

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEL NO. 106 OF 2015

JOSEPH M. NGANGA

JOSEPHINE MUCINA

SIMON CHEGE.....APPELLANTS

VERSUS

LAWRENCE MURIUNGI GICHUNGERESPONDENT

(Being an Appeal from the Judgment and Decree delivered by the Hon. M.C. Chepseba (Mrs) Senior Principles Magistrate on the 28th October in Nairobi CMCC No. 4526 of 2013 Lawrence Muriungi Gichunge – Vs – Joseph M. Ng'ang'a)

JUDGMENT

The parties to this suit recorded a consent judgment on liability at 90% against the appellant and 10% against the respondent. The suit was then listed for formal proof leading to a judgment in favour of the respondent delivered on 28th October, 2014. In that Judgment the respondent was awarded Kshs. 2,700,000/= general damages for pain and suffering, Kshs. 1,260,000/= for diminished earning capacity, Kshs. 180,000/= cost of artificial limb and Kshs. 61,640/= special damages.

The appellants were aggrieved by this judgment leading to the present appeal in which concern has been raised relating to the quantum of damages awarded. Both parties have filed submissions in the argument of this appeal. The main concern is on the award of general damages and diminished earning capacity. This court is mandated as the first appellate court to evaluate all the evidence presented before the trial court and arrive at independent conclusions. This I have done.

Both parties are in agreement on the principles upon which the appellate court may interfere with awards made by the trial court. Comparable injuries attract comparable awards, although not two cases are the same. **See – Jabane vs. Olenja (1986) KLR 661 and Arrow Car Limited vs. Bimomo & 2 others (2004) 2 KLR 101 and David Kiprugut & Another vs. Peter Okebe Pango (2007) e KLR.**

Two medical reports were presented to assist the court in the assessment of damages. These were by Dr. W. Wokabi and Dr. Eva Wainaina. The respondent suffered traumatic amputation of the left forearm which resulted to 65% permanent incapacity. Of the several cited authorities, the following stand out; George **Ragoka Ogola vs. Attorney General (2008) e KLR** where an award of Kshs. 2,000,000/= was made in November, 2008 terms of general damages for pain suffering and loss of amenities for the amputation of the right forearm below the elbow joint. In the case of **Cosmas Kipkoech Sigei vs. Mandrugada Limited & Another (2010) e KLR** the plaintiff suffered a traumatic amputation of the hand at the level of wrist joint where an award of Kshs. 2,000,000/= was made in June 2010.

I have considered the dates when the above awards were made and the fact that the court should bear in mind the depreciation of currency over a period of time. The trial court awarded Kshs. 3,000,000/= which was reduced by 10% contributory negligence on the part of the respondent leaving a balance of Kshs. 2,700,000/= . Taking into consideration all the facts attendant thereto, and the degree of permanent incapacity on the part of the respondent, the award was within the limits of comparable cases and cannot be said to be inordinately high.

The respondent pleaded that he was unable to work as he used to do before, and therefore had suffered loss of earning capacity or diminished capacity to earn and prayed for damages thereunder. He was then 30 years old and was earning Kshs. 400/= per day. The lower court addressed that issue and made an award complained of by the appellants. It will be noted that the award was reduced by a percentage cited by the doctors as being the incapacity sustained by the respondent. Such a claim falls under general damages and proof is on a balance of probability.

The respondent achieved that threshold and, having pleaded the same and having given evidence to that effect, he was entitled to that award. The multiplier of 30 years was not misplaced and damages awarded thereunder cannot be said to be inordinately high. I see no reason to interfere with the said award. There is no challenge in respect of the other awards and I take it that the appellants have not taken any issue with them. It follows therefore that this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 25th Day of September, 2019.

A. MBOGHOLI MSAGHA

JUDGE