



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 45 OF 2015

INTRA-HEALTH INTERNATIONAL INC.....APPELLANT

=VERSUS=

CHARLES MUSEMBI MUNYAO.....RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable M. A. O. Opanga,

Senior Resident Magistrate at Kithimani on 05.03.2015 in Kithimani PMCC No. 88 of 2012)

BETWEEN

CHARLES MUSEMBI MUNYAO.....PLAINTIFF

=VERSUS=

INTRA-HEALTH INTERNATIONAL INC.....DEFENDANT

JUDGEMENT

1. By a plaint dated 2nd July, 2012, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 39,300/- General Damages, Costs and interests.
2. The Respondent's suit was premised on the fact that on the 6th November, 2012, the Appellant's driver so negligently drove the Appellant's motor vehicle reg. no. KBB 494M Nissan Patrol that the said vehicle was caused to collide with motor cycle reg. no. KMCE 256U which was being ridden by the Respondent as a result of which the Respondent sustained serious bodily injuries. The said injuries were pleaded as compound fracture of the right humerus and fracture of the right femur.
3. On 10th July, 2013, the parties recorded a consent on liability in which judgement was entered in favour of the Respondent against the Appellant in the ratio of 60:40 and the matter proceeded to assessment of damages.
4. In his evidence on damages the Respondent testified that he sustained right hand fracture and metal implants were inserted in the Hospital and were yet to be removed. He also suffered multiple fractures on his right leg. He was as a result of the accident admitted at Thika for three and half months and upon his discharge therefrom was readmitted at Kijabe Mission Hospital for 5 days. He was later examined by **Dr Kasuki** who prepared a medical report for him. In his evidence he had not fully recovered as his right hand could not lift heavy loads and he could not walk long distances.
5. In support of his case, the Respondent relied, inter alia, on the medical report of **Dr Charles M. Kasuki** which was exhibited. According to the said report, the Respondent sustained compound fracture of the right humerus and fracture of the right femur. He was treated at Thika District Hospital where he was admitted from 6th January, 2010 till 23rd January, 2010. Thereafter he was admitted at AIC Cure International Children Hospital from 30th May, 2010 up to 4th June, 2010. As a result of the failure of the compound fracture of the right humerus to unite by conservative management, a surgical implant was found necessary through open reduction internal fixation procedure.
6. In her judgement, the Learned Trial Magistrate awarded the Respondent Kshs 180,000.00 in respect of the fracture on the right humerus bone and Kshs 500,000.00 in respect of the fracture of the femur.

7. The Appellant is aggrieved by this award and raises one ground of appeal that:

THAT the learned Magistrate erred in law and fact by failing to assess damages based on the combined effect of the Respondent's injuries, and instead calculating the sum of the assessment of each independent injury, thereby awarding damages that were manifestly high and inflated in the circumstances.

8. As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

9. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...The Judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country.”

10. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated... The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.”

11. It is true as was held by the Court of Appeal in Tahir Sheikh Said Transporters (K) Limited & Another vs. Charles Mugabo Civil Appeal No. 273 of 1998 that General damages must be assessed on the combined effect of all the injuries on the person injured and not calculated as the sum of all the independent assessment for each injury. Similarly, the East African Court of Appeal in Paolo Cavinato vs. Vito-Antonia Di Filippo [1957] EA 535 was of the view that:

“It would be dangerous to consider sets of injuries in isolation and to award a sum of general damages in respect of each injury since in many cases the combined effects of two sets of injuries may be much more serious in its results to the person injured than either set of such injuries would have been separately and in isolation from each other. It is correct to consider the injuries as such *seriatim* and to assess the severity of each separately; the assessment of general damages must be a single assessment arrived at by considering the total effect of all the injuries upon the person injured.”

