

It is not in dispute that the appellant sustained the injuries which are quoted above.

The rationale of award of pain and suffering is explained in paragraph 883 in Halsbury Laws of England 4<sup>th</sup> Edition Vol. 12 ( 1) page 348 -883. ***“Pain and suffering damages are awarded for the physical, mental distress caused to the plaintiff, both pre-trial and in the future as a result of the injury. This include pain caused by the injury itself and the treatment intended to alleviate it. The awareness of and the embarrassment at disability or disfigurement or suffering caused by anxiety that the plaintiff’s condition may deteriorate.”***

It follows that damages are intended to compensate the plaintiff for the suffering and the loss endured as a result of the injuries. The court has to consider the loss suffered and what the plaintiff has suffered as a result of the injuries. In this case the trial magistrate in her judgment stated that submissions for the plaintiff were never filed and she is left to consider the defendants proposal *vis a vi* Dr. Maina’s opinion on resultant disabilities and she awarded Ksh; 200,000/= in general damages.

I find that the award was inordinately too low in view of the injuries sustained by the plaintiff. I find that this is reason for me to disturb the award of damages and based on the cases cited, I find that an award of **Kshs; 600,000/=** in general damages for pain and suffering would be appropriate. I therefore find that the appeal has merit. I order that the judgment of the trial magistrate on the award of general damages is set aside and substituted with Judgment for the plaintiff, in the sum of Kshs; 600,000/= being general damages for pain and suffering.

I award the appellant the proven special damages of Kshs 13,560/-.

I award costs to the appellant.

**Dated, signed at Kerugoya 29<sup>th</sup> day of May 2020**

**L. W. GITARI**

**JUDGE**