



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 42 OF 2017

JOHN MUTUGA KAMAU.....APPELLANT

VERSUS

KANINI HARAKA ENTERPRISES LIMITED.....RESPONDENT

(Being an appeal from the judgment of the Honorable Z. Abdul Resident Magistrate

delivered on 29th August 2017 in Naivasha CMCC No 383 of 2016.)

JUDGMENT

Background

1. This is an appeal against the trial court's judgment on the quantum of damages awarded which were as follows:

- a. General damages Kshs. 1,500,000.00
- b. Special damages Kshs 5,250.00

Kshs, 1,505,000.00

2. The defendant was held 100% liable in the lower court. The plaintiff was a cyclist who was knocked down by vehicle Registration no KBB 495G driven by the defendant's driver. The defendant did not adduce any evidence at the trial. Accordingly, the defendant did not avail any evidence that controverted that availed by the plaintiff.

3. The injuries, for which Dr. Obed Omuyoma assessed permanent disability at 40% were as follows:

- Fracture of the right femur
- Right acetabula fracture
- Deep cut wound on the forehead
- Loss of one upper incisor tooth
- Fracture distal end of the right radius
- Severe soft tissue injury of the right wrist joint
- Blunt injury to the right shoulder joint leading to soft tissue injuries
- Deep cut wound on the right hip joint leading to severe soft tissue injury

4. The appellant's grounds of appeal are:

a. That the learned trial Magistrate erred in law and fact in failing to consider adequately or at all the submissions by the appellant and the authorities submitted.

b. That the learned trial Magistrate erred in law in awarding damages which were so inordinately low as to represent an entirely erroneous estimate of the compensation due to the appellant, owing to the nature of the injuries sustained and the residual disabilities thereto.

5. Both parties filed their written submissions. The appellant who was the plaintiff in the lower court, seeks that this court should review the lower court's award upwards.

6. As this is a first appeal, this court has the duty to review both the legal and factual basis of the suit. In doing its review and reappraisal, this court must be cautious because it did not have the opportunity of seeing and hearing the witnesses first hand. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See **Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA123** and **Abdul Hammad Saif v Ali Mohamed Sholan (1955) 22 EACA, 270**.

Whether the trial magistrate considered all the defendants' submissions

7. As to whether the defendant's submissions were disregarded, the point to note on this head of appeal is what was stated in **Joshua Shitawa v Kishan Builders Limited Eldoret Civil Appeal No 32 of 2012 [2015] eKLR**: namely, that final submissions are only for the guidance of the court; they are unlike pleadings. There is no requirement that each and every submission or authority tendered be analysed in the judgment.

8. In **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held that:

*“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see **Mariga V Musila [1984] KLR 257**).”*

9. The same was reiterated in the case of **Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR**, where the Court of Appeal held that :

*“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in **Rook v Rairrie [1941] 1 All ER 297**. It was echoed with approval by this Court in **Butt v. Khan [1981] KLR 349** when it held as per Law, J.A that:*

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

10. I have read the judgment by the trial magistrate. She clearly considered the evidence, submissions and authorities relied on by both parties. Indeed, she noted that the plaintiff suffered severe injuries which were assessed at 30% and 40% on permanent physical disability by Dr. Malik and Dr. Omuyoma respectively. As would be expected, however, the authorities relied on by the plaintiff were for more severe injuries; whilst the ones relied on by the defendant were for injuries less serious than those in the present case. For that reason the trial magistrate relied on the case of **Samuel Makumi Githambo vs South Siox Farms Ltd Nkr HCCC 9/2008** where the injuries were more similar to those suffered by the plaintiff.

