



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 401 OF 2015**

**LAZARO MANGENI OUNDO.....APPELLANT**

**VERSUS**

**SONY DRIVING SCHOOL LIMITED.....RESPONDENT**

*(Being an appeal from the Judgement of Hon. N. Makau, SRM delivered in Limuru SRM Court on 22<sup>nd</sup> July, 2017)*

**JUDGEMNT**

The appellant was injured following a road traffic accident that took place on 14<sup>th</sup> October, 2011 and blamed the defendant who was the registered owner of the bus registration No. KBN 817N in which the appellant was the passenger. The respondent denied the appellant's claim but after a full trial the lower court found in favour of the appellant and held the respondent 100% liable for the accident. The trial court proceeded to assess damages for the injuries sustained by the appellant and awarded Kshs. 600,000/= general damages and Kshs. 3,500/= special damages.

The appellant was aggrieved by the said judgment and filed this appeal. In the Memorandum of Appeal dated 22<sup>nd</sup> August, 2015 the appellant faulted the lower court on the basis that the general damages awarded for pain and suffering were manifestly low as the court adopted wrong principles in doing so.

The lower court was also faulted to failing to award damages for future medical expenses despite the same being pleaded and proved. Both the appellant and the respondent have filed submissions which I have considered.

As the first appellate court it is my duty to evaluate the evidence adduced before the lower court and arrive at independent conclusions. My consideration will be limited to assessment of damages as this is the thrust of the entire appeal. This court may not interfere with the discretion of the trial court in the award of damages unless the award is inordinately too low or too high, or that the trial court proceeded or applied wrong principles in arriving at such awards thereby giving an erroneous estimate thereof.

The general approach in assessment of damages is that comparable injuries should attract comparable awards. Of course the court would necessarily consider the time when such awards were made and the depreciation of the national currency over time.

From the pleadings, the appellant suffered fracture of the left femur bone, fracture of right clavicle bone and injury to the right shoulder. After the accident he was taken to Tigoni District Hospital and admitted for three days. Thereafter his brother transferred him to Embu where a plaster was applied to his leg.

The evidence on record shows he was attended by Dr. Okombo in Kisumu and Dr. Moses Kinuthia who prepared medical reports. As at the time he gave evidence on 12<sup>th</sup> February, 2014 he told the court that he had not recovered and that he could not knee down. He used a walking stick and was on treatment of physiotherapy. He needed further physiotherapy which Dr. Okombo had suggested would cost Kshs. 250,000/=.

On the other hand Dr. Kinuthia estimated the cost of physiotherapy would be Kshs. 60,000/=. The appellant called Dr. Kinuthia as P.W. 2 who gave evidence and produced the medical report he had prepared after examining the appellant. He examined the appellant on 7<sup>th</sup> January, 2013 and noted that he had pain on the left knee and inability to squat or walk for long. He walked with the aid of a stick and the right clavicle bone was deformed.

The doctor observed in his opinion as follows,

**“The injuries Lazaro sustained in this accident were grievous harm and they caused him pain, suffering and blood loss. The injuries sustained are valid and consistent with the mode of injury. The clavicular fracture resolved with malunion hence the permanent angular deformity. The fracture of the left femur should resolve in a period of 24 months within which he will have**

**incapacity. He meanwhile requires several physiotherapy session at an estimated cost of Kshs. 60,000/=. He is predisposed to post traumatic osteoarthritis of the left knee. Total permanent incapacity is assessed at about 25%.”**

Dr. Okombo was not called to give evidence and so his report, though marked for identification, is not of assistance to the appellant. In arriving at the award made, the trial magistrate stated,

**“I have looked at the submissions on proposal of general damages by both plaintiff and defendant and I have to state the proposed award of kshs. 100,000/= by defendant is too low considering the nature of the injuries sustained.**

**And award of Kshs. 2,000,000/= is too high in the circumstances. Also looking at authorities cited, I have to state considering inflation and time that has passed and the fact that as at the time the plaintiff was testifying he was undergoing physiotherapy and had not fully recovered and I know that the compensation should be fair to both parties as such I will award Kshs. 600,000/= as general damages.**

.....

