



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CIVIL APPEAL NO. 93 OF 2017

DAVID NDONYE WANDERL.....1ST APPELLANT

KAHIU SAMUEL *alias* SAMUEL MWANGI KAHIU.....2ND APPELLANT

-VERSUS-

RAITA OLE TEKEL.....RESPONDENT

(Being an appeal from the judgment of Hon. D N. Musyoka Principal Magistrate

delivered on the 26th April 2017 in Kikiyu CMCC N. 23 of 2014)

JUDGMENT

1. The Respondent had sued the Appellants seeking damages following a road accident on the 9th December 2013 involving their motor vehicle Reg. No. 480N and another wherein the Respondent sustained serious injuries.

Upon hearing of the case, the trial court awarded to the Respondent the following damages in its judgment dated the 5th May 2017.

• General damages	-Kshs.3,000,000/=
• Loss of earnings	-Kshs. 600,000/=
• Future medical expense	-Kshs. 840,000/=
• Special damages	-Kshs. 164,745/=
Total	<u>-Kshs.4,604,745/=</u>

2. The appellants were dissatisfied with the above awards as being inordinately high and thus have urged for their reduction save for special damages.

3. The Respondent's injuries upon which the awards made as stated in the medical Report of Dr. Bhanji dated the 27th January 2014 are multiple serious injuries being

- **Head injury – cerebral concussion**
- **Comminuted fracture of the nasal bone**
- **Fracture dislocation of the left wrist joint**
- **Fracture of the femur shaft**

- **Fracture of the distal of the right fibula bone**
- **Deep laceration over the ventral aspect of the left lower leg.**

The various heads of damages were pleaded in the Amended Complaint dated 16th February 2016.

4. I have considered the proposed awards by each of the parties before the trial court, and the rationale in awarding the appeal from awards by the trial court.

5. As the first appellate court I am obligated to re-consider and re-evaluate the evidence adduced before the trial court and come up with my own findings and conclusion.

Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (1968) EA 123 Page 126.

6. In the matter of assessment of damages, it is trite that an appeal court ought not interfere with the exercise of discretion of the trial court unless it is satisfied that the court misdirected itself in some aspect by and either taking into account an irrelevant factor or failed to take into account a relevant one thus arrived at a wrong decision or as when it is manifest that the court was clearly wrong in the exercise of its discretion – **Mbogo -vs- Shah (1968) EA LR Pg 93, and Kemfro Africa Ltd -vs- Lubia & Another (No. 2) (1987) KLR 30.**

7. It is also trite that while assessing damages, the court ought to be minded that such damages ought not be a misery, or extravagant but realistic, satisfactory and comparable to similar injuries – **Mohamed Juma -vs- Kenya Glass Works Ltd C.A No. 1 of 1986**(unreported), **Butt -vs- Khan (1981) KLR 249** – among others.

8. Having the above principles in mind, I now proceed to interrogate the appellants grounds of Appeal to find whether the said awards were excessive and exaggerated to warrant this court's interference.

9. I have seen the Appellants submissions before the trial court but the Respondents submissions are not filed in the Record of Appeal. Was the omission deliberate or an error?

Both parties have filed their submissions on the appeal.

10. **General damages for pain and suffering**

It is evident from the trial courts judgment that the Magistrate considered the injuries sustained by the respondent as well as proposals put forth by both parties, together with the authorities cited.

11. The injuries sustained by the Respondent can not be said to be minor so as to attract general damages of Kshs.200,000/= as suggested by the appellant. **Simon Mutisya Karii -vs- Simon Kigutu Mwangi** was decided in 2007. The injuries are comparable though the respondents are a bit more serious.

The injuries in the authority **Rwaken Investments Ltd -vs- Isaac Kiprop Chelunyei HCCA No. 600 of 2012 (2016) e KLR** are also serious and comparable to the Respondents.

The court awarded Kshs.1,800,000/= in general damages in October 2016.

12. On the other hand, the Respondent urges that the awards by the trial court be upheld as being realistic and on grounds that no demonstration has been shown that the trial courts discretion as wrongly exercised –

Ratnam -vs- Kumarasamy & Another ALL ELR 1964 Vol. 3 at Pg 933 where it was held that:

“--it was impossible to say that the discretion of the Court of Appeal was exercised on the wrong principle--”

13. Further it is submitted that it has not been demonstrated that the awards are too high as to represent an entirely erroneous estimate of damage– **Butt -vs- Khan (Supra)**.

14. No case or injuries can be exactly similar to another, suffice to state that the court will consider what is comparable in nature, seriousness and the post injury effects.

15. It is worthy to note the doctors report dated 28th January 2014 regarding future prognosis. (Page 5 of the medical report), it was noted that

1. The head injury may have caused damage to the underlying brain tissues with scarring which may predispose him to develop epileptic fits in future.

