



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CIVIL APPEAL NO. 15 OF 2016

MARTIN IRERI NAMU.....1ST APPELLANT

DICKSON KARIUKI NYAGA.....2ND APPELLANT

VERSUS

ALICALINDA IGOKI KIRINGA.....RESPONDENT

J U D G M E N T

A. Introduction

1. This is an appeal against the judgment of Embu Senior Resident Magistrate in CMCC No. 17 of 2013. The respondent sued the appellants jointly and severally for general and special damages following a road accident in which the respondent suffered serious injuries of left shoulder dislocation and fractures to the right tibia fibula and left radius ulna. The parties filed consent on liability in the ratio 90:10 in favour of the respondent. The trial court proceeded to award the respondent Kshs. 2,500,000/= in general damages and Kshs. 176,000/= special damages plus costs of the suit and interests subject to the agreed apportionment.

2. Being dissatisfied with the trial court's judgement, the appellants filed this appeal grounded on the fact that the learned magistrate erred in law in awarding the respondent excessive general damages in complete disregard of conventional awards for similar injuries and also in direct neglect of evidence submitted by the applicants.

3. The parties disposed of the application by way of written submissions.

B. Appellant's Submissions

4. The appellants' submit that the award to the respondent is excessively and manifestly high to warrant the interference of this court. Further, the appellants submit that awards must be within consistent limits taking into account comparable injuries and awards as was held in the case of **Denshire Muteti Wambua v Kenya Power Lighting Co. Ltd [2013] eKLR.**

5. It is submitted that the trial magistrate did not quote any authority to support the award of Kshs. 2,500,000/= so as to shed light on how his award was reached. The appellants relied on the case of **Millicent Atieno Ochuonyo v Katola Richard [2015] eKLR** where it was held inter alia that comparable injuries should be compensated by comparable awards.

6. The appellants submit that they relied on the unreported case of **Joseph Musee Mua v Julius Mbogo Mugi & 3 Others, Nairobi HCCC No. 86 of 2008** where the plaintiff suffered extremely severe and serious injuries that involved hospitalization for six months and was awarded Kshs. 1,300,000/= in 2008.

7. The appellants submit that compensation in the range of Kshs. 300,000/= – Kshs. 500,000/=, subject to liability as agreed, would suffice for the respondent. Reliance is placed on a number of cases. In the case of **Francis Maina Kahura v Nahashon Wanjau Muriithi [2015] eKLR** the high court revised downward an award of Kshs. 850,000/= to Kshs. 500,000/= for a segmental fracture of mid-shaft femur and a cut wound on the knee.

8. In the case of **Sammy Mugo Kinyanjui & Another v Kairo Thuo [2017] eKLR** an award of Kshs. 1,000,000/= was ruled to be on the higher side and was reduced to Kshs. 600,000/= for a respondent who suffered fracture of the right tibia fibula, fracture of the left tibia fibula and soft tissue injuries. Similarly, in the case of **Akamba Public Road Services v Abdikadir Adan Galgalo [2016] eKLR** the court substituted an award of Kshs. 800,000/= to Kshs. 500,000/= for injuries of fracture of tibia fibula and right fibula bone and a blunt injury to the right ankle.

9. The appellant also relied on the cases of **Kenyatta University v Isaac Karumbe Nyuthe [2014] eKLR** where the court substituted an award of Kshs. 700,000/= to Kshs. 350,000/= for injuries of fracture of the right femur, soft tissue injuries to the head and bruises on the right knee and temporarily lost consciousness, the case of **Samuel Kipkemoi Kirui v Ibrahim Shero Hussein [2016] eKLR** where the court held that an award of Kshs. 400,000/= was sufficient for injuries of a fracture of the left femur and severe soft tissue injuries of the left knee joint and finally the case of **Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR** where the court held that an award of Kshs. 700,000/= as general damages was sufficient for injuries of fracture of the right mid-shaft femur, fracture of the right mid-shaft femur, fracture of the left mid-shaft femur, degloving wound on the right tibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead.

10. The appellant also disputed the award of Kshs. 100,000 for future medical expenses as there was no evidence of the same as the respondent had confirmed to court on cross examination that the plates would not be removed.

