



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 315 OF 2016**

**KEVIN NDURA MBUGUA.....APPELLANT**

**-VERSUS-**

**DAVID KARIUKI KIARIE.....RESPONDENT**

*(Being an appeal against the judgment and decree delivered by Honourable L.M. Wachira (Mrs.)*

*(Senior Principal Magistrate) on 27<sup>th</sup> May, 2016 in CMCC NO. 3348 OF 2013)*

**JUDGMENT**

1. David Kariuki Kiarie, the respondent herein, filed a suit against the appellant in which he sought for both general and special damages plus costs of the suit and interest thereon vide the plaint dated 24<sup>th</sup> May, 2013.
2. The respondent pleaded in his plaint that sometime on or about the 24<sup>th</sup> of July, 2012 while he was lawfully walking along Dagoretti-Kikuyu Road at Mukirithi area, the appellant negligently drove motor vehicle registration number KAZ 574M, causing it to veer off the road and knock down the respondent, leaving him with serious injuries.
3. The respondent attributed the accident to negligence on the part of the appellant by setting out its particulars in his plaint.
4. The appellant filed the statement of defence dated 18<sup>th</sup> November, 2013 to deny the respondent's claim.
5. During the hearing of the suit, the parties entered into a consent on liability in the ratio of 80:20 in favour of the respondent as well as an award on special damages in the sum of Kshs.188,650/ and future medical costs of Kshs.80,000/ for removal of the metal plate; leaving the issues of general damages, future medical expenses for bridging the respondent's missing tooth and transport costs, which the parties addressed through written submissions.
6. The trial court finally determined the suit in the following manner:

<i>a) Liability</i>	<i>80%:20%</i>
<i>b) General damages</i>	<i>Kshs.2,500,000/</i>
<i>c) Special damages</i>	<i>Kshs.268,650/</i>
<i>Total</i>	<i>Kshs.2,768,650/</i>
<i>Less 20% contribution</i>	<i>(Kshs.553,730/)</i>
<b><i>Total</i></b>	<b><i>Kshs.2,214,920/</i></b>

The respondent was also granted costs of the suit and interest.

7. Being aggrieved with the aforesaid judgment, the appellant has preferred an appeal against the same and put forward the following grounds vide his memorandum of appeal dated 16<sup>th</sup> June, 2016:

(i) THAT the learned trial magistrate erred in law and in fact and ended up misdirecting herself in awarding exorbitant quantum of damages of Kshs.2,500,000/ by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries allegedly sustained by the respondent herein.

(ii) THAT the learned trial magistrate erred in law in making such a high award as to show that she acted on a wrong principle of law.

(iii) THAT the learned trial magistrate's award on damages was so high as to be entirely erroneous.

(iv) THAT the learned trial magistrate's award was made without considering the medical evidence before the court and she failed to appreciate the nature of injuries sustained by the respondent and hence ended up making an excessive award in view of the medical evidence presented before her.

(v) THAT the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions and authorities in making a finding on quantum.

(vi) THAT the whole judgment on quantum was against the weight of evidence placed before the trial court.

8. This court directed the parties to file written submissions on the appeal. The appellant submitted that whereas the medical evidence produced before the trial court assessed the respondent's permanent incapacity at 12%, the injuries sustained by the respondent were of a skeletal nature and had healed with time, hence the award made on general damages was not only manifestly excessive but was not commensurate to the injuries suffered.

9. The appellant further contended that the trial court did not take into account the authorities cited in the parties' respective submissions, neither did she draw any guidance from comparable awards previously made.

10. For the above reasons, the appellant urged this court to disturb the award made on general damages, citing the case of **Rwaken Investments Limited v Isaac Kiprop Chelunyei & another [2016] eKLR** where an award of Kshs.1,200,000/ was substituted with one of Kshs.800,000/ for injuries similar to those in the present instance.

11. On his part, the respondent in supporting the trial court's award, submitted that the trial court took into consideration all relevant factors, including the medical evidence and the authorities cited by the parties which were merely of persuasive nature, further urging this court to consider **Edward Mzamili Katana v CMC Motors Group Ltd & Another [2006] eKLR** where the court awarded the sum of Kshs.2,000,000/ for similar injuries.

12. It was the respondent's assertion that there is no reason for interference with the trial court's award.

13. I have considered alongside the authorities cited and I have also re-evaluated the evidence placed before the trial court. Whereas the appellant put in six (6) grounds of appeal, I note that the main issue for determination has to do with the question of quantum, specifically the award on general damages.

