



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Appellate Side)

(Coram: Odunga, J)

CIVIL APPEAL NO. 122 OF 2017

JOSEPH MUTUA NTHIA.....APPELLANT

-VERSUS-

FREDRICK MOSES M. KATUVA.....RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate at Machakos Hon. Lorot

delivered on 31st day of May, 2017 in Machakos CMCC No. 1090 of 2009)

BETWEEN

FREDRICK MOSES M. KATUVA.....PLAINTIFF

=VERSUS=

JOSEPH MUTUA NTHIA.....DEFENDANT

JUDGEMENT

1. By a plaint dated 18th August, 2009, the Respondent herein instituted a suit against the Appellant herein claiming Special Damages in the sum of Kshs 6,150/- General Damages, Costs and interests. The respondent further claimed a sum of Kshs 180,000.00 being further medical expenses.
2. The Respondent's suit was premised on the fact that on or about the 27th April, 2009, the Respondent was lawfully travelling as a passenger aboard motor vehicle registration no. KBD 499 along Machakos-Wote Road when near Wote Township the same was so negligently driven that it was allowed to lose control and collide with motor vehicle registration no. KAB 598P causing severe injuries to the plaintiff.
3. The said injuries were pleaded as injury to the left face, loose teeth, loss of 2 teeth, blunt chest injury and blunt back injury.
4. On 22nd February, 2017, the parties recorded a consent on liability in which judgement was entered in favour of the Respondent against the Appellant in the ratio of 85:15 and the matter proceeded to

assessment of damages.

5. In his evidence on damages the Respondent testified that following the said accident, he was treated at Wote District Hospital and later referred to Machakos District Hospital. He was subsequently seen by **Dr Kimuyu** who prepared a medical report for him. He produced the treatment documents and the medical reports as exhibits. He also testified that he incurred expenses and produced receipts in respect thereof.

6. According to the respondent, he was injured on the left side of his face and lost two teeth in the lower jaw while one remained loose. He was also injured on the chest and the back. According to him the doctor said that he required Kshs 60,000.00 for the replacement of the said teeth. It was his testimony that he had not fully recovered as he was still experiencing persistent back aches and headaches. As a result of the accident, he had a scar on the head and as a result of the loss of the teeth he was unable to eat well.

7. In cross examination the plaintiff stated that as a result of the accident he lost consciousness and could not tell the doctor who first attended to him.

8. According to the medical report which was produced as an exhibit, the respondent sustained injury to the face, loose teeth 41, 31 and 32, loss of two teeth, blunt chest injury and blunt back injury. As a result he had difficulty in chewing food, low back ache with associated numbness of both lower limbs, left side headache and chest ache. In the doctor's opinion, the respondent sustained serious multiple injuries with loss of 2 teeth and required permanent teeth replacement at an estimated cost of Kshs 60,000.00.

9. In his judgement, the Learned Trial Magistrate awarded the Respondent Kshs 400,000.00 being general damages, Kshs 120,000.00 being future medical expenses and special damages in the sum of Kshs 6,150/-. He proceeded to discount the general damages with 15% contribution and arrived at a total award of Kshs 448,150/= which he awarded together with costs and interests.

10. The Appellant is aggrieved by this award and raises the following grounds of appeal that:

1) That the learned trial magistrate erred in law and fact by awarding General Damages of Kshs. 400,000 which award is high and manifestly excessive in the circumstances.

2) That the learned trial magistrate erred in law and fact by failing to consider the nature of the injuries suffered by the Respondent thus arriving at a wrong finding.

3) That the learned trial magistrate erred in law and fact in making an award on quantum which was not supported by any authority.

4) That the learned trial magistrate erred in law and fact by disregarding in totality the submissions and authorities tendered on behalf of the appellant and therefore arriving at a wrong decision.

11. It was submitted on behalf of the Appellant that from the medical report, the Respondent was clinically stable and that there is no indication of any permanent or temporary disability. The Appellant submitted that these were minor injuries and damages of Kshs. 170,000.00 were sufficient to compensate the Respondent but in the judgment, the learned magistrate did not rely on the authorities cited by the appellant. The court was therefore urged to substitute the award of Kshs. 400,000/= with Kshs. 170,000/= considering the injuries that the respondent suffered. In this regard the appellant reiterated his submissions on quantum in the trial court and relied on the following Authorities.

1. Purity Wambui Murithii –vs- Highlands Mineral Water Co. Ltd (Nyeri Court of Appeal, Civil Appeal No. 58/2014) where the honourable Court of Appeal Judges in their judgment dated 3rd of February 2015 did not disturb the judgment of the high court where the honourable judge had awarded the appellant General Damages of Kshs. 150,000. The appellant had suffered injuries to the left elbow, pelvic region, lower back and the left knee.

