



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCA NO. 140 OF 2017**

**NEW ORIGINAL INVESTMENTS CO. LTD ..... APPELLANT**

**-VERSUS-**

**BERNARD KIMATU MUIA ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. H.M Ng'ang'a (RM) in the Senior Resident Magistrate's Court at Tawa Civil Case No.40 of 2015, delivered on 16<sup>th</sup> June 2016).*

**JUDGEMENT**

**INTRODUCTION**

1. The Respondent sued the Appellant in the lower Court seeking special damages, general damages, costs for future medical expenses, cost of the suit and interest for injuries sustained in a road traffic accident on 6<sup>th</sup> July 2012 along the Machakos-Kitui road.
2. Parties consented on liability in the ratio of 90:10 in favour of the Respondent after which the trial Court proceeded to assess the damages.
3. Judgment was eventually delivered and the Respondent was awarded Kshs. 2,000,000/= for pain and suffering, Kshs. 128,302/= for special damages, Kshs. 200,000/= for future medical expenses as well as costs of the suit and interest. The amount was subjected to 10% contribution resulting in a net award of Kshs. 2,095,471.80/=.
4. Aggrieved by the award on quantum, the Appellant filed this appeal and listed 4 grounds stating that the learned trial magistrate erred in law and fact by;
  - a) *Awarding and assessing extremely excessive and aggravated quantum of damages to the Respondent without any basis.*
  - b) *Finding that the Respondent was entitled to Kshs. 2,000,000/= as general damages for pain and suffering which was excessive and wrongly computed.*
  - c) *Awarding damages that were not commensurate with the nature of injuries sustained by the Respondent.*
  - d) *Not considering the written submissions made and case law filed by the Appellant.*
5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.
6. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
7. Having looked at the grounds of appeal, the rival submissions and the entire record, the only issue for determination is whether the award should be disturbed.

**THE SUBMISSIONS**

8. The Appellant submits that the trial magistrate did not give reasons for not considering the authority in its submissions and that the award of Kshs. 2,000,000/= for pain and suffering was unconventional and did not mirror past awards.

9. The Appellant also submits that the period between 8<sup>th</sup> and 18<sup>th</sup> July 2014, the Respondent was admitted for gastritis and that it was therefore misrepresentative for him to aver that the hospital visits were due to the accident. That this factor should have been diminutive to the award.

10. Further, the Appellant submits that the award was punitive because the trial magistrate relied on authorities with high awards instead of settling on moderate ones. It relies on the case of **Joseph Mavulu Mutua –Vs- Samuel Njoroge Mwangi (2003) eKLR** where an award of Kshs. 320,000/= was given for; fracture of all ribs on the right side, fracture of the right clavicle, fracture right superior and inferior rami right pubic bone, hospitalization for one month.

11. The Appellant contends that in the Joseph Mavulu case (*supra*), all the ribs on the right side were broken unlike in our case where only 3 were broken.

12. The Appellant also submits that according to Dr. Maonga's medical report, the limb injuries had healed and as such, the award was excessive and unjustified.

13. The Appellant also submits that an award is not supposed to punish the defendant but to as far and fairly as possible compensate the plaintiff for loss suffered. According to the Appellant, the award herein should be moderated as it was manifestly excessive.

14. On his part, the Respondent submits that the trial Court was cognizant of the nature of injuries, nature of treatment, period of hospitalization and rehabilitation after treatment.

15. That the Trial Magistrate weighed all these factors vis-a vis the relevant authorities and came up with a fair judgment in the circumstances.

16. He also submits that the award was in tandem with the injuries sustained and the authorities cited.

#### **WHETHER THE AWARD SHOULD BE DISTURBED**

17. Award of damages is largely a question of discretion and the principles which should guide an Appellate Court in deciding whether to interfere with such an award are well settled.

18. The Appellate Court should be satisfied that in assessing the damages, the Trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

19. The two medical reports on record confirmed the injuries as pleaded in the plaint i.e.

- a) Blunt chest injury.
- b) Fracture of 3 left dust ribs.
- c) Contusion of the right forearm.
- d) Fracture of right radius.
- e) Blunt injury right lower limb.
- f) Fracture of right tibia distal.
- g) Blunt injury left forearm.

20. The Respondent was examined by Dr. Kimuyu on 13/01/2015 and in his medical report dated 19/01/2015, he stated that the Respondent was clinically stable, had external fixations on right lower limb, right foot was swollen and tender and was walking with a limping gait. He had right ankle and knee joint stiffness and tenderness, right forearm post surgical healed scars, right elbow joint stiffness and the right forearm was able to supinate but not prorate.