Injuries

11. I have already highlighted the injuries set out by Dr. Obed Omuyoma, who assessed disability at 40%. On re-examination by Dr. Malik, the appellant suffered the injuries below:

- Fracture of the pelvis
- Fracture of the right acetabulum
- Fracture right femur
- Fracture right wrist joint
- Soft tissue injuries to the head

- Soft tissue injuries to the right shoulder
- Soft tissue injuries of the right groin

The doctor awarded permanent physical disability at 30%

12. The Appellant's authorities included the following: **James Njau Kariuki vs Mary Goreti Wakwibubi & another (2007) eKLR**, where the plaintiff suffered closed head injury- laceration on the forehead of 7cm, bruises and facial cut wounds on the bridge of the nose and over the left eyebrow area- cut left alae nasal, deep cut wound left knee joint, dislocation of the left knee joint, fracture of left acetabulum with left hip dislocation, fracture of the left femur, soft tissue injuries on the left side of the chest. Treatment included total hip replacement and complaints included inability to do strenuous work and to have sexual intercourse. The plaintiff was awarded Kshs 3,000,000/=. This authority is more severe because the plaintiff underwent a total hip replacement, and is unable to have sexual intercourse. The permanent partial disability there was at 50%

13. Appellant also relied on **Florence Hare Mkaha v Pwani Tawakal Mini Coach & Another (2012) eKLR**, where the plaintiff suffered failure of the iliac crest, superior ramus, left pubis, fracture left acetabulum, left knee-fractural condyle of femur. The medical reports indicated that the plaintiff was saddled by permanent incapacity or disability, but the level or percentage thereof is not indicated in any of the reports. The plaintiff there was awarded Kshs 2,400,000/=. Apart from the fracture of the acetabulum the rest of the injuries are inconsistent with the case at hand and the percentage of permanent incapacity is unknown.

14. In addition, the appellant cited **Sabina Nyakenga Mwanga v Patrick Kigoro & Another (2015) eKLR**, where the plaintiff suffered fracture of the humerus, fracture of the pelvis, fracture of the right knee, fracture of condyle femur, bruises on the face, severe retroperitoneal hemorrhage, multiple soft tissue injuries. Permanent incapacity was assessed at 42%. The plaintiff was awarded Kshs 3,000,000/=. This authority has a *close similarity* with the case in issue *apart from the severe retroperitoneal hemorrhage and the higher permanent incapacity* than the instant case.

15. The Respondent's authorities in the lower court included: **Joseph Mutua Kinuthai v David Kamande Kinuthia HCC 621 of 1998** where the plaintiff sustained compound fracture of right tibia and fibula, fracture of femur and midshift, fracture of left tibia and fibula bones and laceration wounds and the court awarded Kshs.120,000/- in general damages. Clearly, this authority demonstrates injuries that are less severe than the case at hand.

16. The trial court eventually relied on **Samuel Githambo Makumi v South Siox Farms Ltd. Nakuru HCC No. 9 of 2008**. There, the plaintiff was awarded Kshs.1,500,000/= for injuries sustained as follows: multiple fractures of the right and left femur, fracture of inferior public ramus radius and right pelvis, fracture of the right scapular, and closed fracture medial malleolus of the leg.

17. Looking at the cases considered in the trial court, those that most closely compare to the present case are the authorities relied on by the plaintiff, namely, the **Sabina Nyakenga Mwanga case** and the **Samuel Githambo Makumi case** relied on by the court.

18. However, in my view, the **Samuel Githambo Makumi case** relied on by the trial court is a fairly old case decided in 2009. On the other hand, the case of **Sabina Nyakenga** relied on by the appellant in the lower court is a fairly recent case, and injuries fairly closely resemble those in the present case. Factoring in the issues of inflation, and the age of the authorities, I find that the award of the trial court was inordinately low and based on the wrong principles.

19. I agree with the appellant's counsel and find that the award made for general damages was inordinately low. An amount of Kshs 2,400,000/= would have been more appropriate to compensate the plaintiff. I would award general damages of Kshs 2,400,000/= in the present case.

Disposition

20. Accordingly, I set aside the award of the trial court, and substitute it with the following award in favour of the appellant/plaintiff:

- | | | |
|--------------------|-------|---------------------|
| a. General damages | Kshs. | 2,400,000.00 |
| b. Special damages | Kshs | <u>5,250.00</u> |
| Kshs, | | 2,405,000.00 |

2. The appellant / plaintiff shall be entitled to the costs of the appeal.
3. Orders accordingly.

Dated and Delivered at Naivasha this 17th Day of December, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Obino holding brief for B. G. Wainaina for the Appellant
2. No representation for Mahida Maina for the Respondent
3. Court Clerk - Fred Kamau