14. To begin with, the courts have held that an appellate court can only interfere with an award of damages where either of the following principles are satisfied:

a) Where an irrelevant factor was taken into account.

b) Where a relevant factor was disregarded.

c) Where the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

15. Going by the trial court proceedings, it is apparent that the parties consented to amending paragraph 7 of the plaint to include particulars of the injuries in the manner hereunder:

a) Fractures of left maxilla and orbital wall

b) Fracture of left fibula/fibula proximal end

c) Fracture of right clavicle

d) Cut wounds on the chins

e) Loss of teeth

16. The medical report dated 25<sup>th</sup> February, 2013 prepared by Dr. Wokabi confirmed the above injuries, terming them as major. The good doctor also assessed the respondent's permanent disability at 12% and noted that the injuries had progressively healed.

17. In his submissions before the trial court, the respondent proposed the sum of Kshs.3,000,000/ as general damages, relying on the case of **David Iyaka Nyongesa v Synergy Industrial Credit Limited & 2 Others HCCC 394 Of 2010** where the court awarded Kshs.2,500,000/ for similar injuries.

18. In contrast, the appellant urged an award of Kshs.500,000/ citing *inter alia*, **John Kiriru Njoroge t/a Jengo & Associates, Advocates v David Njiru [2008] eKLR** where a plaintiff who had suffered fractures of the right hip bone, fracture of the both right leg bone (tibia and fibula) and multiple cuts on the abdomen and lower limbs was awarded Kshs. 450,000/ as general damages; and **Ukwala Supermarkets Ltd v Ronald Chando-Eldoret HCCA NO. 158 of 2009** where a plaintiff sustained a compound fracture of right tibia and fibula and was awarded Kshs.400, 000/= under the same head.

19. As already mentioned, the learned trial magistrate settled for an award of Kshs.2,500,000/ as general damages.

20. From my reading of the impugned judgment, I am satisfied that the learned trial magistrate looked at the parties' submissions and also considered the aforesaid medical report.

21. The learned trial magistrate did not cite or mention any comparable authorities that guided her decision to award Kshs.2,500,000/. Moreover, the learned trial magistrate did not clarify whether she found relevance in the authorities cited by the parties.

22. Upon this re-evaluation of the evidence before the trial court, it is apparent that the appellant through his submissions made reference to a 2<sup>nd</sup> medical report by Dr. Maina Ruga dated 19<sup>th</sup> December, 2013. However, the appellant did not attach a copy of the report to his record of appeal and the learned trial magistrate made no mention of the same in her judgment. In the circumstances, I am unable to address my mind to the aforesaid medical report since it remains unclear whether the same was placed before the trial court for consideration.

23. That notwithstanding, I have looked at the authorities cited in the rival submissions and find them to be in respect of comparable injuries. However, in **David Iyaka Nyongesa v Synergy Industrial Credit Limited & 2 Others HCCC 394 Of 2010** the court awarded Kshs.1,000,000/ and not Kshs.2,500,000/ as stated in the respondent's submissions. Furthermore, it is observed that the authorities cited by the appellant were decided close to 10 years prior to the delivery of the impugned judgment, hence the need to account for inflationary trends.

24. In addition, I have considered the cases of **Rwaken Investments Limited v Isaac Kiprop Chelunyei & another [2016] eKLR** and **Edward Mzamili Katana v CMC Motors Group Ltd & Another [2006] eKLR** cited by the appellant and the respondent respectively before this court. In the former authority, the medical evidence did not indicate any permanent incapacity, while in the latter authority, there were aggravating factors which made the injuries more severe than in the present instance.

25. I have taken into account comparable awards. In **Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] eKLR** the plaintiff therein had sustained similar injuries to those of the respondent. The permanent disability in that case was assessed at 5% which is less than the 12% assessment made in respect to the respondent herein. The court finally awarded a sum of Kshs.1,300,000/ as general damages for pain, suffering and loss of amenities.

26. In the more recent case of **Leonard Njenga Ng'ang'a & another v Lawrence Maingi Ndeti [2018] eKLR** involving a plaintiff who had sustained injuries related to those in this case, the High Court on appeal substituted an award of 2,150,000/ with that of Kshs.1,500,000/ under the head of general damages.

27. In view of the foregoing, I am convinced that the award made by the learned trial magistrate not only fell outside the range of comparable awards but was manifestly high. I am therefore inclined to disturb it.

28. In the end, the appeal is found to be meritorious and the award of Kshs.2,500,000/ under the head of general damages is hereby set aside and is substituted with an award of Kshs.1,500,000/.

29. For the avoidance of doubt the award on appeal is as follows:

a) General damages	Kshs.1,500,000/
b) Special damages	Kshs.268,650/
Gross Total	Kshs.1,768,650/
Less 20% contribution	(Kshs.353,730/)
<b>Net Total</b>	<b>Kshs.1,414,920/</b>

30. Interest at court rates on the special damages shall accrue from the date of filing of the suit while interest at court rates on the general damages shall accrue from the date of judgment until payment in full.

31. In the circumstances of this appeal, a fair order on costs is to direct each party to meet its own costs of the appeal.

**Dated, Signed and Delivered at Nairobi this 29<sup>th</sup> day of November, 2019.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent