



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 28 OF 2017 & 30 OF 2017 CONSOLIDATED**

**DAVID KIBUE MCHOMBA.....1<sup>ST</sup> APPELLANT**

**GUYO GALGALO WAEJERA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**ALEX MUTUA MUNYAO.....RESPONDENT**

(Being an appeal from the Judgment/Decree of Hon. W. K. Kitur, Resident Magistrate,

delivered on 21<sup>st</sup> February, 2017 in Nakuru CMCC.1119 of 2014)

**JUDGMENT**

**INTRODUCTION**

1. This appeal is consolidated with cross appeal HCCA No.30 of 2017. The two appeals arose from suit filed in the lower court by the respondent herein seeking general and special damages from the appellants for the injuries he sustained as a result of an accident involving the respondent and the Appellants' motor vehicle registration number KAL 667 X Toyota Matatu on 4<sup>th</sup> June 2014.

2. Parties herein recorded consent on liability. They agreed that the appellant/plaintiff do shoulder 15% liability and the respondent/defendant do shoulder 85% liability.

3. The trial magistrate assessed damages as follows:-

a. Pain and suffering	Kshs 800,000
b. Cost of future medication/treatment	Kshs 100,000
c. Loss of income	Kshs 83,975
d. Loss of future earning capacity	Kshs 300,000
e. Special damages	Kshs 117,675
<b>Total</b>	<b>kshs 1,401,650.20</b>
Less 15%	(210,247.50)
<b>NET</b>	<b>Kshs 1,191,402.70</b>

4. The appellant being aggrieved by the above assessment filed this appeal on the following ground:-

i. The trial magistrate erred in fact and in law in awarding excessive general damages of Kshs 800, 000 for injuries that the plaintiff sustained.

ii. The trial magistrate erred in fact and in law in awarding loss of income and future earning capacity without basis or proof of the same.

iii. The learned trial magistrate erred in law and in fact in failing to accord due regard to the appellant's submissions on quantum on applicable principles for assessment of damages.

5. Ground in HCCA NO.30 OF 2017 are as follows:

i. That the learned trial magistrate erred in law and in fact by awarding damages that were manifestly, obviously and so inordinately low and not in tandem/commensurate with the Appellant's injuries and or materials on record.

ii. That the learned trial magistrate erred in law and in fact in rendering/writing a judgment that is not based on proper evaluation and consideration of the pleadings, evidence on record, submissions and or the applicable law and principles for award of damages.

6. In this judgment I will refer plaintiff in the lower court as respondent and defendants in lower court as appellants.

#### **APPELLANT'S SUBMISSIONS**

7. The appellants submitted that it is not in dispute that the respondent suffered fracture of the right femur, soft tissue injuries with no fracture of the skull and award of kshs.800,000 as general damages is manifestly high. He urged court to reevaluate evidence adduced and draw its own conclusion. Appellants cited 3 comparable decisions.

8. Under loss of earning capacity, the appellant submitted the injuries did diminish the respondent's chances of getting alternative job neither did the disability exposed him to losing his job completely.

9. Appellant submitted that loss of earnings is the nature of special damages and must be specifically pleaded and proved. They urged court to dismiss award of kshs.800,000 and replace with a figure between 300,000 to 400,000

#### **RESPONDENT'S SUBMISSIONS**

10. The respondent submitted that the appellants are making submissions on reduction of general damages on mistaken belief that the respondent suffered fracture of right femur and soft tissue injuries only and he was not occasioned any permanent disability. He submitted that evidence on record show that the respondent suffered fracture of right femur, fracture of skull and soft tissue injuries with permanent disability of 20%; that the trial magistrate was alive of the injuries suffered by the respondent while awarding damages as captured at page 48 of the judgment.

11. Respondent submitted that the trial magistrate having weighed evidence adduced and upheld respondents evidence as to nature of injuries, the decision on award of damages is unassailable.

12. Respondent further submitted that the authorities relied on by the appellants in challenging the award by the trial magistrate are all distinguishable from this case and hence inapplicable; that in the case of **Michael Adeka Khaemba & 2 others V Rassangylo Muli Kumuyu (2018) eKLR** and **Samuel Kipkemoi Kirui Vs. Ibrahim Shero Hussein & 2 Others (2016) eKLR** the respondents suffered fracture of right femur only and right femur and soft tissue injuries respectively unlike this case where the respondent suffered fracture of the skull in addition and was occasioned permanent disability of 20%.

13. Respondent submitted that the appellants have introduced new arguments and authorities which were not presented before the trial magistrate in this appeal; that in their opinion award of kshs 800,000 was inordinately low and urged this court to enhance the same.

14. The respondent submitted that the appellants have not demonstrated how the trial magistrate erred in awarding damages for loss of earning; that apart from stating that it is special damage whereas loss of earning capacity is in the realm of general damages this ground of appeal was not substantiated.

