



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL APPEAL NO. 7 OF 2015

ISMAEL LONGISHU KOBEL.....APPELANT

-VERSUS-

DAVID KARIUKI GICHANGI.....1ST RESPONDENT

THOMAS MAGARE.....2ND RESPONDENT

(Being an appeal from the judgement/decree dated 15/4/2015 in the Senior Principal

Magistrate's Court at Narok in Civil suit No. 47 of 2014, Ismael Longishu Kobei v. 1. David Kariuki Gichangi and 2. Thomas Magare)

JUDGEMENT

1. The appellant has appealed against this judgement and decree which awarded him damages in the sum of Kshs.980,889. He has appealed on the basis that the award was manifestly low and should be enhanced. Counsel for the appellant has filed written submissions in support of the appeal.

2. The respondents have opposed his appeal. In support of their opposition, the counsel has filed written submissions.

3. The appellant was a passenger in the respondent's vehicle registration No. KAN 368K. He was heading to his home when a collision occurred between that vehicle and vehicle registration No. KAP 902A and in the process he sustained the following injuries:

- 1) Fracture of the right femur.
- 2) Fracture of the left femur.
- 3) Fracture of the left tibia plateau
- 4) Fracture of the left 2nd metatarsal.
- 5) Fracture of the left navicular bone.
- 6) Deep cut wound on the right temporal region.
- 7) Deep cut wound on the right elbow.
- 8) Cut wound on the right leg.

4. The appellant was initially admitted at the Narok District Hospital. He was then taken for treatment at P.C.E.A Kikuyu Hospital. According to the report of Dr. Michael Maru of P.C.E.A Kikuyu Hospital, the appellant sustained fractures of both femurs, left tibia and right foot. The appellant underwent debridement of open femur fracture. He then underwent bilateral femur nailing, ORIF tibia and ORIF foot.

5. Furthermore, there is the medical report of Dr. Wellington Kiamba which is very detailed. Dr. Kiamba found that the appellant sustained the above mentioned injuries as a result he underwent open reduction and internal fixation of the fractures. There were also k-nail screws and plates which were still in his legs. He was of the opinion that the appellant would still require operations for the removal of the nail plates and screws whose minimum cost was estimated Kshs.200,000. He concluded that the appellant had a permanent disability to the extent of

60% and a temporary disability of 12 months.

6. In this court the appellant has raised 5 grounds of appeal. In ground one the appellant has faulted the trial court for misdirecting itself both in law and fact by ignoring his testimony, medical documents and the submissions of his counsel in respect of the gravity of those injuries. Counsel for the appellant cited *Kenya Power and Lighting Co. Ltd v. Mathew Kabage Wanyiri [2016] eKLR*, in which the plaintiff was awarded Kshs.1,200,000 in respect of the following injuries: fracture of the shaft of the left femur and the neck of the right femur, which resulted in a shortening of the lower limb and loss of function at the hip. The plaintiff suffered a permanent disability of about 20%.

7. Furthermore counsel cited *P.W. v. Peter Muriithi Ngari [2017] eKLR*, in which the plaintiff was awarded Kshs.1,600,000 in respect of the following injuries: a fracture of the left femur which had been operated before and fixed with a metallic plate. The plaintiff also suffered fractures of the left fibula and tibia malleoli, which were operated on and fixed with k-wires and plates. The plaintiff also suffered blunt injuries to the pelvis causing fractures of the pelvis.

8. It was counsel's submission that in the light of the injuries and the 60% permanent disability suffered by the appellant, the general damages should be enhanced to Kshs. 3,000,000. Furthermore, it was his contention that the appellant should be awarded the following damages:

- 1) Kshs.600,000 for future medical treatment and operation on the hip joint and the legs.
- 2) Kshs.200,000 for the removal of the plates and screws.
- 3) Kshs.150,000 being the cost of removal of the metal implants.
- 4) Kshs.500,000 for constant medication and future surgery for the hip joint replacement.

9. The respondent in this regard submitted that the award of general damages is at the discretion of the trial court, in respect of which he cited *Butt v. Khan [1981] KLR 349*, in which the Court of Appeal, Law (JA) stated 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. Furthermore, the submission of counsel for the respondent that the appeal is incompetent for lacking the decree, that is appealed against is now a moot issue. It became a moot issue following the order of this court directing the appellant to file a supplementary record of appeal, which was complied with. The said record was served upon counsel for the respondents on 6th June, 2018, according to the affidavit of service dated 11th June, 2018. I authorized this procedure in the interests of expeditiously determining the instant appeal in terms of *article 159 of the 2010 Constitution*.

11. I have considered the authorities cited by counsel for the appellant and I find that the injuries sustained by the plaintiffs in those cases were less serious than the injuries sustained by the appellant in the instant case. According to *Butt & Khan, supra* as an appeal court I may only interfere with an award of the trial court on the following grounds. First, where the award by the trial court is so inordinately high or low as to represent an entirely erroneous estimate. Second, where it is shown that the trial court proceeded on wrong principles. Third, where it is shown that the trial court misapprehended the evidence in some material respects. I find that the injuries sustained by the appellant were more serious than those sustained by the plaintiff in *Kenya Power & Lighting Co. Ltd. V. Mathew Kabage Wanyiri, supra*, in which the plaintiff therein suffered fracture of the left femur and neck of the right femur with the result that the plaintiff had recovered but ended up with a shortening of the right lower limb and loss of function at the hip with a permanent disability of about 20%. The plaintiff was awarded Kshs.1,200,000. That was in the year 2016.

12. Furthermore, in *P W v. Peter Muriithi Ngari, supra* the plaintiff was awarded Kshs.1,600,000 in respect of a fracture of the left femur which was operated on and fixed with a metallic plate. Additionally, there were fractures of the left fibula and tibia which were operated on and fixed with k-wires and plates. And finally, the plaintiff therein sustained blunt injuries to the pelvis causing fractures to the pelvis. The award was made in 2017.

13. In view of the injuries sustained by the appellant in the instant appeal and in comparison with the injuries sustained by the plaintiffs in those cases, I find that the trial court awarded inordinately low damages to justify interference by this court. I hereby do so and I award the appellant Kshs.2,000,000 as general damages. In addition, I award the appellant Kshs.500,000 special damages which were pleaded and proved in evidence.

14. The upshot of the foregoing is that I hereby enter judgement in favour of the appellant jointly and severally against the two respondents as follows:

General damages Kshs.2,000,000

Special damages Kshs. 830,889

Cost of removal of the metal implants Kshs. 150,000

Liability at 100%

TOTAL **KSHS.2,980,889**

15. The appellant has succeeded in this appeal. According to *P W v. Peter Muriithi Ngari, supra*, a successful party in terms of section 27 of the Civil Procedure Act [Cap 27] is entitled to his costs unless there is a good reason to deprive him. The reasons for the deprivation must be stated. Similarly in *Universal Engineering works v. Mohamedali Suleiman Essaji (1951) 2 LRK 99*, it was held that a successful party is entitled to costs unless there are good reasons for depriving him the costs. I find there is no good reason to deprive the appellant the costs of this appeal.

16. As a result the appellant will have the costs of this appeal together with interest.

Judgement Dated, Signed and Delivered in open court at Narok this 25th day of July, 2018 in the absence of both parties.

J. M. BWONWONGA

JUDGE

25/7/2018