



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 101 OF 2019

BETWEEN

NICHOLAS JUMA.....APPELLANT

AND

JAMES WAMBUA MULI.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Kisumu CMCC NO.167 of 2017 by Hon. R.K. Ondieki (SPM) delivered on 22nd July, 2019)

JUDGMENT

1. **NICHOLAS JUMA (Appellant)** sued **JAMES WAMBUA MULI (Respondent)** in the lower court claiming damages for injuries he suffered on 11.02.16 when his motor cycle KMCC 356R collided with Respondent's motor vehicle KCD 963Q due to the negligence of the Respondent.
2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on 22nd July, 2019, the learned trial Magistrate found the Respondent liable at 100% and awarded the Appellant general damages in the sum of Kshs. 1,500,000/, costs and interest.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision on quantum preferred this appeal by way of the Memorandum of Appeal dated 21.08.2019 and which set out 3 mainly on the ground that the award on quantum was low.
5. When the appeal came up for mention on 01.07.2020, I directed that it be disposed of by way of written submissions which the parties dutifully filed.

Analysis and Determination

6. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.
6. This court has considered the parties' pleadings, evidence on record and the submissions and cited authorities.
7. From the submissions filed before the trial court, the Appellant prayed for Kshs. 2,500,000/- and cited **John Kipkemboi & Another v Morris Kedolo [2019] eKLR** where the plaintiff was awarded general damages in the sum of Kshs. 2,500,000/- for amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. Appellant also cited **Gilanis Supermarket & Another v Kennedy Swanya Mwayaka [2018] eKLR** where Kshs. 2,500,000/- was awarded for crush foot injury with fractures of right tibia and fibula resulting to below knee amputation, head injury with intracerebral bleeding and focal intraparenchymal hemorrhage left sided frontal - temporal hemorrhages, soft tissue injuries of chest and bruises on the arms, complaints at date of examination were pain in the chest, at the amputation stump, and inability to walk. It appears that the Respondent did not file any submissions at the trial.

8. In support of the injuries he sustained, the Appellant relied on a treatment note, P3 form and discharge summary which shows he suffered cut wound on right elbow and crush injury to the right ankle joint, with amputation at the crush injury.

9. The principle of law on whether a court, on appeal, can disturb the quantum of damages was well settled in the case of **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini .v. A.M. Lubia and Olive Lubia (1985) 1KAR 727** . At page 730 Kneller J.A. said: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

10. The Appellant suffered amputation of right leg at the ankle among other injuries. The injuries are more or less comparable to the injuries suffered in the cited cases. I am therefore persuaded to interfere with the award which I hereby do by enhancing the award on general damages to Kshs. 2,000,000/- (**two million shillings**) with costs of this appeal to the Appellant.

DATED AT KISUMU THIS 22nd DAY OF October, 2020

T. W. CHERERE

JUDGE

Court assistant - **Ms. Amondi**

For Appellant - **Ms. Oluoch for Staussi, Asunah & Oluoch Advocates**

For Respondent - **Mbugua Atudo & Macharia Advocates**