



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 61 OF 2017**

**CONTINENTAL HAULIERS LTD**

**CONTINENTAL HOMES LTD**

**THOMAS NJENGA KIARIE.....APPELLANT**

**-VERSUS-**

**ISACK KIPKEMEI BITOK.....RESPONDENT**

*(Appeal from the Judgment of Principal Magistrate, dated 10<sup>th</sup> day of May 2017 in Nakuru Chief magistrate's Court Civil Case No 280 of 2014 (previously Eldama Ravine PMCC NO.11 of 2013))*

**JUDGMENT**

1. The Respondent had been involved in a Road Traffic Accident along Nakuru-Eldoret road on the 28<sup>th</sup> June 2012. He sued the owners of the motor vehicles for negligence and consequential loss and damages.

By consent of the parties dated 11<sup>th</sup> January 2017 the issue of liability was resolved and apportioned at 80:20 in favour of the Respondent. Upon trial the trial magistrate awarded the Respondent general damages for pain and suffering at Ksh.900,000/=.

2. I have considered the injuries stated by both doctors which they produced as exhibits.

Dr. Joseph Sokobe's report is dated 30<sup>th</sup> November 2011. Injuries are stated as

- Fracture of left femur
- Cut wound on left forearm
- **Complaints** – walk with a limping gait, cannot walk for long distances, occasional pains on the left thigh during the cold season, shortening of limb deformity, likelihood of developing early osteoarthritis of the left hip joint and knee joints, assessed permanent disability to 40%.

3. Dr. Wambugu's report dated 9<sup>th</sup> June 2016 stated injuries as

- Closed fracture of left femur, and lacerations wound left forearm. Fracture managed by open reduction and internal fixations of metal implants, occasional pains on the leg when cold, metal implants *in situ*
  - Walks with limping gail
  - shortening of leg
  - fracture had healed and united
  - will benefit from a shoe – heel to raise the uneven weight distribution axis, predisposed to early onset of osteoarthritis
  - Permanent incapacity assed at 7%.

The medical reports agree on the Respondents injuries and prognosis.

4. The Appellant had proposed general damages at Kshs.350,000/= and relied on two authorities **NBI HCCA No.193/2012 Kenyatta University –vs- Isaac Kamma Nyuthe(2014) e KLR** where Kshs.350,000/= were awarded in November 2014 and **Ann Muriithi –vs- The Headmistress Machakos Girls** and others where a sum of Kshs.420,000/= was made in 2013 for similar injuries.

5. For the Respondent a sum of Kshs.2,000,000/= was proposed citing **Elizabeth Wamuyu Wanjohi –vs- John Muriithi Mbaya & 2 Others (2015) e KLR** where the plaintiff sustained injuries to the distal femur fracture right supracondylar region of the knee, right elbow dislocation and deformity as well as soft tissue injuries over the right lower para spinal region and lower limbs.

6. The Appellants were dissatisfied with the Award of Kshs.900,000/= in general damages and faulted the trial magistrate that he failed to consider the medical report prepared by Dr.Wambugu and their submissions and thus arrived at an inordinately high award. They seek reduction of the same.

7. Both parties have filed their written submissions.

The Appellant's distinguished the authorities cited by the trial magistrate in respect of the injuries as having been too severe as compared to those sustained by the Respondent and urged for re-assessment downwards.

The Respondent defending the trial court's award urged that the award was reasonable and realistic.

8. I have considered the authorities cited and the totality of submissions by both counsel.

As an appellate court I shall not readily interfere with the trial courts discretion in the assessment of damages unless it is clear that in arriving at the said award, the court took into account an irrelevant factor or left out a relevant one, or it is entirely an erroneous estimate of the damage – **Butt –vs- Khan (1977) I KAR Kemfro Africa Ltd –vs- Lubia 1987) e KLR 257) and Mwanasokoni - vs- Kenya Bus Services Ltd (1985) KLR 931** among others.

9. I have stated the injuries stated in the two medical reports – Paragraphs 2 and 3 above.

While awarding Kshs.900,000/= to the Respondent the trial court considered the authorities and agreed that sums of Kshs.350,000/= - Ksh.420,000/= were awarded for similar injuries in the two authorities cited by the Appellant in 2013 and 2014 respectively. He considered passage of time and inflation to award Kshs.900,000/=.

10. The authority relied on by the Respondent **Elizabeth Wamuyu Wanjohi (Supra)** was decided on 24<sup>th</sup> April 2015. The injuries were stated as fracture of the right femur, deformed right knee and soft injuries to the spinal region and lower limbs. The doctor who examined the plaintiff found him to be

***“...moribund with severe debilitation, unable to walk without support and then only with limited motion due to severe back and knee pains ...”***

The court awarded Kshs.1.5M for pain and suffering:

11. I agree the injuries are quite comparable to those of the Respondent herein. However I am of opinion that injuries ought to be considered cumulatively but not singly. The totality and post injury effects must be considered together and an award granted cumulatively.

12. The Appellants in their submissions have done some good work by analysis the trial court's judgment paragraph by paragraph, and the cited authorities in particular the **Elizabeth Wamuyu Wanjohi Case (Supra)**. The plaintiffs injuries were no doubt more serious than the respondent's herein and the hearing was ex-parte thus there was no challenge to the assessment of damages.

13. Looking at submissions of both counsel and having considered the cited authorities, I come to the finding that the trial Magistrate's award of damages for pain and suffering was excessive and not a fair estimate of the damage.

14. *Quantum* of damages need not be a misery but realistic, reasonable and comparable to similar awards for comparable injuries though no injury can be completely similar to another - **Rosaline Violer Akinyi -vs- Celestine Opiyo Wagwau (2017) e KLR**.

15. **Section 78(2) C.P.A** enjoins the Court on appeal to exercise its original jurisdiction in dealing with an Appeal, in this case re-assessment of the damages. In **Civil Appeal No.17 of 2017 Mwavita Jonathan –vs- Silvia Onunga (2017) e KLR, the court set aside an award of Kshs.1,000,000/=** and substituted it with an award of Kshs.400,000/= for left knee commuted fracture, blunt chest injury, dislocated right knee and sprains to the cervical spine of the neck and lumber sacral spine.

16. In **Ibrahim Kalema Lewa –vs- Esteel Co. Ltd Nbi HCCA No. 475 of 2012 (2016) e KLR**, the High Court upheld on award of Kshs.300,000/= in 2016 where injuries sustained were inter trochariteric fracture or left femur with physical disability assessed at 25%.

In **Kenyatta University –vs- Isaac Kamau Nyuthe (Supra)** for fracture of right femur, soft tissue injuries to head and bruises of right knee, and with a permanent incapacitation of 20%. The court on appeal reduced an award of Kshs.700,000/= to Kshs.350,000/= in 2014.

17. For the foregoing and having found the trial magistrate's award to be excessive, I set aside the said award and substitute it with an award of Kshs.600,000/= which is more realistic and comparable, thus Kshs.480,000/= to the Respondent.

The award will be subject to the Respondents contribution on liability of 20%.

18. This award will accrue interest at court rates from the date of the subordinate court's judgment.

19. I award costs of the appeal to the Appellants.

**Dated, signed and delivered this 28<sup>th</sup> Day of February 2019.**

**J.N. MULWA**

**JUDGE**