12. That was the position adopted by G B M Kariuki, J (as he then was) in Swaleh Sifuna Ali vs. Evans Maina & 2 Others Kakamega HCCC No. 83 of 2003 where he held that:

“In personal injury cases, compensation is never for each individual injury to the body. It is on the basis of heads of damages such as pain and suffering and loss of expectation of life, or diminution of income or earnings etc. and in assessing damages,

the Court looks at the cumulative effect of the injuries suffered and awards what it considers a fair compensation bearing in mind that the plaintiff cannot be returned to the position he was in before the injuries were suffered and that damages are intended to compensate the plaintiff and in so doing, it should be realised that no two cases are the same or identical nor do individual plaintiffs respond the same way to the treatment and the effects vary even where the injuries are not dissimilar... There is a need for consistency in awarding damages for injuries that are not dissimilar and the current value of the shilling and the economy have to be considered although it would be pointless to give astronomical awards which in the end would be impossible to pay just as it would make nonsense of the law to make measly sums for severe injuries and therefore a balance must be struck in which tortuous wrongs result in fair compensation.”

13. The rationale for taking the above positions is due to the fact that 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 endeavour 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 be conventional. See **Tayab vs. Kinanu [1983] KLR 114; West (H) & Son Ltd vs. Shephard [1964] AC 326 at 345.**

14. In this case it is clear that the Learned Trial Magistrate based her award of damages on each head of the injuries sustained by the Respondent. That was clearly an error of principle. However, to justify this court in interfering with the quantum of damages awarded by the trial court only, this court must be satisfied not only that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence, but as a result of the same the award arrived at was so inordinately high or low as to represent an entirely erroneous estimate.

15. In this case it is clear that the Respondent sustained compound fracture of the right humerus and fracture of the right femur. He was treated at Thika District Hospital where he was admitted from 6th January, 2010 till 23rd January, 2010. Thereafter he was admitted at AIC Cure International Children Hospital from 30th May, 2010 up to 4th June, 2010. As a result of the failure of the compound fracture of the right humerus to unite by conservative management, a surgical implant was found necessary through open reduction internal fixation procedure.

16. I have considered the authorities relied upon both here and before the trial court. I have however not had the benefit of the appellant's submissions since the record does not have the hardcopy of the proceedings allegedly filed. Though I directed the parties to furnish the court with soft copies of their submissions, only the Respondent complied. I therefore only had the benefit of the Respondent's submissions. This court has time and again emphasised to counsel the importance of complying with the directions with respect to the furnishing of soft copies and counsel who fail to comply therewith only have themselves to blame in the event that hardcopies allegedly filed are missing from the court record. That is the unfortunate situation the appellant herein finds himself and he has himself to blame for the unfortunate circumstances. I will however revisit this issue later in this judgement.

17. Having considered the decisions that are on record, it is my considered view that the case that comes nearest to the instant case is **Bethwel Mutai vs. China Road & Bridge Corporation [2008] eKLR**. In that case, following the accident in which the plaintiff was knocked down by a motor vehicle, the plaintiff sustained fracture of the left clavicle, fracture of the right humerus and fracture of the right femur. He was admitted in Hospital from 9th December, 2006 till 21st December, 2006 and was subsequently followed up in Nairobi. He was operated on the clavicle and the humerus and the same were professionally fixed while the 3rd injury was fixed with an interlocking nail. As a result, the plaintiff complained of occasional pain on the right arm and thigh. The plaintiff was on 25th April, 2008 awarded Kshs 800,000.00 as general damages. That case was determined 7 years before the instant case was determined. Though the injuries sustained in the present case did not include the fracture of the left clavicle, considering the lapse of years and the inflationary tendencies as well as the resultant consequences in both cases, though I find that the learned trial magistrate made an error of principles in making separate awards for each injury, I am not satisfied that in the end she, as a result, arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

18. In the premises, this appeal fails and is dismissed.

19. As regards costs, as I have stated elsewhere in this judgement, the Appellant's counsel ignored this court's directions to furnish the court with soft copies of the appellant's submissions. Section 1A(3) of the **Civil Procedure Act** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

20. One of the overriding objectives of the **Civil Procedure Act** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. In fact, in such circumstances, the court may well invoke its powers under section 56 of the **Advocates Act** and penalise advocates in costs personally.

21. The appellant will bear the costs of this appeal.

22. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd May, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Nthiwa for Mr Mulwa for the Appellant

CA Geoffrey