2. That he had already developed symptoms– a post-concussional syndrome being headache which is extremely incapacitating.

3. He may even develop other post-concussional syndromes namely lack of concentration, forgetfulness, dizziness irritability, insomnia which are incapacitating and take long subside.

16. I have also noted that the Respondent – (Page 6 medical report) – underwent several surgeries to reduce the dislocations and fractures and further surgeries were recommended with estimated costs stated in both private and public hospital, as well as intensive physiotherapy.

17. In conclusion (Page 7 medical report) the doctor opined that it would be unlikely for the respondent to recover fully from the injuries.

18. I have perused the proceedings before the trial court and specifically the Respondents evidence and cross examination.

The medical report was produced by the doctor, Nassir Bhanji. No serious issue was raised in cross examination by the Appellant's Advocates save for costs of the future surgeries.

19. General damages for pain and suffering were awarded at Kshs.3,000,000/=.

There is no doubt that the sum of Kshs.3,000,000/= is high and no comparable authorities were cited in support by the trial magistrate.

Having considered the seriousness and the post treatment surgeries, I am of the opinion that a sum of Kshs.1,800,000/= would be more realistic and fair.

20. The sum of Kshs.1,800,000/= is therefore set aside and substituted with an award of Kshs.1,800,000/= in General damages – See **Rwaken Investments Ltd(Supra), John Kibicho-vs-Emmanuel Parsmei Mkoltiko (2017) e KLR** where the court awarded general damages for multiple fractures Kshs.1,800,000/= in 2016. The injuries are comparable to a large decree to the respondent's injuries.

21. Loss of earning capacity

I agree with the appellant that the award of Kshs.600,000/= was not supported by sufficient evidence. No documents were produced to support that the respondent was a cattle trader making a monthly income of Kshs.25,000/=.

22. I am minded that proof of income need not always be proved by documentary evidence. It is now a common practice and accepted that majority of traders in Kenya do not have documents, receipts or even bank Accounts that would demonstrate their income but they are able to support their families.

Thus, the trial court considered a more reasonable income and multiplier as opposed to a blanket and out of the sky estimate suggested by the Respondent.

23. The appellant did not tender any submission on this subhead of damages before the trial court nor before this court, and therefore the court had nothing on record to rely on.

24. The trial court's discretion in taking guidance from the minimum wages guidelines for the period is commendable. The application of Kshs.10,000/= in my view is quite appropriate in the circumstances. It is not unrealistic. I am satisfied that the said sum represents a fair estimate of the damage.

25. The Doctor opined that as a result of the injuries, the respondent may never recover. He was then 36 years old. I have no reason to upset the multiplier of 5 years, there having been no counter-Appeal on the issue. The trial court's award of Kshs.600,000/= is upheld.

26. Future medical Expenses

The Doctor who examined the respondent recommended future surgeries and intensive physiotherapy.

He gave estimates of the cost both in private and public hospitals.

27. For surgical corrections he estimated the cost in a private hospital to about Kshs.350,000/= while physiotherapy was stated as about Kshs.2,500/= per week.

It would without a doubt, be close to ½ of the said sums in a public or Mission hospital. The post-surgical interventions are necessary. As such, I shall set aside the sum of Kshs.840,000/= and reduce it by ½ to Kshs.420,000/= in a public Hospital as being more realistic without a formal quotation from any of the hospitals.

28. **Special damages** were awarded at Kshs.164,745/= What is pleaded in the Amended Plaintiff dated 16th February 2016 is Kshs.180,745/=.

29. It is trite that special damages must be pleaded and strictly proved. I have seen the Respondents exhibits No.6 for Kshs.13,580/=, ExtNo.7 for Kshs.15,800/=, Ext 8 for Kshs.119,800/= as well as Ext No. 11(b) for Kshs.1,000/=. This is a total of Kshs.163,800/= being receipts in respect of medical treatment.

That is what was strictly proved. I therefore set aside the award of Kshs.164,745/= and substitute it with Kshs.163,800/=.

30. For the foregoing the appellants appeal succeeds as demonstrated above.

The final awards are as hereunder:

1. General damages for	
pain and suffering	- Kshs.1,800,000/=
2. Loss of earning capacity	- Kshs. 600,000/=
3. Future medical expenses	- Kshs. 420,000/=
4. Special damages	- <u>Kshs. 163,800/=</u>
Total	- <u>Kshs.2,983,800/=</u>
Less 10% contributory	
Negligence	- <u>Kshs. 298,380/=</u>
Due to Respondent	- <u>Kshs.2,685,420/=</u>

31. The Appeal having succeeded in part, I order that each party bears its own costs of the Appeal.

Dated and signed at Nakuru this 23rd day of January 2019.

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J.N. MULWA

JUDGE

Dated, Signed and Delivered at Kiambu this 21st Day of February 2019.

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C. MEOLI

JUDGE