C. Respondents' Submissions

11. The respondent submitted that the judgement entered by the trial court was proper and was based on the weight of evidence. It is further submitted that this court can only interfere with the trial court's award if it is shown by the appellant that the trial court took into account irrelevant factors or left out irrelevant factors when assessing the damages or if the amount of damages is so inordinately high or low that the quantum awarded is a wholly erroneous estimate of damages as was held in the case of **Ndung'u Dennis v Ann Wangari Ndirangu & Anor [2018] eKLR**. It was submitted that the appellant had not proved the above conditions.

12. The respondent submits that the award was not excessive. He relies on the case of **Lucy Waruguru Gatundu v Miriam Nyambura Mwangi [2017] eKLR** where the respondent states that the facts were similar to those in this case and the learned judge upheld an award of Kshs. 2,000,000/= as general damages.

D. Analysis & Determination

13. 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**.

14. I have carefully and keenly read and understood the proceedings, the judgement appealed against as well as the Record of Appeal, the grounds thereof 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 erred in its award of the general damages of Kshs. 2,500,000/=*.

15. 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.”

16. According to the record and the medical reports for both Dr. Thiong'o for the respondent and Dr. Leah Wainaina for the appellant, the respondent sustained a left shoulder dislocation and fractures on the right tibia fibula and left radius ulna. The trial court awarded a cumulative award of Kshs. 2,776,000/= as damages broken down as Kshs. 2,500,000/= for general damages, Kshs. 176,000/= for special damages and Kshs. 100,000/= for future medical expenses.

17. 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 awarding the respondent an amount which was inordinately high and further awarding the respondent Kshs. 100,000/= for future medical expenses whereas there was no evidence of the same given that the respondent had confirmed to court on cross examination that the plates would not be removed.

18. I have considered the injuries sustained by the respondent and the cases relied on by the parties. The cases cited by the respondent have little relevance to the injuries sustained. Specifically, the case of **Lucy Waruguru (supra)** where the injuries suffered by the plaintiff were far serious than those suffered by the respondent. In the aforementioned case of **Lucy Waruguru (supra)**, the plaintiff sustained injuries of *Right mid-shaft femur fracture, Comminuted compound tibia/fibula fracture, Right thigh ecchymosis and tenderness, Right leg 10cm cut wound, Septic bone loss and Tenderness of right hip*. The fractures suffered by the respondent herein were single fractures and not communitated fractures.

19. The case of **Sammy Mugo Kinyanjui (supra)** cited by the appellant is more comparable to the injuries suffered by the respondent. In that case the respondent suffered slight tenderness in the forehead, neck, chest, abdomen, right knee and both legs; fracture of the right tibia; fracture of the left tibia and fibula and the medical report revealed that his injuries though severe had healed. The court therein held that the award of Kshs. 1,000,000/= in 2017 which was found to be on the higher side and reduced to Kshs. 600,000/= in appeal.

20. Similarly, in the case of **Akamba Public Road Services (supra)** also cited by the appellant, the respondent sustained a fracture to the right tibia leg bone, malleolus and right fibular bone and a blunt injury to the right ankle. The medical report revealed that the respondent had a permanent partial disability of the right tibia and fibula due to fracture, the fracture site was a weak point, post fracture arthritis and pain. Permanent partial disability was estimated at three (3%) per cent and it was the doctor's opinion that the soft tissue injuries would leave no

residual disability. The court therein proceeded to substitute an award of Kshs. 800,000/= to Kshs. 500,000/= in 2016.

21. Having had due regard to the aforesaid cases and the factors of inflation, I am of the considered opinion that a sum of award of Kshs 800,000/= general damages for pain and suffering and loss of amenities would be adequate compensation for the injuries that the Respondent herein sustained. I do note that there was no reason given by the trial magistrate for the awarding the award of Kshs. 2,500,000/= as general damages which was not comparable to the injuries sustained.

22. On the issue of future medical expenses, I have already found that there was no legal or factual basis of the award of Kshs. 100,000/=. It is hereby set aside.

23. I find the appeal merited and it is hereby allowed.

24. The award is as follows: -

a. General damages for pain and

suffering - **Kshs. 800,000/=**

b. Special Damages - **Kshs. 176,000/=**

Total = **Kshs. 976,000/=**

c. Less 10% contribution = **Kshs. 97,600/=**

Kshs. 878,400/=

25. Each party to meet their own costs.

26. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Kathungu for Respondent