



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**CIVIL APPEAL NO.9 OF 2017**

**HUSSEIN ALI SHARIFF alias HUSSEIN ALI .....APPELLANT**

**VERSUS**

**A L L (Minor suing through F T L.....RESPONDENT**

**JUDGEMENT**

A L L , a minor aged 12 years old, was involved in a road traffic accident on 27<sup>th</sup> April, 2012 in Marsabit. His father instituted Civil Suit No.13 of 2015 before the Magistrate's court in Marsabit. On 15<sup>th</sup> August 2017 parties filed a consent before the court whereby liability was agreed upon at 80% against the appellant and 20% against the respondent. Parties further agreed to produce two medical reports without calling the MAKERS and filed written submissions on quantum.

The trial Court assessed general damages at Ksh.3.7million. This triggered the filling of this appeal based on the following grounds:

- 1. The assessment of general damages at Ksh.3.7 million is inordinately high in the circumstances.***
- 2. The trial Court did not consider the submissions by both parties and ignored their respective authorities.***
- 3. The trial Magistrate erred by failing to consider that the minor had healed with minimal disability.***
- 4. The trial Court departed from the principles applied in award of damages.***

M/S Kibatia & Co. Advocates appeared for the appellant. Counsel submit that the respondent's counsel submitted for Ksh.4 million as general damages while they submitted for an award of Ksh.1.8million. Their submission was based on the case of ***JOSEPH MUSEE MUA –V- JULIUS MBOGO & OTHERS, Nairobi HCCC No.86 of 2008*** where Ksh.1.3 million was awarded for similar injuries. After taking inflation into account, counsels offered Ksh.1.8million as general damages. It is further submitted that the trial Court framed an issue as to whether the defendant was liable to pay Ksh.4 million as general damages. The trial Court appeared to assess damages from the figure of Ksh.4 million and this was erroneous.

Counsels for the appellant further contend that the trial court erred by considering the age of the minor

and the age of the victim in the case of **EDWARD MUZAMILI KATANA – V- CMC MOTORS LTD (2006) KLR**. The victim in that case was 52 years old while the minor in this case was 12 years old. That consideration is not supported by the law. The only consideration is inflationary trends. A second medical report by Dr. Wambugu noted that the minor walked with normal gait and unaided. There was no shortening of either limbs and the left ankle joint was neither swollen nor deformed. The fractures had united quite well. The damages awarded is inordinately high in the circumstances.

Mr. Kitheka appeared for the respondent. Counsel supports the award. Counsel submit that both doctors who examined the victim opined that the minor was predisposed to post traumatic osteoarthritis and inability to walk long distances. Dr. Wambugu assessed permanent incapacity at 6%. The injuries suffered are severe and have left life changing effects on the minor. Counsel maintains that the award is not inordinately high and that the trial court did not proceed on wrong principles. Submissions by both Counsels were considered by the trial Court.

This is the first appeal. No evidence was adduced. I have to evaluate the facts of the case and make my own conclusion. The trial Court made comparison on the age of the victim in this case and that of **EDWARD MUZAMILI KATANA (Supra)**. That comparison becomes relevant when it comes to issues of permanent incapacity and the predisposition to post traumatic osteoarthritis. If a young victim suffers permanent incapacity, which greatly affects his normal life, there is nothing wrong to take that into account. Such a victim is likely to live longer with that incapacity as compared to an elderly victim. The same applies to osteoarthritis. If such problems sets in during early age, the young victim is likely to suffer pain and suffering for quite a long period. I see nothing wrong in that consideration by the trial court.

The Magistrate's court framed three issues. The 1<sup>st</sup> issue involved the degree of negligence. Liability had already been agreed upon and this was a non- issue. The second issue involved special damages of Ksh.100,769. The appellant seems not to be complaining about that award. The 3<sup>rd</sup> issue was "**whether defendant liable to pay Ksh 4 million as general damages**". Counsel for the respondent had submitted for a sum of Ksh 4 million as general damages while the appellant had offered Ksh.1.8 million. Although Counsels for the appellant contends that the two figures are quite close. It is evident that there is over Ksh.2.2million difference. Turning to the issue as framed by the trial Court. I do agree with the appellant's submissions that the manner in which the issue was drafted is erroneous. It makes the Court to focus mainly on that figure as opposed to considering the injuries suffered. The Court is likely to consider how much to reduce from the figure of Ksh.4 million instead of assessing damages in line with the injuries. I have noted that while considering the issue of damages, the trial Court considered the applicable principles such as inflation, the degree of injury suffered and past decided cases relating to comparable injuries. The Court could have framed the issue as "What quantum should be awarded to the victim."

Two medical reports were produced by consent. The first medical report by Dr. J.W. KIHUMBA dated 12.10.2014 itemized the injuries as follows:

- **Closed left humerus mid-shaft fracture**
- **Right clavicle medial end fracture**
- **Left calcaneal fracture**
- **Right superior and left inferior pelvic rami fracture**
- **Left fourth toe middle phalanx injury**

At the time the minor was examined by Dr. Kihumba, he complained of pain in the left humerus especially during cold weather, scars on the incision wounds and chronic pain with a limping gait in the left foot especially during long distances. The doctor opined that the victim was predisposed to post traumatic osteoarthritis.

The second medical report by Dr. Wambugu P.M is dated 13<sup>th</sup> July, 2017. It gives the injuries as follows:

- *Fracture left humerus*
- *Fracture right clavicle*
- *Fracture pelvis involving the right acetabulum and left pubic ramus.*
- *Fracture left 4<sup>th</sup> toe.*
- *Chip fracture left upper central incisor.*

The victim complained of occasional pains left arm which is worse when it is cold, occasional low back pains on sitting for long and occasional left ankle pain. The doctor observed that the child was predominantly right handed. The left upper limb was moving with complete range and pain free save for the healed surgical scar, he had a scar on the healed right clavicle, walked with a normal gait and unaided. No true shortening of either limbs, left ankle joint was not swollen or deformed and had pain free movement. The right hip joint movements are normal. Dr. Wambugu agreed with the findings of Dr. Kihumba on the issue of early onset of osteoarthritis . He assessed permanent incapacity at 6%.

In the case of **EDWARD MZAMILI KATANA(Supra)** that was cited by counsel for the respondent, the victim suffered head injury with concussion, cut wound and bruises scalp, fracture of the left scapula, compound fracture dislocation of the left elbow, chest injury with multiple fractures of the left 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> ribs and fracture of the left femur upper ? shaft. Ksh. 2 million was awarded on 10<sup>th</sup> May 2006. Counsel for the appellant relied on the case of **JOSEPH MUSEE MUA (Supra)**. In that case Ksh.1.3 million was awarded as general damages on 21<sup>st</sup> November, 2013. The victim sustained Injuries on the head, left leg, broken tooth and a missing tooth, chest pain and injuries on the right shoulder and left elbow. Fracture of tibia and fibula bones. He was hospitalized for 2 ½ months and permanent incapacity was assessed at 5%.

The principles involving award of damages are well settled. A Superior Court should not readily interfere with the award of damages made by a lower court unless it can be shown that the Court applied wrong legal principles or that the award is inordinately high or low to amount to an erroneous estimate. The record shows that when the first medical report was done, the victim was still suffering from the injuries sustained during the accident. The trial Court correctly observed that the report was done about two years after the accident. The second report was done in 2017 about five years later. By then the victim had almost healed and was walking normally. The only issue was the threat of early onset of osteoarthritis and the pain on the left hand during cold weather. It is well established that the damages awarded by Courts cannot fully compensate the injuries sustained by accident victims. Medical doctors can only anticipate what the victims are likely to suffer in future as a result of the injuries. Such propositions may or may not occur. The most important thing is to take the position that the post-accident effects will indeed occur. On the other hand, the damages awarded should not be seen as a punishment to those held liable. The Courts should strike a balance between the two.

Taking the circumstances of this case and the opinion of the two doctors on the injuries suffered by the victim, I do agree with the appellant's contention that the assessment of damages by the trial Court is excessively high. The victim had almost fully healed and was walking normally. I do find that an award of Ksh.2.7 million is sufficient compensation as general damages.

In the end, I do find that the appeal is merited and is hereby allowed. The amount of Ksh.3.7 million awarded by the trial Court is set aside and replaced with an award of Ksh.2.7 million. The special damages of Ksh.100,769 is hereby retained. Parties shall bare their respective costs for this appeal.

**Dated, Signed and Delivered at Marsabit this 23<sup>rd</sup> Day of January, 2018**

**S. CHITEMBWE**

**JUDGE**