**The plaintiff did not specifically plead and pray for future medical expenses as such I will not award the same. They pleaded Kshs. 7,200/= as per paragraph 6 of the plaint. They proved Kshs. 3,500/=. He will have the same and for doctor’s attendance, the same can be recovered by the plaintiff when seeking for cost as is the practice.”**

The submissions filed by the parties before the lower court addressed the occurrence of the accident and the subject of quantum. In those submissions the counsel for the appellant herein cited only one case that is **Charles Mathenge Wahome vs. Mark Mboya Likanga & 2 others (2011) e KLR**. On the other hand, the respondent’s counsel cited several authorities which included **Wambaira and 17 others Vs. Kiogora and 20 others (2004) e KLR, Khilna Enterprise Limited Vs. Charles Maina Migwi (2006) e KLR**.

From the extract of the judgment of the lower court cited above, it is clear that the lower court considered the submissions of both parties and the cited authorities. To that extent, I find no fault. In the submissions now before me, the respondent has cited several authorities on related injuries. These include **Kenyatta University vs. Isaac Karumbe Nyuthe (2014 e KLR** in which the respondent therein sustained fracture of the right femur, soft injuries to the head and bruises on the right knee. He also underwent temporary loss of consciousness at the time of the accident. He was admitted at Kenyatta National Hospital for two months. The lower court awarded kshs. 700,000/= general damages which was reduced to Kshs. 350,000/= on appeal. That judgment was delivered on 13<sup>th</sup> November, 2013.

In the case of **Samuel Kipkemoi Kirui vs Ibrahim Shero Hussein and 2 others (2016) e KLR** the respondent therein sustained a fracture of the left femur and severe soft tissue injuries to the left knee. The trial court awarded Kshs. 400,000/= which was confirmed on appeal. That judgment was delivered on 14<sup>th</sup> July, 2016.

In the case of **Florence Njoki Mwangi vs. Peter Chege Mbitiru (2014) e KLR** the respondent sustained fracture of the right mid shaft femur, fracture of the left mid shaft femur, degloving wound of the right tibia fibula necessitating skin grafting, amputation of the right foot behind the ankle joint and multiple cuts on the forehead. The trial court awarded Kshs. 700,000/= general damages which was contested on appeal as being inordinately low. The appellate court however found that it was not inordinately low and upheld that award. That judgment was delivered on 14<sup>th</sup> July, 2014.

Having considered the material placed before me and the cited authorities, and going by the injuries sustained by the appellant herein, I am not persuaded that the award of Kshs. 600,000/= is inordinately low so as to attract intervention by this court. Accordingly, that award is hereby confirmed.

The trial magistrate denied the appellant future medical expenses because he did not specifically plead the same. The plaint at paragraph 6 set out particulars of injuries sustained by the appellant and added **“detailed particulars of the injuries are set out in the medical report which the plaintiff shall seek leave of the court to refer to at the hearing hereof”**.

This was followed by prayer (c) stating cost of future medical expenses. Dr. Moses Kinuthia called by the appellant as P.W. 2 produced his report which specifically stated that the appellant **“Requires several physiotherapy sessions at an estimated cost of Kshs. 60,000/=”**

In his evidence the doctor repeated that evidence and remained firm under cross -examination. It is clear therefore that the appellant pleaded that cost, produced evidence to that effect and was therefore entitled to it. The reasons advanced for denying him that award cannot withstand the weight of evidence adduced. Accordingly, I make an award of Kshs. 60,000/= for future medical expenses.

The appellant pleaded special damages of Kshs. 7,200/=. The plaint was never amended before the hearing started. That notwithstanding, when Dr. Kinuthia gave his evidence he produced receipts amounting to Kshs. 28,000/=. The production of those receipts was not objected to by the Respondent and no dispute was raised in the submissions before the trial court and in this court. It is only fair and just that the appellant be awarded those costs. The award made by the trial court in terms of special damages was 3,500/=. This shall be added to the sum of Kshs. 28,000/= making a total of Kshs. 31,500/=.

In the end this appeal is dismissed save for the award of Kshs. 31,500/= in terms of special damages. Costs follow the event but considering the nature of this case, each party shall bear their own costs.

***Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of October, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**