2. **Kiwanjani Hardware Ltd & Another vs. Laban Kiilu Muthoka (Machakos HCCA 17/2008)** in which **Hon. Justice Lenaola** awarded the respondent Kshs. 175,000/= for similar injuries as the respondent herein.

12. The appellant therefore concluded that the trial magistrate awarded the Respondent excessive award as general damages. Further, the learned trial magistrate did not consider the Appellant's submissions on quantum. In his view, had the Appellant's submissions been considered, a different conclusion would have been arrived at. He called upon this Court to consider the submissions tendered and find in favour of the Appellant and allow the appeal.

13. On behalf of the Respondent, it was submitted that this being the first appeal, the court is mandated to review and examine the evidence afresh and make its own independent conclusion but bearing in mind it did not see or hear the witnesses.

14. It was submitted that before the trial court only the respondent testified as regards his injuries. While reiterating the contents of the medical report, it was observed that the respondent requires permanent teeth replacement at an estimated cost of Kshs 60,000/= each making a total of 120,000/=. The respondent as on physiotherapy regularly and the reported back complication requires intensive physiotherapy with nerve stimulation. She stated that the respondent will benefit from counselling to alleviate anxiety and that the gaps of teeth are of cosmetic concern.

15. It was the respondent's view that from the above evidence and documents, it is clear the respondent suffered multiple injuries. According to the appellant while the appellant submitted on soft tissue injuries, the unchallenged oral and medical evidence show that the respondent suffered multiple injuries. In his view, there is a difference between soft tissue injuries and serious multiple injuries as given by the doctor and this is the point of departure with the appellant's position.

16. It was therefore submitted that the trial court properly considered the evidence and the injuries and the award of Kshs 400,000/= which is not inordinately high as to be disturbed by this court.

17. The respondent relied on the following authorities:

a. **Patrick Murithi Mukuha-vs-Edwin Warui Munene & 5 Others [2005] eKLR** in which the plaintiff sustained loss of the right upper premolar, loosening of the left upper incisor, cut on the occipital, chest injuries with haemoptysis, blunt abdominal injuries and tender testicular area then with the right testicle noted missing. The court awarded Kshs 500,000/= as general damages for pain and suffering

b. **Francis Ochieng & Another vs. Alice Kajimba [2015] Eklr** in which the plaintiff sustained head injury with hematoma, subconjunctual hematoma of the right eye, loss of consciousness for 2 hours, loss of 5 anterior lower and 2 upper teeth and cut wound on the right hand and the right knee. The court awarded him Kshs 350,000/= as general damages for pain and suffering

18. It was therefore the respondent's submissions that the range of damages for serious multiple injuries is between Kshs 350,000/= and Kshs 500,000/= hence the court was therefore within the range when it awarded Kshs 400,000/= subject to liability. The respondent therefore prayed that the appeal on quantum having no merit be dismissed with costs.

Determination

19. As properly appreciated by the parties herein, this appeal revolves around the award of quantum of damages. As regards the quantum of damages, I agree with the position of Court of appeal in **Cecilia W. Mwangi & Another –vs- Ruth W. Mwangi [1997] eKLR**, as follows:

“It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards

inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees...we would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd –vs- Shephard* [1964] AC 326 at page 345:

‘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 the 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.’

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Pho Choo v Camden and Islington Area Heath Authority* [1979] 1 ALL ER 332 at page 339 and this approach was also adopted by this court in the case of *Tayab v Kinanu* [1982-88] 1 KAR 90.

Lord Denning MR said:

‘In considering damages in personal injury claims, it is often said: “the defendants are wrongdoers so make them pay in full. They do not deserve any consideration.” That is a tedious way of putting the case. The accident, like this one may have been due to a pardonable error much as may befall any of us. I stress this so to remove the misapprehension, so often repeated that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay.’

The reason why this passage is referred to by us is to show that damages ought to be assessed so as to compensate, reasonably the injured party but not so as to smart the defendant.”

20. However, 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.”

21. 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.”

22. 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.”

23. Having considered the decisions that are on record, it is my considered view that the case that comes nearest to the instant case is **Patrick Murithi Mukuha-vs-Edwin Warui Munene & 5 Others [2005] eKLR**. Save for the injuries to the testicles, the other injuries seem to be similar to the instant case. The plaintiff was however awarded Kshs 500,000.00 as general damages. In my view an award of Kshs 400,000.00 in the present case cannot therefore be termed as being inordinately high as to justify interference. While this Court may well have arrived at a different figure, I am not satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high as to represent an entirely erroneous estimate. In the premises there is no justification why this court should interfere with the said award.

24. In the result, this appeal fails and is dismissed with costs to the respondent.

25. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 26th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muumbi for the Respondent

Miss Mbilo for Mr Mulwa for the Appellant

CA Geoffrey