15. While arguing in respect of appeal no.30 of 2017, the respondent submitted that the award of kshs 800,000 is inordinately low given the nature of injuries sustained by the respondent. Appellant cited authorities the case of **George Kiboi Waithaga Vs. Kevin Oino Simba (2011) eKLR** where the High court upheld award of kshs.500,000 for less severe injuries and no permanent disability; and the case of **Charles Mathenge Wahome Vs. Mark Mboya Likanga & 2 Others (2011) eKLR** where disability was assessed at 25% and kshs.1,500,000 awarded.

16. Respondent submitted that the respondent herein was entitled to a higher award than claimant in **Charles Mathenge Wahome** case above since he suffered skull fracture and this case was delivered 5 years after. Respondent urged this court to enhance the award to at least kshs.1,500,000.

#### **ANALYSIS AND DETERMINATION**

17. The appellant is of the view that award of kshs.800,000 for pain and suffering is inordinate high and should be reduced to kshs.400,000 whereas the respondent's view is that the award is low and should be enhanced to kshs.1,500,000. The appellant never substantiated the appeal against award under loss of income.

18. This being the first appellate court I am required to reevaluate evidence before the trial court and arrive at an independent determination; this I do while minded of the fact that unlike the trial court, I never got opportunity to take evidence first hand and observe demeanor of witness. I will therefore give due allowance.

19. After recording consent on liability respondent testified and availed a doctor while the appellants availed **Doctor Jennifer Kahutu**. Plaintiff said he was injured on the head, left shoulder, chest and back and fracture on the right leg. Plaintiff testified that he was working as a mason before the time of the accident but at the time of testifying in court on 11<sup>th</sup> October 2016 plaintiff said that he could do light work and was working in a tyres company.

**20. Doctor Kiamba** for the respondent examined respondent on 6<sup>th</sup> August 2014 and reexamined him on 25<sup>th</sup> February 2014. He produced 2 reports in court. On the second examination, the doctor found that soft tissue injuries had healed but he still had difficulties walking or standing for long due to fracture on right femur. He assessed temporary disability of 8 months and permanent disability of 20%. He testified that fracture of the skull was seen at PGH and he also saw it. He added that kshs.40,000 estimate for future treatment by appellants doctor was an underestimation. In cross examination the doctor said he was not supplied with X-ray of the skull but he relied on discharge summary.

21. Doctor Jennifer who adduced evidence in support of appellant's case confirmed that the respondent sustained fracture of the right femur. She said fracture of the skull was not seen on documents availed to her and that X-ray had been taken 2 days after the accident. She said the discharge summary was dated 5<sup>th</sup> June 2014 and X-ray 6<sup>th</sup> June 2014.

22. Dr. Kiamba on the other hand said he was not shown X-ray. In cross examination Dr. Jennifer said that she did not view X-ray from PGH but discharge summary from PGH indicate that there was fracture of the skull. She also confirmed that a fracture takes 6 weeks to unite and may take 2 years to heal completely; and that she examined the respondent after 1 year. He confirmed that there is negative impact on injury of the leg if the respondent is a mason. She said estimate cost of treatment is from Kenyatta National Hospital and that the cost may vary. In reexamination, Dr. Jennifer said that the plaintiff took X-ray reports to her.

23. Appellant's contention is that the respondent never sustained skull fracture and award of kshs.800,000 is high in view of comparable award to claimants in the cases cited. However, on reevaluation of evidence adduced, I note that the appellant's doctor never got opportunity of looking at X-ray taking 2 days after the accident in Nakuru General Provincial Hospital (PGH), 2 days after the accident. She admitted that the discharge summary from the hospital indicated that there was skull fracture. She also confirmed that fractures join within 6 weeks and stated that the x-ray film is not dated.

24. Both doctors were not shown X-ray from PGH but they do not dispute that the discharge summary indicated X-ray was done and it showed fracture of skull. In his testimony the respondent talked of injury to the head. Nature of injury to the head could be shown by X-ray. X-ray presented to Doctor Jennifer is undated. Record on discharge summary has not been challenged. Dr. Kiamba indicated that it was a simple fracture of the skull but fracture of the femur was serious. PGH is the first hospital, which treated the plaintiff. X-ray of the head, was done there and result indicated in the discharge summary. My view is that the appellant did not sufficiently challenge that evidence.

25. From the foregoing, I find that the trial magistrate did not misapprehend evidence adduced. I take note of the fact that as per respondents doctor the fracture of the skull was simple and that fractures heal with time. There is however no doubt that the plaintiff suffered pain, suffered temporary incapacitation, and depending on the nature of his work there is degree of permanent incapacitation, which the two doctors failed to agree on. Having found that, I find that the award of kshs.800,000 is reasonable in the circumstances.

## **26. FINAL ORDERS:**

- i. Appeal on quantum is hereby dismissed.
- ii. Cost of the appeal to the respondent/plaintiff

**Judgment dated, signed and delivered at Nakuru this 24<sup>th</sup> day of July 2019.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Jennifer Court Assistant

Non appearance Counsel for Appellant

Muchemi holding brief for Njuguna Counsel for Respondent