21. He also stated that the Respondent had not fully recovered and had not been able to work as a mason for a long time. He would require close orthopedic follow up to assess fracture healing process and the inserted implant of right forearm would require removal at an estimated cost of Kshs. 200,000/= after fracture healing. The external fixation would require removal after fracture healing and the Respondent would require counseling and occupational therapy.

22. The Respondent was examined for a second time by Dr. Maonga (on behalf of the Appellant) on 05/06/2015. The Doctor confirmed that the fractures on the limbs had been surgically managed by plating. That the blunt trauma sustained on the right leg led to a compound fracture of the right tibia necessitating 3 different surgeries involving plating and external fixation that had since been removed.

23. That the fracture fragments were clinically uniting but he had a resultant right leg shortening, stiffness of right knee and ankle joints which were permanent. He also confirmed that the estimated cost of future medical expenses was Kshs. 200,000/=. He assessed the total temporary functional incapacity at 35 months and total permanent disability at 20%.

24. In his evidence in Court, the Respondent testified that he was admitted for two and a half months and discharged on 11/09/2012 after which he attended Kwa Kala dispensary, Kangundo hospital and Machakos Imaging centre as an outpatient.

25. With regard to the gastritis issue raised by the Appellant, it is indeed in Dr, Maonga's medical report that the Respondent was admitted for 10 days in July 2014 due to gastritis.

26. From the evidence on record however, this does not negate the fact that the Respondent was treated as an outpatient in the year 2014 due to injuries sustained from the accident.

27. For instance, the treatment notes show that he attended Machakos General Hospital on various days between January and June 2014 as well as Bishop Kioko Catholic Hospital on various days between March and June 2014.

28. The accident having occurred in July 2012, it is evident that more than one year down the line, the Respondent was still attending hospital for follow up and other services. I am therefore not convinced that there was misrepresentation on the part of the Respondent.

29. In its submissions to the trial Court, the Appellant relied on **Isaac Mwenda Micheni –Vs- Mutegi Mirango (2004) eKLR** and stated that the injuries sustained were; fracture of the left tibia and fibula, cut wound on scalp, cut right knee, bruised right forearm, compound fracture of left tibia and fibula, cut right supra patella right knee, cut right forearm, cut left chin and multiple cuts on the left side of the face.

30. I looked at the said authority and the injuries sustained were stated to be; wound on scalp, fracture of left tibia and fibula, cut wound on knee, bruised right forearm. Clearly, the injuries stated by the Appellant in its submissions were exaggerated.

31. Further, there is no mention of metal plating, skin grafting, period of hospitalization or a percentage of permanent incapacitation.

32. In my view, the Isaac Mwenda case (*supra*) is not comparable to the instant case and it is evident that the Trial Magistrate was alive to the requirements in assessment of damages as can be seen from page 10 of the judgment where he stated;

***“In assessment of damages, the general and time tested method of approach is that comparable injuries should as far as possible be compensated by comparable awards with a view of maintaining a similar level of awards in similar cases.”***

33. I note that the trial magistrate mentioned the Isaac Mwenda case (*supra*) in his judgment which in my view is enough indication that it was considered.

34. I have also looked at the Joseph Mavulu Case (*supra*) and again, there was no metal plating, no skin grafting, no permanent incapacitation of any percentage and the plaintiff therein did not complain that the accident had affected performance of his duties.

35. In our case however, both doctors confirmed that the Respondent had not been able to work for a long time. It is therefore my considered view that the Respondent's injuries were more severe hence making the authority not comparable.

36. Having looked at all the authorities relied upon by the trial magistrate, I am satisfied that they offered proper guidance on the quantum of damages awardable.

37. In fact, he went out of his way and looked at other authorities save for the ones that had been submitted by the parties. I agree with the Respondent that, the Trial Magistrate was cognizant of the nature of injuries, nature of treatment, period of hospitalization, rehabilitation after treatment and that he weighed all these factors vis-a vis the relevant authorities.

38. Accordingly, I do not agree that the damages awarded were so inordinately high as to amount to a totally erroneous estimate.

## **CONCLUSION**

39. The court therefore finds that the appeal has no merit and makes the following orders;

**i. The appeal is dismissed.**

**ii. Costs to the Respondent.**

**DATED, DELIVERED, SIGNED THIS 23<sup>RD</sup> DAY OF JANUARY 2019 IN OPEN COURT.**

.....

**HON. C. KARIUKI**

**JUDGE**