



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO. 12 OF 2017.

KENYA WILDLIFE SERVICE APPLICANT

VERSUS

GODFREY KIRIMI MWITI RESPONDENT

JUDGMENT

The respondent was employed by the appellant as a ranger. On the 12th of July 2013 the respondent while in the cause of his duties was travelling in motor vehicle Registration Number, KBB 542S ISUZU LORRY along the Marsabit - Loiyangalani road at about 7.00pm when the vehicle overturned. The respondent sustained injuries and filed the civil suit before the Marsabit principal court seeking damages. The trial court awarded the respondent Kshs. 3, 500,000 as general damages. Kshs. 180,000 for future medical expenses and Kshs. 5,000 as special damages. The appellant was held 100% liable. The appeal is based on the following grounds: -

- 1) That the trial court erred in law and fact by awarding exorbitant damages of Ksh. 3,500,000/= which is too high in comparison to the weight of the evidence on record and in total disregard of the legal precedents in similar cases.
- 2) That the trial court erred in law and in fact by totally ignoring the Appellant's evidence and in particular the uncontroverted 2nd medical report opinion and submissions on record.
- 3) That the trial court erred in law and in fact in awarding damages for future medical expenses contrary to the Respondent's pleadings and evidence before it.
- 4) That the trial court erred in law and in fact by awarding damages which are not commensurate with the injuries suffered by the Respondent.
- 5) That the trial court erred in law and in fact in failing to appreciate and find that damages for pain and suffering ought to be punitive but consolatory especially considering the fact that the Applicant had catered for all the Respondent's medical bills.
- 6) That the trial court's decision is against the weight of the evidence on record and bad in law and the awarded damages were given without any legal basis.

Mr. Kariuki appeared for the appellant. Counsel submit that the awarded damages are exorbitant. Comparable injuries should attract comparable wards. Counsel relies on the case of **DORCAS MUTUTHO ILEVE Vs MUIHYA LYDIA (2018) eKLR** where the court stated as follows: -

“I respectfully agree with the principles for consideration of awards of general damages as set out in various precedents that damages must be conventional, with comparable injuries being remedied by comparable awards made in similar cases while giving allowance for changes in the value of money generally, and that the amounts should aim to achieve a fair compensation for both the plaintiff and the defendant and to be reflective of the comparative health of the Kenyan economy, as well as sensitive to ability of the defendants to meet the liability.”

Mr. Kariuki further submit that there were two medical reports. The medical report by the respondent's doctor assessed permanent incapacity at 25% while the appellant's doctor assessed permanent incapacity at 15%. It is submitted that Courts should not award sums that are punitive. Mr. Kariuki relies on the case of **IBRAHIM KALEMA LEWA Vs ESTEEL CO. LTD (2016) eKLR**. In this case the victim suffered 25% permanent incapacity. Kshs. 300,000 was awarded as damages. The case of **MWAVITA JONATHAN Vs SILVIA ONUNGA (2017) eKLR, Kisumu HCA 17 OF 2017** also been cited. Justice Majanja awarded Kshs. 400,000 where the claimant sustained

left hip commuted intertrochanteric fracture, blunt chest injury, dislocation right knee joint, sprain at the cervical spine of the neck and lumber- sacral spine of the back.

Counsel for the appellant also submit that the award of Kshs. 180,000 for future medical expenses is also erroneous. The 2nd Medical report indicate that the respondent does not require any further treatment. The award of Kshs. 180,000 is therefore against the weight of evidence on record. The award by the trial Court should therefore be disturbed.

Mr. Mwirigi appeared for the respondent. Counsel submit that the assessment of damages by the trial court is reasonable. The award of Kshs. 3.5 million is not inordinately high or excessive bearing in mind the injuries suffered by the respondent. The respondent was examined by Dr. Nicholas Koome on July 2015 and he was still complaining of pain yet the accident occurred on 12th July 2013. A second medical report by Dr. W.M Wokabi also gave similar injuries as the one by Dr. Koome. The second medical report assessed permanent incapacity at 23%. There is no dispute in relation to the injuries sustained by the respondent and their severity. It is also submitted that the medical report by Dr. Koome gives an estimate of future medical expenses that will be incurred by the respondent. The appellant is not claiming to be paid the hospital expenses because the same were paid by the appellant's insurers, **KEN INDIA ASSURANCE COMPANY LIMITED**. Counsel maintain that the findings by the trial court on liability have not been faulted by the appellant. Counsel relies on the case of **KIGARAGARI VS AYA (1985) eKLR** where the court of appeal stated as follows:-

For this court to interfere it must be shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or inadequate that a wrong principle may be inferred.

