



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIVASHA**  
**(CORAM: R. MWONGO, J)**  
**CIVIL APPEAL NO. 77 OF 2015**

**FRED OGADA AZERE.....1<sup>ST</sup> APPELLANT**  
**SONY TRADING CO. LTD.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**EZEKIEL KIARIE NGANGA.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree of SM Mwinzi, SRM delivered on 22<sup>nd</sup> July 2015 in Naivasha CMCC No 287 of 2013)*

**JUDGMENT**

**Background**

1. This appeal arises from the lower court's decision which awarded general damages of Kenya shillings 1,800,000/= for injuries sustained and special damages of Kenya shillings 5,000/= to the respondent following an accident that occurred on 31 December 2012 along the Nairobi - Naivasha road.

2. The only evidence adduced in the lower court was by the appellant. He testified that he was a passenger in motor vehicle registration number KBH 283J which was involved in an accident with motor vehicle registration number KBQ 630C, a bus. He said that the bus was overtaking in the lane in which the vehicle he was in was driving in the opposite direction when the accident occurred.

3. The appellant's evidence disclosed that he suffered various injuries. He produced to police abstract, P3 form, treatment documents from Kijabe hospital and a medical report in support of his case. Dated 10<sup>th</sup> May 2013, the medical report, was by Doctor Wellington Kiamba and it showed the following injuries sustained by the respondent:

- a. Commuted fracture of the right acetabulum
- b. Posterior dislocation of the right hip joint
- c. Laceration on the left ear and the left eyelid
- d. Mild head injury
- e. Laceration on the right knee and Leg
- f. Bruises on the right hand

4. The appeal herein seeks that the damages be reviewed to a reasonable level of compensation, and focuses only on quantum. Liability, which was found at 100% against the appellants, has not been challenged in the appeal.

5. In the submissions, the Appellant proposes an award of Kshs 600,000/= while the respondent maintains that the awarded sum of Kshs 1,800,000/= is sufficient.

**Analysis and Determination**

6. It is settled law that the duty of this court as the first appellate court is to re-evaluate the evidence in the lower court and to draw its conclusions while bearing in mind that it did not itself have the opportunity to hear and see the witnesses testify. (See **Selle and Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123**, **Peters v Sunday Post Ltd (1958) EA 424**. Further, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did [see **Ephantus Mwangi & Another v Duncan Mwangi Wambusu [1982 – 1988] 1 KAR 278** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**]. In the latter case the Court of Appeal stated:

*“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.*

7. The Court of Appeal observed in **Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal 26 of 2013 [2014] eKLR** as follows:

*“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”*

8. It is trite that general damages are damages at large and that the court is enjoined to do the best it can in reaching an award that reflects the nature and gravity of the injuries, and I might add, that is in keeping with the norms and expectations of the socio economic environment of the country. In assessing damages, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are or can be exactly alike.

9. In **West (H) & Son Ltd v Shepherd [1964] AC. 326, 345**, Lord Morris of Borth-y-Gest emphasized the point on uniformity of awards when he observed that:

*“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be endeavor to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”*

#### *Damages*

10. The parties relied on the following cases. The appellant cited: **Edwin Otieno Japaso v Easy Coach Bus Company Limited [2016] eKLR** where the High Court enhanced to 2,000,000/= an award for fracture and dislocation of the right little finger, soft tissue injuries to the chest, dislocation of the right hip with a fracture of the acetabulum, fracture of the pelvis involving both superior and inferior pubic rami bilaterally, lacerated cut wound on the anterior left leg, and lacerated wound on the anterior right leg. There, permanent disability was assessed at 25%. On appeal the award was increased by 500,000/= from Kshs 1,500,000/= awarded in the lower court on the ground that there was also loss of earnings. The Judge stated that Kshs 1.5 million was adequate for just the injuries.

11. Appellant also cited: **Kennedy Ooko Ouma Dachi v Joseph Maina Kamau & another [2018] eKLR** where the appellant therein sustained a fracture to the acetabulum, and according to the medical report, the appellant would need total hip replacement surgery every ten years. Since the Appellant was aged 37 years at the time of the accident, he would be required undergo at least three cycles of hip replacement surgery. On appeal, and for those reasons, the High Court enhanced the amount of general damages from Kshs1,000,000/= to Kshs1,400,000/=.

12. On his part, the respondent relied on the following authorities: **Mwaura Muiruri v Suera Flowers Ltd and Benson Maundu, Nakuru H.C.C No. 189 of 2009** where the plaintiff was awarded Ksh.1,900,000/= for multiple lacerations on the face, soft tissue injuries on the chest cage (mainly left sub-axillary area), comminuted fractures of the right humerus upper and lower thirds of the tibia, compound double fractures of the right leg upper and lower 1/3 tibia fibula. His total permanent disability was assessed at 70% computed as follows: 50% for the loss of the right arm and 20% on the left leg.

13. In the present case, the respondent did not suffer any permanent incapacitation, and no issue arises as to loss of earnings. Further, the medical report was not contested and must be taken as is.

14. The above cases are all fairly recent and fairly similar to the current case in the nature and extent of injuries and comparability of awards. As earlier stated, the context in which the compensation for the respondent must be evaluated is determined by awards made in the past.

15. Several authorities are more to the point on injuries sustained by the respondent. In **Mary Pamela Oyioma v Yess Holdings Limited [2011] eKLR**, the plaintiff sustained a comminuted fracture of the right femur; a compound fracture of the right tibia, a fracture of the left tibia; soft tissue injuries of the right shoulder and multiple cuts over the whole body. The court awarded Kshs. 900,000/=. That case bears comparable injuries to this case.

16. In **James Gathirwa Ngungi v Multiple Hauliers (EA) Limited & another [2015] eKLR**, the injuries pleaded were: Compound comminuted fracture of the right tibia, Compound comminuted fracture of the right fibula Residual injuries include; re-fracture of the right leg, many sinuses on the right leg with pus, bone exposure, chronic bone infection and dead bone, restriction in walking, difficult in walking, restriction in mobility of the fore arm, difficulties in squatting, weakness of the left upper limb. The plaintiff could not carry or lift heavy objects, and walks with aid of clutches, had restriction of movement of the left limb, and had pain due to prolonged surgery procedure. From

the two medical reports availed the undisputed injuries sustained by the plaintiff were fracture of left radius; fracture of the left ulna; fracture of right tibia and fracture of the right fibula. The plaintiff suffered a lot of pain and was subjected to numerous operations due to re-occurring bone infection. There, the court awarded amount 1,500,000/= as general damages.

17. In **Cold Car Hire And Tours Limited & 2 others v Elizabeth Wambui Matheri [2015] eKLR**, the High Court upheld the lower court award of Kshs 1,400,000/= for Comminuted fracture of the right acetabulum and dislocation of the right hip joint.

18. In light of the foregoing authorities, I am of the view that the respondent's injuries were not as severe and as to warrant an award of Kshs 1,800,000/=. I would reduce the award to Kshs1,350,000/=, which is more in keeping with the awards for the type of injuries sustained.

#### **Disposition**

19. Accordingly, the appeal succeeds on general damages, and the award shall be for the amount of Kshs 1,350,000/=. Special damages shall remain at Kshs 5,000/= making a total award of Kshs 1,400,000/=.

20. The appellants shall have costs of the appeal.

21. Orders accordingly.

**Dated and Delivered at Naivasha this 28<sup>th</sup> Day of February, 2019**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. No representation for the Appellants
2. Ngunjiri holding brief for Owuor for the Respondent
3. Court Clerk - Quinter Ogutu