



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KIAMBU**

**CIVIL APPEAL NO. 96 OF 2017**

**PETER GITHUA KARANJA.....1<sup>ST</sup> APPELLANT**

**GILBERT MUTINDA.....2<sup>ND</sup> APPELLANT**

**DIPLOY PLASTIC *alias***

**DPL FESTIVE LTD.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**THOMAS KABUTI MUCHORI.....RESPONDENT**

*(Being an appeal from the judgment of the Senior Resident Magistrate's Court of Kenya at Limuru,*

*Hon. Mr. O.H. Oduor – Principal Magistrate – delivered on 25<sup>th</sup> Day of April 2016*

*in Limuru Senior Resident Magistrate Civil Case No. 26 of 2012)*

**JUDGMENT**

1. This Appeal is against the *quantum* of damages awarded to the Respondent by the trial court following injuries he sustained in an accident on the 26<sup>th</sup> July 2010 involving the appellants motor vehicle Reg. No. KAY 082M Toyota matatu and KBK 028Y along the Naivasha-Nairobi Highway.

2. Liability was settled by the parties by consent at 80:20 against the defendants.

3. The medical report from Kijabe AIC Hospital stated the Respondents injuries as

- **Closed posterior hip fracture dislocation with posterior acetabulum wall fracture**
- **Laceration of the right heel**
- **Right leg abrasion**
- **Hospitalised for 10 days**
- **Open reduction and internal fixation surgery with cannulated screws done**
- **At risk of developing osteoarthritis of the left hip**
- **Necessity for hip replacement at a cost of 350,000/= in a Mission or government hospital.**

4. Upon assessment the trial court awarded the Respondent

- General damages                    -Kshs. 700,000/=

· Cost of future operation	-Kshs. 350,000/=
· Special damages	-Kshs. <u>213,161/=</u>
Total	-Kshs. <u>1,263,161/=</u>

Subject to 20% reduction

5. The Appellant faults the trial magistrate that he misdirected himself in law and fact by awarding excessive general damages and has urged for reduction of the same. I have considered the Respondents injuries, parties submissions before the trial court and in this appeal.

6. For this court to be persuaded to interfere with the trial court's assessment of damages, it has to be satisfied that the trial court in assessing the damages took into account irrelevant factors or left out relevant ones or that the amount is so inordinately high that it must be a wholly erroneous estimate of damages – **Kemfro Africa Ltd –vs- Lubia & Another (No. 2) 1987 KLR and Butt –vs- Khan (1982 – 88) IKAR.**

7. In the same breath, the court must warn itself of the purpose for compensation as stated in **Cuossens –vs- AG (1999) EA 40.** “---That the object is to give the injured party compensation for the loss and damage that would place him to the same position he would have been had the injuries not occurred, and as a substitute for that which is generally more important than money.”

8. Echoing **Madam JA in Ugenya Bus Service Ltd –vs- Gachiki (1976- 1985) EA 575,** it is a difficult task to accurately assess damages to the satisfaction of both parties, and no court aims at doing so but doing the best it is able to in the circumstances.

9. The Appellant had proposed Kshs.200,000/= general damages for pain and suffering before the trial court, citing **Jerome Ndungu Wangome –vs- Geoffrey Mbutha** where Kshs.150,000/= was awarded.

The full authority was not provided.

The Respondent had proposed Kshs.3,000,000/= and relied on three 1991 authorities with only digests provided.

10. In their written submissions in this appeal, the Appellants citing the case **HCCC No. 404 of 1991 Jerome Ndungu Wangombe –vs- Geoffrey Mbuthia** once against a digest of the case has urged that as the Respondent had healed by the time he testified, the sum of KShs.700,000/= was excessive, and that the award of Kshs.350,000/= future medical expenses was not necessary as the doctors whose medical reports the trial court relied on had agreed that removal of the screw was risky. Further it is submitted that at the time, the respondent had not developed osteoarthritis.

11. The Respondent citing Madan J holding in **Mohamed Juma –vs- Kenya Glass Works Ltd CA No.1 of 1986** observed that general damages should not be miserly, extravagant but realistic, satisfactory and reasonable.

12. I have considered the trial courts rationale in awarding the general damages. He considered relevant authority **Michael Maina Gitonga -vs- Serah Njuguna (2012) e KLR** where a sum of Kshs.1,500,000/= was awarded for multiple fractures to the right leg, fibula & tibia and dislocation of right hip.

These injuries are more serious, a fact he observed.

13. In more recent decisions with comparable injuries, amounts ranging from Kshs.500,000/= have been awarded depending on the severity and multiplicity of the injuries, among them **David Kimathi Kaburu -vs- Dionisius Mburungu (2017) e KLR,** Kshs.630,000/= (Nov 2017) **Joseph Kahinda Maina -vs- Evans Kamau Mwaura & 2 Others (2014) e KLR** when a sum of Kshs.2,400,000/= was awarded for fracture of the right hip joint, metal blades and screws needed to be removed and future medical expenses also awarded; **Mwavita Jonathan –vs- Silivia Onunga (2017) e KLR.**

14. Looking at the above authorities, and being aware that no injuries could be exactly the same, but that comparable injuries ought to attract comparable damages as far as possible (**Stanley Maore –vs- Geoffrey Mwenda NYRCA Civil Appeal No. 147 of 2002 (2004) e KLR,** I am of the considered opinion that the trial courts award was well within the comparable compensatory damages.

I say so because the authority cited by the appellant was too old to be of useful comparison to the awards in current authorities.

15. The appellant has fallen short in persuading me to set aside the award of damages for pain and suffering.

To that extent the appeal fails. The trial court award for general damages is upheld.

16. On special damages, no challenge was mounted. The sum of KShs.212,661/99 is upheld.

17. For future medical expenses awarded for removal of the fixation screws, the need to have the screws removed was stated by all the doctors, and the estimate cost in a government hospital also stated as Kshs.350,000/=. Though stated to be risky, that is a matter for the Respondent to decide to take the risk or not.

18. The appellant has not satisfied the court as to why it should interfere with the trial courts discretion in the assessment of damages. It is

not enough to state. A party must give cogent and credible reasons in support of their grounds of appeal – See **Section 107 – 109 Evidence Act**. The trial court’s awards are therefore upheld.

19. Having not satisfied the principles set out in the **Kemfro Case and Butt –vs- Khan (Supra)**, I find no merit in the appeal. It is dismissed with costs to the Respondent.

**Dated and signed at Nakuru this 23<sup>rd</sup> Day of January 2019.**

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**J.N. MULWA**

**JUDGE**

**Dated, signed Delivered at Kiambu this 21<sup>st</sup> Day of February 2019.**

.....

**C. MEOLI**

**JUDGE**