This is a first appeal and the court is expected to re-evaluate and draw its own conclusion. Before the trial court two witnesses testified for the plaintiff's case while no witness testified for the defendant. The respondent testified that he was employed by the appellant and was stationed at **SIBILOI NATIONAL PARK**. On 12th July 20013 at about 7.00pm they were taking supplies to Loiyangalani and Sibilo. They were traveling in motor vehicle registration number **KBB 542S**. The vehicle was moving at a high speed and overturned while the driver was negotiating a right corner. He suffered several injuries and was treated at Loiyangalani and also at the Karen hospital in Nairobi. He still has problems of walking because of double vision. He has a headache during cold and hot weather. He is unable to chew hard foodstuffs since he lost some of his teeth. When he resumed his duties he was assigned the CCTVs surveillance section because he could not hold a gun properly. Later on he could also not work with the CCTVs as he was using one eye. The medical board assessed and found him to be unfit for any deployment. He still had implants which required to be removed at a cost of Kshs, 180,000. The artificial dentals also require changing. He was retired from service. After the accident he became unconscious and only found himself at Loiyangalani District hospital where he was admitted for one day. He was then airlifted to Karen hospital. The hospital bill was settled by the appellant.

PW2 PC ADAN BONAYA was stationed at Loiyangalani police station. He confirmed that the accident was reported at the police station on 12th July 2013. He produced the police abstract that was filled at the station.

The respondent was a passenger in the accident vehicle. The appellant is not contesting the trial Court's findings on liability. The respondent did not contribute to the occurrence of the accident. The appellants correctly did not fault the trial Court on liability.

The appeal is mainly on the amount of damages awarded. This is both for the amount of general damages and the future medical expenses. Two medical reports were produced. The report by Dr. NICHOLAS KOOME describes the respondent's injuries as: -

- Left zygomatic bone fracture.
- Left ethmoidal bone fracture and maxillary fracture.
- Nasal septum fracture.
- Lower orbital floor fracture.
- Loss of teeth, 6 on upper; 3 on lower jaw.
- Distal left radius fracture.

The doctor assessed permanent incapacity at 25%. He also indicated that the respondent requires further surgery to remove the implants in his facial bone, and left wrist at an approximate cost of Kshs. 180,000.

The 2nd medical report is dated 20th September 2017 by Doctor W.M. WOKABI. The doctor's report states as follows: -

Medical, clinic and radiological evidence confirms that he had sustained multiple fractures of the face namely left ethmoid, left maxilla, left zygoma, nasal septum and left orbit. He also lost a total of 9 front teeth. He underwent surgery and these fractures were reduced and fixed with facial implants. The lost teeth were replaced with permanent bridges. He was later assessed that he retires on medical grounds. He was also registered as a person living with disability. I can also confirm that he sustained fracture of the distal end of the left radius. This fracture was fixed with a metal plate.

Today his complaints that: -

- a) He sees double with the left eye**

b) He has deformity of the left thumb.

c) He cannot lift or carry heavy objects with the left upper limb.

d) He cannot grip or grasp tightly with the left hand.

Examination revealed that he had an obvious deformity. He is wearing spectacles whose left glass is opaque. He has an upper permanent bridge of teeth and lower permanent bridge of 3 teeth. There is a scar on the anterior left forearm. The movements of the left wrist are marginally restricted. There is a mallet finger deformity of left thumb due to out extension tendon. X-rays reviewed show presence of plated fracture of the distal end of the left radius.

The doctor assessed permanent incapacity at 15%. This incapacity is in relation to the double vision on the left eye. According to the doctor, double vision is very disturbing and affects eyesight to an extent that it affects reading and walking. There is no remedy for this problem. 30% incapacity is for total blindness of one's eye. The doctor also assessed disability on the left hand at 8% and totaled all round incapacity at 23%. I see no much difference with the permanent incapacity assessed by Dr. Koome of 25%.

In the case of **BUTLER Vs BUTLER (1984) KR, 225**, the Court of Appeal stated as follows in relation to award of damages: -

8) In awarding damages, a court should consider the general picture and all the prevailing circumstances and effect of the injuries on the claimant but some degree of uniformity is to be sought in the awards, so regard should be paid to recent awards in comparable cases in local courts.

10) The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.

I have seen the decision of Majanja J in the case of Mwarita Jonathan (supra). The trial Court had awarded Kshs. 1,000,000 as general damages and Kshs. 327,518 as special damages. In my view those injuries were quite serious and could attract more than Kshs. 400,000 as held by the trial court. This is my opinion. As held in the Butler Vs Butler case, there is the discretionary element accorded to the judicial officer who is assessing damages. Such discretion must however be exercised judiciously and guided by past decisions and the circumstances of the case.

In the case of **IBRAHIM KALEMA LEWA (supra)**, Justice J.K Serگون declined to disturb an award of Kshs. 300,000 by the trial court for intertrochanteric fracture of the left femur. The claimant was admitted for two months.

In the case of **TERRY KANYUA MARANGU Vs WELLS FARGO LIMITED; MERU HCCC NO. 18 OF 2013 (2014) eKLR** the claimant sustained injuries to the head and was unconscious with Glasgow Coma scale 9/15, cut wound on the left upper lip, loss of two left upper incisors, cut wound on left wrist joint with multiple lacerations, depressed fracture left frontal region which healed with obvious deformity, peri-orbital left eye swelling with ecchymosis and cut wound right lower limb-pre tibia region. He complained of persistent loss of memory and had visible facial scars. Kshs. 3,600,000 was awarded for general damages for pain and suffering. This authority was relied upon by the respondent's counsel before the trial court.

According to doctor Wokabi, the internal fixation of the facial fractures is satisfying and does not show any facial deformity. Implants were used to fix the fractures and will not require to be removed. If they remain they will not cause any adverse effects. The respondent also suffers from double vision. He was assigned CCTV duties but could not cope and was ultimately retired on medical grounds.

The report by the Ministry of Health dated 4/2/2015 indicate that the respondent's physical appearance is good. The report indicate that he suffered facial injuries, dental formula injuries and fracture of the wrist. There is loss of 30% function capacity on the left eye. The incapacity is permanent. Three doctors namely Dr. Pacitica Onyancha, Dr. Catherine Mutisya and Dr. Dennis Otworu signed the medical report which led to the retirement by the respondent on medical grounds. He was declared unfit for further service and the left eye was found to have lost 30% vision.

In the case of **ALPHONSE MWATSUMA MWAGAMCHI Vs JOSEPH MWANZI, A MWANZU & ANOTHER; Mombasa HCCC NO. 300 OF 2001; (2005) eKLR**, the claimant sustained loss of seven (7) teeth and injuries to his legs. He was walking with the aid of a stick (Bakora). The injuries healed but the loss of seven (7) teeth was permanent incapacity. The Court awarded Kshs. 1,200,000 as general damages and Kshs. 190,000 as cost of replacing the lost teeth. In the same case, the court considered the case of **P. NEKESA Vs ANDREW MWAMBUINGU & ANOTHER; HCCC NO. 4539 of 1988 (Nairobi)**. Where Kshs. 380,000 was awarded in 1993 for fracture of the Maxilla with loss of ten (10) teeth requiring replacement. The court also considered the case of **RAPHAEL OLOO Vs INDUSTRIAL PLANT (E.A) LTD; NAIROBI HCCC NO. 4400 of 1988**. Kshs. 1,000,000 was awarded for loss of six (6) teeth and low backache leading to failure to lift heavy objects.

In the case of **JOSEPH MWANZA Vs ELDORET EXPRESS; Kisumu Civil Case No. 160 of 2004** (unreported), the plaintiff suffered head injury with multiple facial injuries, lacerations right frontal scalp, gross right peribitaloedema and tenderness with enapithalmos, diplopia of right eye, swelling and tenderness facial side bone craniomaxillofacial fractures, compound depressed frontal bore fracture. Kshs. 1,200,000 was awarded as general damages.

The respondent's injuries vary from facial injuries, loss of nine teeth and injury to his hand. His permanent incapacity has been assessed to be between 23% to 25%. He was definitely compensated for the early retirement. There is no evidence that the respondent is not walking properly. He may not be able to chew hard foodstuff but he can eat. He can also use his hands and is able to see, though with double vision.

Given the nature of the injuries, do find that the award by the trial court is quite high. The respondent was given proper treatment at the expense of the appellant. Apart from the permanent loss of teeth and the visual problem, the rest of the injuries should have fully healed. The injuries are not very minor and an award of Kshs. 400,000 as proposed by Mr. Kariuki would not be a comparable award. The case of Terry Kanyua (supra) may have involved serious injuries but falls within the class of injuries suffered by the respondent. I have also been able to show that an award of Kshs. 1,200,000 can be made for loss of seven (7) teeth and other injuries. I do find that an award of Kshs. two million (2,000,000) is reasonable compensation as general for pain and suffering.

The last issue involves the award of Kshs. 180,000 as future medical expense. It is clear from both medical reports that there are implants put during the operations the respondent did undergo. The opinion of Dr. Wokabi that the implants can stay in place permanently does not take into account the respondent's possible wish to have them removed. Dr. Koome opined that it would cost Kshs. 180,000 to remove the implants. I find that proposal to be fair. I do not wish to disturb the award of Kshs. 180,000 as damages for future medical expenses. There are also implants on the hand.

In the end, I do find that the appeal is merited. The award of Kshs. 3,500,000 by the trial Court as general damages for pain and suffering is hereby set aside and replaced with an award of Kshs. 2,000,000. The rest of the findings of the trial Court shall not be disturbed. Parties shall meet their own costs of the appeal. The respondent shall have the costs awarded by the trial court.

Dated, Signed and Delivered at Marsabit this 26th Day of September 2018.

S. CHITEMBWE

JUDGE