REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 190 OF 2017

PAUL MUIRURI NJAU.....APPELLANT

- VRS -

1. DAVID WARUINGE GICHIA.....1ST RESPONDENT

2. PAUL KURIA KARANJA.....2ND RESPONDENT

{Being an appeal against the Ruling of Hon. M. Ochieng – SRM Githunguri dated and delivered on the 13th day of November 2017 in the original Githunguri Senior Principal Magistrate's Court Civil Case No. 25 of 2016}

JUDGEMENT

The appellant sued the respondents for compensation for bodily injuries suffered in a motor accident that occurred on 9th June 2015 and was by a judgement delivered on 13th November 2017 awarded a sum of Kshs. 250,000/= as general damages for pain and suffering, future medical expenses of Kshs. 80,000/= and special damages of Kshs. 15,420/=. When the damages were subjected to the agreed ratio of 10% contributory negligence he was left with a sum of Kshs. 310,878/=. Being aggrieved by the trial Magistrate's assessment of the general damages for pain and suffering he preferred this appeal. The same is premised on the following grounds: -

> **"1. THAT the Learned trial Magistrate erred in law and fact in awarding Kshs. 250,000/= as general damages as the same was inordinately low considering the injuries suffered by the Appellant.**
>
> **2. THAT the Learned trial Magistrate erred in law and in fact in failing to take into account the medical evidence before her while making the award on quantum of general damages.**
>
> **3. THAT the Learned trial Magistrate erred in law and fact in making an award on quantum of general damages which was not comparable to awards made by the courts for similar injuries.**
>
> **4. THAT the Learned trial Magistrate erred in law and fact in failing to take into account the Appellant's submissions while making the award on quantum of general damages.**
>
> **5. THAT the Learned trial Magistrate erred in law and fact in failing to apply proper legal principles regarding liability and thus arriving at a bad decision."**

The appeal which is vehemently opposed was canvassed through written submissions. It is the appellant's contention that in assessing the damages for pain and suffering the trial court failed to consider the nature of the injuries and awards for comparable injuries hence arriving at an award that was inordinately low. Counsel urged this court to allow the appeal, set aside the award of the lower court, assess the damages afresh and award the costs of the case in the trial court and in this appeal to the appellant. Counsel placed reliance on the following cases: -

- **Savco Stores Ltd v David Mwangi Kamotho [2008] eKLR.**
- **Joseph Kitheka v Stephen Mathuka Pius [2000] eKLR.**

While conceding that the appellant sustained a fracture of the right tibia fibula Counsel for the respondents submitted that the award was not inordinately low as to warrant this court to interfere. Counsel submitted that the trial Magistrate relied on medical evidence of two doctors and hence took into consideration the nature of the injuries suffered by the appellant. Counsel contended that the trial Magistrate also considered past wards. Counsel contended that the award accorded with awards for comparable injuries and was reasonable. To support his submissions Counsel relied on the following cases: -

- **Milicent Atieno Ochuonyo v Katola Richard [2015] eKLR.**
- **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No. 2) [1985] KLR.**
- **Denshire Muteiti Wambua v Kenya Power & Lighting Co. Ltd [2013] eKLR.**
- **Easy Coach Limited v Mary Lossa Akech [2019] eKLR.**
- **Michael Adeka Khaemba & 2 others v Rassangyllo Muli Kumuyu [2018] eKLR.**
- **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR.**
- **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR.**
- **Naomi Momanyi v G4S Security Services Ltd & another [2018] eKLR.**

Counsel for the respondent urged this court to dismiss the appeal, affirm the decision of the lower court and award the costs of the appeal to the respondent.

By this appeal this court is urged to set aside the award of the trial court and substitute it with its own. In the case of **Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No. 2) [1987] KLR 30** the Court of Appeal held: -

> **"1. 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 to be that; it must be satisfied that either that 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."**

It has also been long held that similar injuries should attract similar awards ***(see the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR*** where the Court of Appeal stated: -

> **"Having so considered we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

Further as was stated by Majanja J in the case of **Naomi Momanyi v G4S Security Services Kenya Limited & another [2018] eKLR: -**

> **"9. In addition, the current value of the shilling and the economy have to be taken into account and although astronomical awards must be avoided, the court must ensure that awards make sense and result in fair compensation *(see Ugenya Bus Service v Gachoki NKU CA Civil Appeal No. 66 of 1981 [1982] eKLR and Jabane v Olenja [1986] KLR 661).***

The appellant is aggrieved that he was awarded Kshs. 250,000/= for a fracture of the right tibia/fibula. By the time of the trial the appellant had healed considerably and there was no likelihood of permanent disabilities. The record shows that he was walking normally and that he continued with his normal life. In arriving at the award the trial Magistrate compared the appellant's injuries with those of the plaintiffs in the cases of: -

> **1. Simon Mutisya Kavil v Simon Kigutu Mwangi [2013] eKLR where Kshs. 200,000/= was awarded for comminuted fractures of the left tibia/fibula with severe friction burn in the year 2013.**
>
> **2. DSV Transami Kenya Limited v Scholastic Nyambura [2012] eKLR where in the year 2012 the plaintiff was awarded Kshs. 250,000/= for a fracture of the tibia/fibula.**

Guided by the principles in the three Court of Appeal decisions cited earlier in this judgement I am satisfied that there is good reason to disturb the award of the trial Magistrate. It is my finding that whereas the trial Magistrate awarded a similar award to that for similar injuries the ward did not take inflation into consideration. The trial Magistrate delivered her judgement in the year 2017 hence four years after the decision in the case of **DSV Transami Kenya Limited v Scholastic Nyambura (supra).** The award was therefore based on a wrong principle and is inordinately low as to warrant this court to interfere. Taking everything into account and noting that the future medical expenses for removal of the implants were awarded separately, I am satisfied that an award of Kshs. 350,000/= is what would have been a reasonable award for the injuries at that time.

Accordingly, the trial court's award for general damages for pain and suffering is set aside and is substituted with an award for Kshs. 350,000/=. The awards under the other heads and the ratio of contribution shall remain undisturbed and the costs of this appeal shall be to the appellant. It is so ordered.

Signed and dated in Nyamira this 16th day of December 2020.

E. N. MAINA

JUDGE

Judgement dated and delivered in Kiambu Electronically via Microsoft Teams on this 18th day of December 2020.

MARY KASANGO

JUDGE