



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL APPEAL NO. 12 OF 2017**

**MUGO SYLVESTER.....APPELLANT**

**VERSUS**

**GEORGE KARIUNGL...RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. The respondent instituted suit against the appellant for the payment of general and special damages for injuries sustained following a road traffic accident involving the respondent and a motor vehicle owned by the appellant. The trial court found the appellant 100% liable for the accident and found in favour of the respondent proceeding to award him general damages of Kshs. 700,000/= and special damages of Kshs. 3,000/=.
2. The appellant filed his amended memorandum of appeal dated 10<sup>th</sup> July 2017 based on six grounds which can be summarised as follows;
  - a. That the learned magistrate erred in fact and in law making an award of Kshs. 700,000/= as general damages which was excessive and against the weight of evidence adduced regarding the injuries suffered by the respondent.
3. The parties disposed of the appeal by way of written submissions.

**B. Appellant's Submissions**

4. It was submitted that the award on general damages was based on a misapprehension of the facts and evidence in light of the injuries sustained by the respondent and in total disregard of the appellant's evidence, submissions and authorities on quantum. The appellant relied on the case of **Denshire Muteti Wambua v Kenya Power & Lightning Co. Ltd [2013] eKLR** where it was held that the general method of approach for assessing damages is that comparable injuries should be compensated by comparable awards.
5. The appellant further submitted that the trial court erred in failing to determine whether the alleged head fracture was actually sustained and whether it was in fact as a result of the accident as was stated in the case of **Francis Ochieng & Another v Alice Kajimba [2015] eKLR** where the court was confronted with an issue of disputed injuries of loss of teeth.
6. The appellant submitted that an award of Kshs. 350,000 would suffice. Reliance was placed on the case of **Duncan Mwenda & 2 Others v Silas Kinyua Kithela [2018] eKLR** where the court set aside an award of Kshs. 600,000/= and substituted it with Kshs. 350,000/= for a respondent who sustained severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall.

**C. Respondent's Submission**

7. It was submitted that the appellant was 100% liable for the accident as the appellant had an obligation to drive at a reasonable speed and to keep his lane. The respondent further submitted that the amount awarded by the trial court as general damages and special damages was just, appropriate and need not be interfered with.

**D. Analysis & Determination**

8. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the

case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**.

9. I have carefully perused the judgement as well as the record of appeal, the grounds of appeal and the parties' submissions. The appellant has not raised any grievance against the liability and as such the only issue for determination is *whether the trial court's award of general damages of Kshs. 700,000/= was inordinately high*.

10. The principles upon which an appellate court will interfere with the findings of the trial court were explained in the case of **Kemfro Africa Ltd t/a Meru Express Services Gathogo Kanini v A.M. Lubia & another (1982-88) 1 KAR 777**:

**“ the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages.”**

11. According to the respondent, he suffered injuries of a fracture to the base of the skull as well as multiple bruises to both hands and right knee. This was further supported by the report of Dr. H.N. Njiru. The appellant filed a medical report by Dr. Leah Wainaina who subjected the respondent to a second medical examination which revealed that the respondent sustained head injuries, specifically haemorrhagic contusions and soft tissue injuries. This was corroborated by the CT scan report that showed there was no skull fracture.

12. As I understand, the substance of the appellant's contention is that the learned magistrate failed to consider the nature and extent of the injuries sustained by the appellant and hence came to the wrong assessment of damages. The appellant's case before the trial court and in this court is that the respondent did not suffer a fracture to the skull as a result of the accident.

13. I have examined the documents relating to the respondent's treatment. It is only the medical report of Dr. Njiru that states that the respondent suffered a fracture to the skull. The report of Dr. Leah Wainaina was backed up with a report from a radiologist who carried out a CT scan to the respondent's head that revealed no fracture to the base of the skull. It is my considered view that the inferences and conclusions one can make is that there was no fracture to the base of the skull.

14. I have re-evaluated the evidence on the injuries sustained and the cases cited by the parties most of which bore little relation to the injuries sustained especially those of the respondent. The case of **Duncan Mwenda (supra)** cited by the appellant bears more relation to those suffered by the respondent. In the case of **Lilian Wanja v Cyprian Mugendi Igonga & 2 others [2016] eKLR**, the high court revised the award to the appellant upwards from Kshs. 200,000/= to Kshs. 500,000/= for injuries of scars on the forehead, left side of the chest, left thigh, the knees as well as the right elbow which are minor compared to those suffered by the respondent.

15. The trial magistrate did not indicate in his judgment which authorities he relied on in assessing the quantum of damages. It is highly probable that the court left out important factors that ought to have guided him in the assessment. as a result which he arrived at a very high award of Kshs. 700,000/= whereas the injuries were mostly soft tissue.

16. I find that the appellant has satisfied the court that the quantum of damages was inordinately high. I hereby set aside the award of Kshs. 700,000/= and substitute it with Kshs. 450,000/= which in my view is an adequate award in the circumstances.

17. I find the appeal successful and allow it accordingly in the foregoing terms.

18. Each party to meet its own costs of the appeal.

19. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Nzekele for Naminda for Respondents**